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**Manual on
International
Cooperation
in Criminal Matters
related to Terrorism**

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Manual on International Cooperation in Criminal Matters related to Terrorism



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Preface

The Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC), as mandated by the General Assembly, provides assistance to requesting countries in the legal and related aspects of counter-terrorism, especially for the purposes of ratifying and implementing the universal legal instruments against terrorism and strengthening the capacity of national criminal justice systems to apply the provisions of those instruments in compliance with the principles of the rule of law.

In order to assist Member States in understanding the provisions contained in the universal instruments, drafting new legislation that complies with the requirements of the universal instruments and enhancing international cooperation in criminal matters relating to terrorism, UNODC has developed a number of technical assistance tools. One of these tools is the present *Manual on International Cooperation in Criminal Matters related to Terrorism*, which has been developed to enable legal practitioners specialized in the fight against terrorism to efficiently and speedily utilize international cooperation measures such as extradition and mutual legal assistance, as well as to give them practical advice concerning the difficulties and obstacles they may encounter. It can also serve as an educational tool to be used in the training of legal practitioners in the fight against terrorism.

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Introduction

A. Context

1. Terrorism: a threat to international peace and security

Since the adoption of the Convention for the Prevention and Punishment of terrorism by the League of Nations in 1937, the fight against terrorism has been continuously on the agenda of the international community. Thus, since 1963 the international community has armed itself with an arsenal of 16 universal legal instruments relating to the prevention and suppression of terrorist acts. Moreover, for more than a decade, the General Assembly of the United Nations, in particular on the initiative of its Sixth Committee, has adopted annual resolutions on measures intended to fight international terrorism.

As part of the plan of action of the United Nations Global Counter-Terrorism Strategy, Member States, resolved¹ to cooperate fully in the fight against terrorism, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens; and to ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of national and international law, in particular human rights law, refugee law and international humanitarian law.

The Security Council has also adopted several resolutions regarding the fight against terrorism. Resolution 1373 (2001),² of 28 September 2001, adopted following the attacks of 11 September 2001, is of particular importance because of its effective range of action. Importantly, the resolution was adopted by the Council under Chapter VII of the Charter of the United Nations,³ which means that terrorism must be regarded as a threat to international peace and security.

In the resolution, the Council called on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism, and recognized the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism.

Before the adoption of resolution 1373 (2001), the number and the complementarity of conventions, protocols and resolutions of the United Nations against terrorism already constituted a structure that offered an effective legal framework for international legal cooperation in criminal matters. However, in that resolution, the Security Council called upon all States to become parties as soon as possible to the relevant international conventions and protocols relating to terrorism

¹ General Assembly resolution 60/288, annex, section II, paragraphs 2 and 3 (see annex I for the text of the resolution).

² See <http://daccessdds.un.org/doc/UNODC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

³ See <http://www.un.org/aboutun/charter/>.

(paragraph 3 (d)), giving the existing texts a much greater impact than they had had before.

In General Assembly resolution 60/288, Member States resolved to implement all General Assembly resolutions on measures to eliminate international terrorism.

It is in this context that international cooperation in criminal matters related to terrorism is of major importance in the realization of the goal of preventing and suppressing such offences. However, mechanisms for international cooperation are of no use without their effective use by Member States and their counter-terrorism practitioners.

2. Strengthening international cooperation in criminal matters

Against the backdrop of globalization and the development of international terrorism, therefore, it is necessary to strengthen the means to punish offences committed in that context on an international scale. It is often difficult to start investigations and prosecutions against those suspected of participating in terrorist activities. It is even more difficult to try to institute proceedings when the suspect, the victim, the principal evidence, the principal witnesses, the principal experts or the proceeds of the crime do not come under the authority of the country concerned. Whereas all forms of transnational criminality, including terrorism, have thrived with globalization, the national mechanisms for cooperation between States still lack cohesion and are often ineffective. Yet international cooperation is essential to criminal justice practitioners faced with new forms of transnational criminality and terrorism. It is indeed unrealistic today to confine all criminal investigations or prosecutions related to terrorism within national borders. This is even more so as criminals profit from the advantages obtained for the protection of citizens within the framework of state sovereignty.

The international community has developed a series of mechanisms for international cooperation in criminal matters concerned in particular with extradition, mutual legal assistance, the transfer of criminal proceedings, the transfer of convicted persons, recognition of decisions of foreign criminal jurisdictions, the freezing or seizure of assets, and cooperation between law enforcement agencies. Those mechanisms relate to all types of criminality – international, transnational or national – including terrorism.⁴

On the other hand, other types of cooperation may be specific to the fight against terrorism, in particular concerning cooperation in the fight against the financing of terrorism.

B. Objective of the *Manual*

The objective of the present *Manual on International Cooperation in Criminal Matters related to Terrorism* is to enable legal practitioners specialized in the fight against terrorism to act more effectively and more rapidly, that is, to provide them with immediate answers concerning the tools they can use to fight against this evil and the relevant types of cooperation, as well as to give them practical advice

⁴ A/CONF.203/5, paragraph 56.

concerning the difficulties and obstacles they may encounter. It is also intended for use as a teaching aid in the training of legal practitioners in the fight against terrorism.

C. Function of the *Manual*

The *Manual* should provide appropriate answers to questions from criminal justice professionals arising in the application of the universal instruments against terrorism and, more generally, in the context of implementation of Security Council resolution 1373 (2001) and General Assembly resolution 60/288, as well as other relevant resolutions.⁵ In fact, as far as international cooperation in criminal matters is concerned, States enter into bilateral and regional treaties, ratify international conventions or act by virtue of reciprocity. Given the universality of the terrorist threat, it is no longer judicious to confront it mainly through bilateralism or even regionalism, as many terrorist activities now involve illegal activities in two or more countries that may not have entered into bilateral or regional cooperation agreements. The universal instruments, which by their very nature have a broad geographical scope, make it possible for all countries to cooperate, to benefit from a broadened scope of cooperation, to restrict and even completely eliminate the conditions and grounds for refusal to cooperate whenever compatible with binding human rights standards, and to speed up proceedings.

Furthermore, this same concept of States working together should prevail with regard to the suppression of terrorism, which is made easier by the universal instruments. Criminals seek to exploit the differences between legal systems, take advantage of the lack of coordination between government services in different countries and exploit the concern for sovereignty of most States and, often, the fact that certain countries are unable to overcome their differences in order to work together. While taking into account different legal traditions, it is advisable nonetheless to provide the means for effective cooperation.

D. Structure of the *Manual*

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

Annexes can be found at the end of the *Manual* and the index facilitates subject searches.

⁵ Security Council resolutions 1267 (1999), 1452 (2002), 1456 (2003), 1526 (2004), 1535 (2004), 1540 (2004), 1566 (2004), 1617 (2005), 1624 (2005) and 1730 (2006).

Module 1

Basic principles of international cooperation against terrorism

Objectives

- 1.A. To determine the legal basis used to criminalize acts of terrorism and, consequently, to identify the offences and criminal statutes related to requests for international cooperation in criminal matters.
- 1.B. To determine common legal basis for all types of international cooperation against terrorism.
- 1.C. To define obligations as regards international cooperation against terrorism.
- 1.D. To lay down useful rules for effective cooperation.
- 1.E. To identifying the competent national authorities that will be called upon to participate in international cooperation in criminal matters.

1.A. Criminalization of acts of terrorism

Acts of terrorism are defined in the sectoral universal conventions and protocols related to the fight against terrorism.

Being legally binding, the universal instruments constitute a universal basis for international cooperation in criminal matters since they cover almost all the offences and mechanisms required for the fight against terrorism at the international level. This arsenal of legal instruments is supplemented by Security Council resolution 1373 (2001) of 28 September 2001, which constitutes a particularly significant mechanism of coordination for international cooperation in criminal matters. Other instruments, regional or national, are used to criminalize acts of terrorism.

- **The following therefore constitute the legal basis for the criminalization of acts of terrorism:**
 - (a) Relevant resolutions of the Security Council;
 - (b) Universal instruments;
 - (c) Regional instruments;
 - (d) National legislation.
- **Choice of legal basis.** In order to determine which of all the legal instruments is appropriate in a particular case, practitioners should take into account:
 - (a) The hierarchy of international standards;
 - (b) The scope of the instruments;
 - (c) The legal tradition of States regarding the application of international treaties and agreements in domestic law.

(a) *Hierarchy of international standards: primacy of the resolutions of the Security Council*

Security Council resolutions relating to the fight against terrorism and the negotiated universal instruments truly complement one another. Thus, the implementation of resolutions, the provisions of which are not always precise, requires the ratification and application of the universal conventions and protocols, which are very precise texts. The binding resolutions of the Security Council are to be implemented in the light of the negotiated universal instruments.

In fact, as explained below, the resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations: must be applied by all Member States; take precedence over any other international obligation; and, finally, are binding.

- **Mandatory application by States**

- *Article 24 of the Charter of the United Nations*

- In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
- In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

- *Article 25 of the Charter of the United Nations*

- The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Relevant Security Council resolutions are thus binding in accordance with the Charter of the United Nations, adopted as an international convention. The resolutions clearly state that all means to combat terrorism must be taken in conformity with the Charter and with international law.⁶

- **Primacy over any other international obligation.** Under Article 103 of the Charter of the United Nations, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail (see the International Court of Justice Order of 14 April 1992, *Lockerbie case*, concerning Security Council resolution 748 (1992).)⁷

⁶ Security Council resolution 1373 (2001) refers to international standards of human rights and resolutions 1456 (2003), 1535 (2004), 1566 (2004) and 1624 (2005) refer to international human rights, refugee and humanitarian law.

⁷ “In accordance with Article 103 of the Charter, the obligations of the Parties in that respect

- **Binding power**

- Based on Chapter VII of the Charter⁸
- Paragraphs 1 and 2 of Security Council resolution 1373 (2001): the Council “decides”⁹
- To put the resolution into effect, the Security Council may *take* binding measures that it sees fit (Articles 41 and 42 of the Charter)¹⁰

prevail over their obligations under any other international agreement” (see paragraph 42 of *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, *Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 114). (available at <http://www.icj-cij.org/icjwww/idocket/ilus/ilusframe.htm>). (See also the two judgements of the Court of First Instance of the European Communities case T-306/01, judgement of 21 September 2005 (*Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*), and case T-315/01, judgement of 21 September 2005 (*Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*): “From the standpoint of international law, the obligations of the Member States of the United Nations clearly prevail over every other obligation” (<http://curia.europa.eu/en/transitpage.htm>).

⁸ Chapter VII. Action with respect to threats to the peace, breaches of the peace, and acts of aggression:

“Article 39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

“Article 40. In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.”

⁹ The exact nature of the obligations set forth in the Security Council resolutions depends on the wording used. It is generally agreed that Council decisions are obligatory (where the Council “decides”), whereas its recommendations (where the Council “calls on” Member States) do not have the same legal value. Of the three paragraphs of resolution 1373 (2001) addressed to States, the first two are expressed as binding decisions, while the third is expressed as a recommendation.

¹⁰ “Article 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

“Article 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

(b) *Scope of the instruments*

By their nature, the universal instruments have a broader geographical scope than regional or national instruments as regards offences and cooperation in criminal matters. In addition to the fact that the latter have a limited geographical scope of application, it is important that they not contravene the universal instruments,¹¹ which cover most types of terrorism and offer a legal regime specific to the fight against terrorism as a threat to peace. Terrorism is an offence that affects the global community as a whole. The threat being international, the answer should therefore be universal. Consequently, Security Council resolution 1373 (2001) has a general range of action, not limited in time or space.

(c) *Legal tradition of States regarding the application of international treaties and agreements in domestic law*

There are two principal ways in which to apply international treaties in domestic law. The process is determined by the system governing the relation between international law and the law adopted by the State, depending on whether the State has a monist or a dualist system:

(i) *Monist systems.*¹² In a monist system, international and national law are of a unified nature, the two sources being treated as belonging to the same legal family. In this approach, when a State ratifies a treaty, the treaty has the same authority as its national law, without the need for recourse to specific legislative provisions in order to put it into effect. Thus, once a treaty has been signed and ratified, a State with a monist system is bound by the text of the instrument. Accordingly, national jurisdictions and other public organisms refer directly to the provisions of the treaty itself as a source of law.

It should be noted that there are also different approaches within monist systems, namely:

a. Systems in which only certain treaties are considered as directly applicable in domestic law and where provisions of treaties share the same hierarchical level as domestic laws, in compliance with the principle that the most recent law takes precedence;¹³

b. Systems in which the treaties are superior to legislative acts, but their status remains inferior to constitutional provisions.¹⁴

However, even in a monist legal system, the existence of national legislation is required to establish sanctions;

¹¹ For example, under the universal instruments, a request for cooperation may not be refused on the ground of political motivation of the act.

¹² For example, Benin, Bolivia, Cyprus, Switzerland and the United States of America are civil law countries and follow the monist system.

¹³ For example, Albania (article 122 of its Constitution), Germany (article 25 of its Constitution), Romania (article 11 of its Constitution) and Turkey (article 90 of its Constitution).

¹⁴ For example, Central African Republic (article 69 of its Constitution), France (article 55 of its Constitution), Greece (article 28 of its Constitution), Haiti (article 276-2 of its Constitution), Lithuania (article 105 of its Constitution) and Netherlands (articles 91 and 95 of its Constitution).

(ii) *Dualist system*.¹⁵ Dualist systems are subject to one constraint: international law and domestic law exist separately and most often function independently of one another. In contrast to monist systems, when a State with a dualist system binds itself to an international treaty, the treaty does not automatically have the authority of national law. Accordingly, national legislative action is required for incorporation in order to give the treaty its full effect.¹⁶

However, once a State has been bound by a treaty, through its signature and ratification, it is then bound by the international legal obligations:¹⁷ it must comply or it will risk violating its international obligations.¹⁸ It is thus the responsibility of the legislative power to ensure that the domestic law applies the international law, rather than contravening it.

Furthermore, before an act is passed incorporating the treaty into national law, national jurisdictions are not strictly bound by the provisions of the treaty. In practice, however, such sources of law are considered very persuasive. Accordingly, jurisprudence of the high courts illustrates that judges use international law as a

¹⁵ It should be noted that most Commonwealth countries observe the dualist system; for example: Kenya and Malaysia. Fifty-three countries make up the Commonwealth: Antigua and Barbuda, Australia, Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei Darussalam, Cameroon, Canada, Cyprus, Dominica, Fiji, Gambia, Ghana, Grenada, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Seychelles, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tonga, Trinidad and Tobago, Tuvalu, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Vanuatu and Zambia (www.thecommonwealth.org).

¹⁶ For example, the United Kingdom, a State with a dualist system, ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (United Nations, *Treaty Series*, vol. 213, No. 2889) in 1951. However, the provisions of the Convention did not have the same authority as law until the adoption of the act of incorporation, the Human Rights Act 1998, which transformed the Convention into national law.

¹⁷ Article 18 of the Vienna Convention on the Law of Treaties (United Nations, *Treaty Series*, vol. 1155, No. 18232), Obligation not to defeat the object and purpose of a treaty prior to its entry into force, states:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

¹⁸ See article 26 of the Vienna Convention on the Law of Treaties reflecting international customary law, namely, the *pacta sunt servanda* principle: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. In addition, under article 27 of the Convention: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”

guide in the interpretation of laws and are influenced both by national and international court decisions.¹⁹

Consequently, for legal practitioners:

- Either the application of an international treaty or agreement is direct and they can call upon such international law directly as a basis for their judicial acts;
- Or a national law must be implemented for the application of the international treaty or agreement; in the absence of such a law the judge and/or prosecutor will not be able to base his actions on the international instruments or on a national law. States that are represented by such authorities, including the judicial authority, are therefore in violation of their international obligations and notably not in compliance with their obligations under Security Council resolution 1373 (2001); these judicial authorities are urged to interpret the standards of national law in the light of international law.

Judges and/or prosecutors who wish to make a request for cooperation are thus advised first to contact their counterpart in the requested State in order to ensure the full effect, in domestic law, of the international standard.

1.A.1. Relevant resolutions of the Security Council

- **The innovative character of the legal basis for cooperation.** The legal instruments emanating from the resolutions of the Security Council constitute legal tools in the fight against terrorism at the disposal of criminal justice system professionals and lend an entirely new dimension to international cooperation in criminal matters. The conventional mechanisms of cooperation resulting from bilateral and multilateral treaties are familiar to criminal justice professionals. In contrast, the innovative nature of obligations resulting from resolutions, which require States to cooperate with one another without indicating precisely how they are to proceed, should be emphasized.

¹⁹ The Supreme Court of Canada recognized that international law could be used in the interpretation of the Constitution, laws and even common law: see judgement *Pushpanathan v. Canada* (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, where, according to the Supreme Court, although Canada has never adopted the Convention on the Rights of the Child into domestic law, an immigration official exercising discretion is nevertheless bound to consider the values expressed in that Convention; also see judgement *Suresh v. Canada* (Minister of Citizenship and Immigration), 2002 SCC 1, 1 S.C.R. 3, where the Canadian Court judged that, in addition to experience and case law, international law, which includes international obligations and the values expressed in the various sources of international law, for example, declarations, pacts, conventions, judicial and quasi-judicial decisions of international jurisdictions and, finally, customary standards, should also be taken into account. Also see House of Lords, United Kingdom, 8 December 2005, *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004) A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals)* ([2005] UKHL 71); or, for the purpose of finding the grounds for a decision, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations, *Treaty Series*, vol. 1465, No. 24841); see the website: <http://www.houseoflords.co.uk/>.

- **Incorporation of Security Council resolutions into domestic law.** Certain States have adopted specific measures for the application of Security Council resolutions and, in particular, resolution 1373 (2001):

(a) This could be a provision setting forth the direct application of the resolution and the primacy of Security Council resolutions adopted under Chapter VII of the Charter of the United Nations;²⁰

(b) It could also be a measure requiring the executive power to take the necessary steps for the incorporation of the Security Council resolutions.²¹

Furthermore, certain high courts have indicated that binding resolutions of the Security Council are easily equated to treaties,²² resulting in their immediate incorporation into domestic law in the same manner as a legally ratified treaty.

Thus, the binding resolutions of the Security Council create legal standards that must be incorporated into domestic legislation.²³

- **Security Council resolution 1373 (2001)**

➤ *A binding text with wide-ranging authority.* Security Council resolution 1373 (2001) is a special case in that it is both binding and has wide-ranging authority. Adopted under Chapter VII of the Charter of the United Nations, on peace and security, it constitutes a binding instrument for States.²⁴ Thus, resolution 1373 (2001)²⁵ requires States to take certain measures and the Council establishes that all acts of terrorism constitute a threat to international peace and security, and declares that acts, methods

²⁰ Such is the case of Argentina pursuant to decree 1521/2004 of 1 November 2004.

²¹ Such is the case of Kazakhstan (Decree No. 1644 of the Government of the Republic of Kazakhstan on measures for implementing United Nations Security Council resolution 1373 (2001) of 28 September 2001, adopted on 15 December 2001).

²² For example, on 9 September 1993, the Spanish Council of State (No. 984/93) indicates: “Under article 96.1 of the Constitution, the resolutions of international organizations of which Spain is a member can be assimilated to treaties, resulting in the immediate incorporation of the resolutions into the domestic legal system as soon as they are published in the *Official Journal*” [unofficial translation]. The Constitutional Council of France adopted a similar stance in its decision of 30 December 1977. For further details, see Antonio Cassese, *International Law*, 2nd ed. (Oxford, Oxford University Press, 2004), paragraph 8.4.4. For case studies on Security Council resolutions related to the fight against terrorism, see also: French Court of Cassation, Criminal Chamber, 4 January 2005, *Nizaret al.*, appeal n. 03-84652.

²³ In paragraph 2 (c) of the plan of action annexed to the United Nations Global Counter-Terrorism Strategy (General Assembly resolution 60/288, annex), the Member States resolve to implement all Security Council resolutions related to international terrorism and to cooperate fully with the counter-terrorism subsidiary bodies of the Council in the fulfilment of their tasks.

²⁴ Under Article 25 of Chapter V of the Charter of the United Nations, the Member States have agreed to accept and carry out the decisions of the Security Council in accordance with the Charter.

²⁵ It should be noted that Security Council resolution 1373 (2001) also established a Counter-Terrorism Committee made up of all 15 members of the Council. The purpose of the Committee is to promote and monitor implementation of resolution 1373 (2001) and to facilitate technical assistance to countries that do not have the necessary means at their disposal to comply with the requirements of the resolution and the conventions and protocols concerned in the fight against terrorism. The Counter-Terrorism Committee Executive Directorate was set up in order to strengthen and coordinate such action (see the Committee website: <http://www.un.org/sc/ctc/>).

and practices of terrorism are contrary to the purposes and principles of the United Nations.²⁶

- Concerning the *definition of acts of terrorism*, in resolution 1373 (2001) the Council requires Member States to criminalize the financing of terrorism and calls on States to become party to the relevant international conventions and protocols as quickly as possible. The universal instruments define and prohibit certain acts, which are considered to be of a terrorist nature, as criminal offences. In addition, the Council requires States to criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out acts of terrorism.²⁷
- *International cooperation in criminal matters*. In paragraph 3 of the resolution, the Council calls upon all States to cooperate fully in the fight against terrorism.
- **Security Council resolution 1566 (2004)**,²⁸ adopted under Chapter VII of the Charter, condemns all acts of terrorism, gives a definition of terrorism²⁹ and calls upon States to cooperate without reservation in the fight against terrorism.
- **Security Council resolution 1624 (2005)**³⁰ calls upon all States to prohibit incitement to acts of terrorism.

²⁶ Security Council resolution 1373 (2001), paragraph 5. See also Council resolution 1624 (2005), which condemns, “in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security, and [reaffirms] the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations”.

²⁷ Resolution 1373 (2001), paragraph 1 (b).

²⁸ Although resolution 1566 (2004) is not binding, it is of interest as regards the criminalization of terrorism, thanks to its definition of terrorism.

²⁹ In its resolution 1566 (2004), the Council offers a definition of terrorism: terrorist acts are “criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, 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, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”.

³⁰ Although resolution 1624 (2005) is not binding, it is considered a recommendation to criminalize incitement to terrorist acts. It follows the tradition of Security Council resolutions relative to threats to international peace and security caused by acts of terrorism, in particular resolutions 1267 (1999), 1373 (2001) and 1617 (2005). In addition, article 20, paragraph 2, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex) requires that: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” (For the text of the Covenant, see <http://www2.ohchr.org/english/law/ccpr.htm>). For more comments on incitement to terrorism, see the technical assistance working paper of the United Nations Office on Drugs and Crime (UNODC), *Preventing Terrorist Acts: a Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism*

- **Security Council resolution 1267 (1999) and subsequent resolutions**³¹ create a sanctions regime against certain persons and entities³² (see section 2.C.1 (a) (ii) below).

1.A.2. Negotiated universal instruments

1.A.2 (a) *Definition of acts of terrorism*

- **The constitutive elements of acts of terrorism are defined** in the sectoral conventions and protocols in the fight against terrorism, referred to hereinafter as the “universal instruments”. There are 16 such instruments (13 instruments against terrorism and 3 instruments amending three conventions and protocols).³³
- **The universal instruments against terrorism require the criminalization** of a certain number of offences in the areas that they regulate. To that end, they define the behaviours considered acts of terrorism.³⁴ Each text specifies, when necessary, types of liability.
 - *List of conventions and protocols*
 1. Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963)³⁵
 2. Convention for the Suppression of Unlawful Seizure of Aircraft (1970)³⁶
 3. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971)³⁷

Instruments (New York, 2006). Illustrating this point is article 5 of the Council of Europe Convention on the Prevention of Terrorism (Council of Europe, *Treaty Series*, No. 196) (<http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm>), which criminalizes public provocation to commit terrorist offences, defined as “the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed”.

³¹ The sanctions regime has been modified and strengthened by subsequent resolutions, including resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005) and 1735 (2006). These resolutions have all been adopted under Chapter VII of the Charter of the United Nations.

³² Security Council resolutions may be consulted at http://www.un.org/Docs/sc/unsc_resolutions.html.

³³ The international instruments related to the prevention and suppression of terrorism may be consulted at the following website: <http://untreaty.un.org/English/Terrorism.asp>.

³⁴ Of the 13 instruments against terrorism and 3 instruments amending 3 conventions and protocols, 14 instruments require States parties to suppress the offences defined in each instrument. Two of the 16 instruments do not include definitions of offences: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963, which simply requires parties to establish their jurisdiction for offences, defined in accordance with their national legislation, committed on board aircraft registered in their territory, and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991, which stipulates that the parties are required to adopt measures that may, but do not necessarily need to be, of a penal character, in order to prevent the illicit manufacturing and transfer of unmarked explosives.

³⁵ United Nations, *Treaty Series*, vol. 704, No. 10106.

³⁶ *Ibid.*, vol. 860, No. 12325.

³⁷ *Ibid.*, vol. 974, No. 14118.

4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)³⁸
5. International Convention against the Taking of Hostages (1979)³⁹
6. Convention on the Physical Protection of Nuclear Material (1979)⁴⁰
7. 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 (1988)⁴¹
8. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)⁴²
9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988)⁴³
10. Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991)⁴⁴
11. International Convention for the Suppression of Terrorist Bombings (1997)⁴⁵
12. International Convention for the Suppression of the Financing of Terrorism (1999)⁴⁶
13. International Convention for the Suppression of Acts of Nuclear Terrorism (2005)⁴⁷
14. Amendment to the Convention on the Physical Protection of Nuclear Material (2005)⁴⁸
15. Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005)⁴⁹
16. Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005)⁵⁰

³⁸ General Assembly resolution 3166 (XXVIII), annex.

³⁹ General Assembly resolution 34/146, annex.

⁴⁰ United Nations, *Treaty Series*, vol. 1456, No. 24631.

⁴¹ *Ibid.*, vol. 1589, No. 14118.

⁴² *Ibid.*, vol. 1678, No. 29004.

⁴³ *Ibid.*, vol. 1678, No. 29004.

⁴⁴ S/22393, annex I; see *Official Records of the Security Council, Forty-sixth Year, Supplement for January, February and March 1991*.

⁴⁵ United Nations, *Treaty Series*, vol. 2149, No. 37517.

⁴⁶ *Ibid.*, vol. 2178, No. 38349.

⁴⁷ General Assembly resolution 59/290, annex. Given that this is a recent Convention, competent authorities are advised to verify that the Convention has been ratified by their national authorities.

⁴⁸ Adopted on 8 July 2005 by the Conference to Consider and Adopt Proposed Amendments to the Convention on the Physical Protection of Nuclear Material.

⁴⁹ Adopted on 14 October 2005 by the Diplomatic Conference on the Revision of the SUA Treaties (LEG/CONF.15/21).

As regards the incorporation of international treaties and agreements, see section 1.A.4, on national legislation below.

1.A.2 (b) *Offences defined by the universal instruments*

To enable professionals to find the offences that correspond to the elements defined in the universal instruments as quickly as possible, an exhaustive list of these is given in annex III of the Manual. This makes it possible to determine the most appropriate definition according to the instruments, while noting that the universal instruments establish five categories of offence:⁵¹

- (a) Offences related to the financing of terrorism;
- (b) Offences related to the status of victims;
- (c) Offences related to civil aviation;
- (d) Offences related to ships and fixed platforms;
- (e) Offences related to dangerous materials.

1.A.3. Regional conventions

- **Scope of application.** Regional conventions may criminalize acts of terrorism and promote cooperation in criminal matters. It should be noted, however, that, as previously indicated, the universal instruments, by their nature, have a broader geographical scope than regional treaties. However, judges and prosecutors should nevertheless determine whether a regional instrument is applicable for the purpose of cooperation.

In conclusion, when two types of instrument – universal and regional – can be used as a basis for cooperation, the universal instruments can serve as a useful basis (see section 1.A above, on the hierarchy of standards) supported by regional texts.

For an indicative list of regional conventions, see annex IV.

1.A.4. National legislation

No matter what the national procedure relative to the application of international treaties and agreements in domestic law, the national legislation should cover all the manifestations of terrorism provided for by the universal instruments,

⁵⁰ Adopted on 14 October 2005 by the Diplomatic Conference on the Revision of the SUA Treaties (LEG/CONF.15/22).

⁵¹ The *Legislative Guide to the Universal Legal Regime against Terrorism* (United Nations publication, Sales No. E.08.V.9) and the *Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments* (UNODC, New York, 2006) give examples of implementation measures and of possible legislative approaches in order to ensure that domestic legislation is in compliance with the instruments (see www.unodc.org). In addition, the Terrorism Prevention Branch of UNODC provides technical assistance to all States that request it for the purpose of transposing the provisions of the universal instruments into domestic law (Terrorism Prevention Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria; telephone: (+43-1) 26060 5604; facsimile: (+43-1) 26060 5968; www.unodc.org).

even if the terms describing such acts are not identical. Accordingly, for the needs of legal cooperation in criminal matters, what the acts are called does not need to be identical in the legislation of the requesting and requested States. It is sufficient for the alleged acts to correspond to an act criminalized in the laws of the two countries.

- **The necessary legislative incorporation of international treaties and agreements.** Explicit implementation of international treaty provisions into domestic **legislation** has the important advantage of enhancing transparency, accessibility and understanding of the treaty norm among parliamentarians, litigants, the courts and officials responsible for the administration of the legislation.⁵²

Thus, no matter what the national legal tradition, the implementation of the universal instruments requires their legislative incorporation following ratification.⁵³ This is the case not only for the effective implementation of measures in the fight against terrorism, but also so as to create the necessary legal basis for practitioners. Even though the universal instruments related to terrorism can serve as a useful legal basis for the criminalization of terrorist offences, the texts are not precise as regards the penalties incurred by the perpetrators of acts of terrorism. This area, falling under state sovereignty, should be provided for so as not to benefit offenders. In addition, States cannot accept that their territory be used as a safe haven for terrorists. Therefore, a legislative void renders all mutual legal assistance or extradition almost impossible as a result of the dual criminality rule. In particular, it allows a person to perpetrate an act of terrorism or even to prepare or carry out such an act without it being permissible for the authorities to judge him.

1.B. Legal basis for international cooperation against terrorism: the instruments for cooperation

1.B.1. Security Council resolution 1373 (2001)

Under Security Council resolution 1373 (2001):

(a) **In matters of mutual legal assistance**, the Security Council decides that all States must afford one another the greatest measure of assistance.⁵⁴ The purpose

⁵² E. Eid and H. Haboyan, "Implementation by Canada of its international human rights treaty obligations: making sense out of the nonsensical", *The Globalized Rule of Law: Relationships between International and Domestic Law*, O. E. Fitzgerald, ed. (Toronto, Irwin Law, 2006), pp. 449-465.

⁵³ Security Council resolution 1373 (2001) calls on States to become parties as soon as possible to the relevant international conventions and protocols relating to terrorism.

⁵⁴ In paragraph 2 (f) of resolution 1373 (2001), States are required to 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. This provision is binding, as it has been adopted under the auspices of Chapter VII of the Charter, including for States that have not ratified all or some of the universal instruments. Furthermore, according to paragraph 2 (e) of the resolution, States are required 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. Accordingly, the prosecution of perpetrators of terrorist acts may

of this provision is to encourage States, and thus their competent judicial authorities, to interpret broadly, without worrying about technical issues, the scope of the mutual assistance that can be given, even if it includes forms that are not expressly mentioned in the resolution and the universal instruments against terrorism. In addition, the Council calls upon all States to find ways of intensifying and accelerating the exchange of operational information;⁵⁵

(b) **In matters of extradition**, according to paragraph 2 (e) of the resolution, 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.⁵⁶ Furthermore, the resolution prohibits granting safe haven to perpetrators of terrorist acts (paragraph 2 (c)). In order to give full effect to those provisions, States are to apply the extradite or prosecute (*aut dedere aut judicare*) principle.⁵⁷ No derogation from the application of this principle is permitted.⁵⁸

1.B.2. Universal instruments

The universal instruments make it possible to implement resolution 1373 (2001) more effectively.⁵⁹

- **In matters of mutual legal assistance**, the conventions and protocols against terrorism provide a sufficient legal basis. Thus, in the absence of mutual legal assistance treaties and/or a specific domestic legislation, the competent national authorities are actually in a position to grant mutual legal assistance, as if they were acting on the principle of reciprocity, with regard to:
 - All the offences set forth in the conventions and protocols against terrorism. Nothing in the texts of the instruments requires that the offence be completed before a mutual assistance request is presented. Thus, a mutual assistance request may be made in order to obtain documents that could corroborate other evidence leading to the belief that an offence was being planned;
 - All other States parties to the instruments.

require States to afford one another the greatest measure of mutual assistance. Paragraph 3 of the resolution should be considered the necessary development of the two first paragraphs, which are binding.

⁵⁵ Paragraph 3 of resolution 1373 (2001) calls upon all States to 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.

⁵⁶ The principle is also set forth in paragraph 2 of resolution 1566 (2004).

⁵⁷ This principle is also set forth in paragraph 3 of resolution 1456 (2003), which states that States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute. Concerning the latter principles see section 1.C.1 below.

⁵⁸ This obligation is explained in the universal instruments as extradite or submit for prosecution (see section 1.C below).

⁵⁹ The Counter-Terrorism Committee, made up of the 15 members of the Security Council, was established according to resolution 1373 (2001) and is responsible for monitoring the implementation of that resolution (see the Counter-Terrorism Committee website at <http://www.un.org/sc/ctc/>).

For a summary of the relevant articles of the conventions and protocols against terrorism that are the basis for mutual legal assistance, see annex V.

- It should be noted that article 18, paragraph 1, of the United Nations Convention against Transnational Organized Crime⁶⁰ requires the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings. The Convention is the sufficient legal basis for mutual legal assistance and can serve as the legal basis where offences committed by a terrorist group satisfy its provisions.
- **In extradition matters.** The universal instruments against terrorism may be used by States parties as sufficient legal basis for granting extradition.
 - Thus, all these instruments expressly provide that they may be used as sufficient legal basis for extradition with respect to the offences set forth therein when a State party makes extradition conditional on the existence of a treaty and receives a request for extradition from another State party with which it has no extradition treaty.

1. A party that makes extradition conditional on the existence of a treaty⁶¹ may, when it receives requests for extradition from another country with which it has no extradition treaty, consider the universal instruments as the legal basis for extradition with respect to the offences set forth in such treaties. States may, by a simple declaration, declare one or more treaties the legal basis for extradition⁶² (see annex VII for a model of such a declaration).
2. States parties that do not make extradition conditional on the existence of a treaty are required to recognize the offences set forth in the universal instruments as extraditable cases.
3. The provisions of certain extradition treaties or agreements entered into by States parties shall be considered modified between the parties where they are incompatible with the texts of certain conventions.⁶³

- Furthermore, two legal fictions arise:
 - (a) The offences are regarded for the purpose of extradition as having been committed not only in the place in which they occurred but also in the territory of the States required to establish their jurisdiction in accordance with the convention or protocol concerned.⁶⁴ This is to

⁶⁰ United Nations, *Treaty Series*, vol. 2225, No. 39574. See in particular article 3 (Scope of application), of the Convention.

⁶¹ See sections 1.B.3 and 1.B.4 below concerning regional and bilateral treaties.

⁶² This is the case, for example, of Sri Lanka and the United Republic of Tanzania.

⁶³ International Convention for the Suppression of Terrorist Bombings, article 9, paragraph 5; International Convention for the Suppression of the Financing of Terrorism, article 11, paragraph 5; International Convention for the Suppression of Acts of Nuclear Terrorism, article 13, paragraph 5; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol of 1988 for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf and the two Protocols of 2005 (article 11, paragraph 7).

⁶⁴ Or “in a place within the jurisdiction of the State Party requesting extradition”, wording only used in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime

guarantee that extradition is not refused on the basis that the offence was not committed in the territory of the requesting State;

(b) The offences set forth by the universal instruments shall be deemed to be included as extraditable offences in any existing bilateral or multilateral extradition treaties. It is thus not necessary for States parties to negotiate special agreements with one another.⁶⁵

In fact, all the conventions concerning acts of a criminal nature concluded since 1970 except for one, the Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1991, include provisions according to which the offences set forth shall be deemed to be included as extraditable offences in any extradition treaty concluded between parties. Thus parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.

- It is recommended that authorities ensure that, in the absence of extradition and mutual legal assistance treaties as well as specific domestic legislation, they are actually in a position to grant extradition and mutual legal assistance with regard to:
 - All the offences set forth in the universal instruments against terrorism;
 - All other States parties to the aforementioned instruments.
- In addition, as regards exchange of information, the universal instruments against terrorism set forth the principle of a strong commitment to cooperate between States parties or invite them to establish mechanisms to make such cooperation possible, or even set forth the principle of an obligation to exchange information and/or have recourse to a channel for the transmission of information.

Annex II lists relevant articles of the universal instruments against terrorism concerning cooperation as regards exchange of information.

- *The role of the International Criminal Police Organization.* Whether or not indicated explicitly in the universal instruments against terrorism, the exchange of information from a police body can always be carried out through the International Criminal Police Organization (INTERPOL).⁶⁶

Navigation (article 11, paragraph 4).

⁶⁵ See, for example, article 11, paragraph 1, of the Financing of Terrorism Convention.

⁶⁶ Under the terms of article 2 (a) of its Constitution, the purpose of INTERPOL is: “to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights”. In accordance with article 4 of its Constitution, each country is represented within INTERPOL by a police department indicated by the proper governmental authority, while article 32 provides that each country shall appoint a body that will serve as the national central bureau to ensure liaison with the various departments in the country; those bodies in other countries serving as national central bureaux; and the Organization’s General Secretariat. Given its quasi-universality (186 members), obligatory identification of national points of contact, provision to all its members of a powerful and protected global police communications system, the I-24/7 network, multiple databases and dedicated operational services, INTERPOL plays an essential part in the search for and communication of information as regards terrorism

Indeed, this international organization is established in international public law on the basis of a treaty-type constitution that: (a) contains a general commitment of its members to cooperate (article 31); (b) envisages the establishment of mechanisms to allow for that cooperation (article 32); and (c) provides the legal framework for exchange of information as part of international police cooperation in the shape of rules on the processing of information for the purposes of international police cooperation, adopted by the meeting of the General Assembly of INTERPOL (at its 72nd session, held in Benidorm, Spain, from 29 September to 2 October 2003 and at its 73rd session, held in Cancun, Mexico, from 5 to 8 October 2004) and the amendments to the rules on the processing of information for the purposes of international police cooperation, adopted at the 74th session, held in Berlin from 19 to 22 September 2005.

In its resolution 1617 (2005), the Security Council encouraged Member States to work in the framework of INTERPOL, in particular through the use of the INTERPOL database of stolen and lost travel documents, to reinforce the implementation of the measures against Al-Qaida, Osama bin Laden and the Taliban, and their associates. In its resolution 1699 (2006), the Council requested Member States to communicate information related to all individuals or entities that are the subject of sanctions, in particular the freezing of assets, travel bans and arms embargoes, to INTERPOL for recording in its databases (see section 2.C.1 (a) (ii) below).

Annex XVII includes an indicative list of international instruments that mention the role of INTERPOL in the transmission of information.

1.B.3. Regional instruments

Regional instruments can be a useful tool for judicial cooperation in the fight against terrorism. However, it is advisable to keep in mind both that they often have a limited geographical group of States parties; and that they can only be used as a legal basis for cooperation between two States in cases where the States concerned belong to the same regional community.

- **Links between conventions (multilateral/regional/bilateral).** A State may have signed several conventions, for example, a general multilateral convention and a bilateral convention. In that case, the request for mutual assistance may be based on one of the two conventions, or on both when they are complementary and not in conflict. In the event of a conflict, one must either refer to the provisions of the conventions, where appropriate, that provide for the interrelation of the conventions (found in the preliminary or concluding articles of the convention) or, should the interrelation of conventions not be provided for, use the provision that is most favourable to mutual assistance.⁶⁷

(see www.interpol.int and the United Nations Counter-Terrorism Online Handbook at <http://www.un.org/terrorism/cthandbook/>; see also sections 2.D.2 (c) below on the role of INTERPOL in mutual legal assistance and 3.B on extradition.)

⁶⁷ It should be noted that, under the Vienna Convention on the Law of Treaties of 1969 (United Nations, *Treaty Series*, vol. 1155, No. 18232), the later treaty prevails where there are

- **In matters of mutual legal assistance.** The regional framework may allow for the removal of obstacles between countries with different legal traditions: States often turn to multilateral treaties on mutual legal assistance in criminal matters. Such treaties usually indicate the types of assistance that will respect both the rights of both requesting and requested States regarding the scope and types of cooperation and also the rights of suspects, and the procedures to follow in order to issue and execute requests. The regional instruments solve certain issues that arise between States with different legal traditions, some of which grant mutual assistance only to judicial authorities and not to the public prosecutor.
- **In matters of extradition.** Extradition may be implemented on the basis of multilateral conventions, whether relating specifically to extradition or concerned with a more general subject, but where extradition procedures are included.

The offences set forth in the universal instruments shall be deemed to be included in any existing bilateral or multilateral extradition treaty.

For a non-exhaustive list of multilateral conventions relating to mutual legal assistance and extradition, see annex VI. The list includes many regional instruments that foresee an exchange of police information at the regional level aimed at the specific needs of a particular geographical area.

1.B.4. Bilateral treaties

- **In matters of mutual legal assistance.** In order to establish an effective framework for mutual legal assistance, States can also use bilateral treaties on mutual assistance in criminal matters.⁶⁸
- **Common law countries.** Common law countries often first use bilateral treaties as the basis for cooperation⁶⁹ and/or domestic law (see section 1.B.6 below regarding national legislation). However, some common law countries may agree to apply the provisions of a multilateral convention in lieu of a bilateral treaty.⁷⁰

two treaties relating to the same subject (article 30, paragraph 3) (see http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). In addition, under article 103 of the Charter of the United Nations, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

⁶⁸ For example, the Treaty between the United States of America and the Swiss Confederation on mutual legal assistance in criminal matters of 1973 (United Nations, *Treaty Series*, vol. 1052, No. 15865). For an example of a treaty between a civil law State and a common law State, see the Treaty on Mutual Assistance in Criminal Matters between Australia and the Republic of Italy of 1988 (United Nations, *Treaty Series*, vol. 1819, No. 31152) (<http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/dfat/treaties/1994/5.html?query=%5e+treaty+on+mutual+legal+assistance>).

⁶⁹ For example, the Extradition Treaty between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America of 2003 (http://www.fco.gov.uk/Files/kfile/USExtradition_210503.pdf).

⁷⁰ See for example, article 11, paragraph 2, of the Financing of Terrorism Convention for such a provision regarding extradition or article 18, paragraph 7, of the Organized Crime Convention.

- **In matters of extradition.** Certain States require that extradition be negotiated at the bilateral level. This is, for example, the case of some common law countries.⁷¹

If a State party to one of the universal anti-terrorism conventions makes extradition conditional on the existence of a treaty and receives a request for extradition from another State party with which it has no extradition treaty, the requested State party may consider that convention the legal basis for extradition as regards the offences to which it applies.

For example, articles 6 and 7 of the Suppression of Terrorist Bombings Act of Sri Lanka are typical expressions of language implementing the standard convention obligation:⁷²

“7. Where there is an extradition arrangement made by the Government of Sri Lanka with any Convention State in force on the date on which this Act comes into operation, such arrangement shall be deemed, for the purposes of Extradition Law, No. 8 of 1977, to include provision for extradition in respect of the offences specified in the Schedule to this Act.

“8. Where there is no extradition agreement made by the Government of Sri Lanka with any Convention State, the Minister may, by Order published in the *Gazette*, treat the Convention, for the purposes of Extradition Law, No. 8 of 1977, as an extradition arrangement made by the Government of Sri Lanka with that Convention State providing for extradition in respect of the offences specified in the Schedule to this Act.”

The offences set forth in the universal instruments shall be deemed to be included in any existing bilateral extradition treaty.
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1.B.5. Multilateral or bilateral arrangements between executive authorities

Although arrangements may not of themselves constitute a legal basis for international cooperation in criminal matters, they are still useful for such cooperation, as they can provide for both harmonization of the cooperation procedures between the States parties to the arrangement and an acceptable simplification of those procedures. They can, for example, make it possible to transmit directly requests for mutual legal assistance and the related replies, on the basis of a simple agreement between the Governments concerned.⁷³

States are therefore encouraged to conclude bilateral and multilateral arrangements to promote cooperation.⁷⁴ It should be noted that arrangements

⁷¹ UNODC has established a Model Treaty on Extradition (General Assembly resolution 45/116, annex, amended by resolution 52/88), which constitutes a framework susceptible of assisting States interested in negotiating and concluding bilateral extradition agreements (see the explanatory manual of the Model Treaty and the Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters (http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf). The Economic Community of West African States has used these model treaties in the regional context.

⁷² See <https://www.unodc.org/tldb/index.html>.

⁷³ For example, the Agreement relative to Cooperation in Security Matters between the Government of France and the Government of the Kingdom of Morocco of 2000.

⁷⁴ Security Council resolution 1373 (2001), paragraph 3 (c).

entered into frequently relate to the exchange of information and intelligence. Many such exchanges may be carried out through INTERPOL.

For example, the Commonwealth Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth (Harare Scheme)⁷⁵ and the London Scheme for Extradition within the Commonwealth⁷⁶ are agreements relative to mutual legal assistance and extradition between Commonwealth countries adopted by ministers of justice of member countries. The objective of the two agreements is to simplify the two mechanisms. They are regularly updated for that purpose during inter-ministerial meetings (for example, during the meeting in Kingston in November 2002). The agreements are not treaties, but declarations by each member State of the Commonwealth agreeing to establish legislation that allows for extradition or mutual legal assistance between Commonwealth countries, in compliance with the principles of the two schemes. These are typical examples of non-binding “soft” law: States are only bound by them once they are incorporated into their domestic legislation. Nevertheless, the majority of Commonwealth States utilize the mechanisms provided for in the two agreements, greatly facilitating mutual legal assistance and extradition between one another.

⁷⁵ See http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/2C167ECF-0FDE-481B-B552-E9BA23857CE3_HARARESCHEMERELATINGTOMUTUALASSISTANCE2005.pdf.

⁷⁶ See http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf.

1.B.6. National legislation⁷⁷

If no treaty binds States for the purpose of cooperation or if the existing treaty does not include such a provision, national legislation may serve as the basis for judicial cooperation (this is the case in particular in common law legal systems where national legislation is used as the basis for cooperation in criminal matters).⁷⁸

- **Mutual legal assistance: the need for national legislation.** In some countries, the mechanisms of mutual legal assistance may be provided for by domestic legislation, which is applied either generally to all other States or to designated States on the basis of reciprocity.⁷⁹

⁷⁷ Examples of national laws concerning mutual legal assistance:

Argentina: Ley de cooperacion internacional en materia penal (Law on international cooperation in criminal matters) (<http://infoleg.mecon.gov.ar/infolegInternet/anexos/40000-44999/41442/norma.htm>)

Australia: Mutual Assistance in Criminal Matters Act 1987

(<http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/frameLodgmentAttachment/DBFB65276483E790CA256F860004B13A>)

Canada: Mutual Legal Assistance in Criminal Matters Act of 1985, c.30 (4th Supp)

(<http://www.canlii.org/ca/sta/m-13.6/>)

Djibouti: Loi sur le blanchiment, la confiscation et la coopération internationale en matière de produits du crime (Law on money-laundering, confiscation and international cooperation with regard to the proceeds of crime) of 2002

(<http://www.presidence.dj/LES%20TEXTES/loi196an02.htm>)

Germany: Gesetz über die internationale Rechtshilfe in Strafsachen (Law on international legal assistance in criminal matters) (<http://www.gesetze-im-internet.de/irg/index.html>)

Hungary: Act XXXVIII of 1996 on international legal assistance in criminal matters

(http://www.era.int/domains/corpus-juris/public_pdf/hungary_act1.pdf)

Jamaica: Mutual Assistance (Criminal Matters) Act of 1997

(http://www.oas.org/juridico/MLA/en/jam/en_jam-mla-law-mla1997.pdf)

Kiribati: Mutual Assistance in Criminal Matters Act of 2003 (<http://www.pacii.org/cgi-pacii/disp.pl/ki/legis/num%5fact/maicma2003384/maicma2003384.html?query=%7e+mutual+legal+assistance+in+criminal+matter>)

Luxembourg: Loi du 8 août 2000 sur l'entraide judiciaire internationale en matière pénale

(Law on international mutual legal assistance in criminal matters)

(<http://www.legilux.public.lu/leg/a/archives/2000/0981809/0981809.pdf?SID=659bcb4fbac87a83ac50d604457d91b8#page=2>)

Switzerland: Loi fédérale du 20 mars 1981 sur l'entraide internationale en matière pénale

(Federal act on international mutual legal assistance in criminal matters)

(http://www.admin.ch/ch/f/rs/c351_1.html)

Thailand: Act on Mutual Assistance in Criminal Matters, B.E.2535

([http://www.inter.ago.go.th/UN/UN%20\(E\)/English/MLAT/The%20Act%20on%20Mutual%20assistance%20in%20Criminal%20Matters%202535.pdf](http://www.inter.ago.go.th/UN/UN%20(E)/English/MLAT/The%20Act%20on%20Mutual%20assistance%20in%20Criminal%20Matters%202535.pdf))

United Kingdom: Crime (International Cooperation) Act of 2003 (<http://www.opsi.gov.uk/Acts>)

United Republic of Tanzania: Mutual Assistance in Criminal Matters Act of 1991

(<http://www.parliament.go.tz/Polis/PAMS/Docs/24-1991.pdf>)

Vanuatu: Mutual Assistance in Criminal Matters Act of 2002 (<http://www.pacii.org/cgi-pacii/disp.pl/vu/legis/num%5fact/maicma2002384/maicma2002384.html?query=%7e+mutual+legal+assistance+in+criminal+matter>).

⁷⁸ Such as in the United States, where domestic law is used as the legal basis for mutual legal assistance.

⁷⁹ For example, Switzerland and United Kingdom. Some States provide for case-by-case assistance through administrative agreement (Canada, for example, where agreement is supported by domestic law).

- **Flexibility in the interpretation of national legislation for the implementation of mutual assistance.** Several problems arise directly from the approach adopted as regards the legislative implementation of the obligations set forth in the treaties and conventions on mutual legal assistance. In practice, some States may not have made the required modifications to their national law concerning the obligations set forth in the applicable bilateral or multilateral treaty and sometimes the lack of flexibility of the laws in effect in the requested State does not permit it to respond to a request for mutual assistance in accordance with the procedures of the requesting State. This problem is particularly serious between civil law countries and common law countries, as their procedures for collecting evidence are often quite different.

It is therefore advisable to apply national laws and applicable rules in a flexible manner, both from the point of view of the legislation and rules of the requesting State and from that of the legislation and rules of the requested State.

The following is an example of legislative measures for taking statements from compellable witnesses:⁸⁰

“Almost all bilateral or multilateral mutual legal assistance treaties provide that a State may request that statements be taken. When the witnesses in question refuse to testify of their own free will, the requested State shall, arising from its obligations in this area, be entitled to compel the witness to appear at a designated location and make the requested statement.

“Several States attempt to fulfil this obligation by taking measures so that their courts are in a position to issue summonses to appear before the domestic authorities so that they may be transmitted to the foreign State that made the request. This is often considered a simple domestic law procedure.

“The statement thus recorded and transmitted to the other State is, however, often of little use to the State that had requested it. According to the law of certain States, it is in fact essential for official representatives of the requesting State to be present during the making of the statement. According to the law of certain other States, such presence is not sufficient and it is necessary for the witness to be questioned by the competent authorities of the requesting State, a prosecutor from the department of public prosecutions and the defence attorney, for common law States, or an examining magistrate, for civil law States. Furthermore, in certain other States, it is the manner in which the statement is recorded that is of great importance, some requesting an official report or a verbatim report. If the law of the requesting State is not flexible enough to take into account the different needs of States in matters of testimonies or statements, the legislative provisions adopted in no manner fulfil the essential purpose of effective mutual legal assistance.”

The content of national laws on extradition varies greatly: laws may, for example, set rules for the extradition procedure or the conditions to appear in future extradition treaties.⁸¹

⁸⁰ Unofficial translation from Kimberly Prost *Pratique et nouvelles tendances de l'entraide judiciaire: l'avenir de la coopération internationale* (1998) (http://www.oas.org/juridico/mla/fr/can/fr_can_prost98.html).

1.B.7. Reciprocity agreement

In becoming party to a reciprocity agreement, a State has undertaken or undertakes to return the favour to another party that responds positively to its request for cooperation. Such an agreement formalizes obligations incurred as a result of the goodwill and trust between the parties.

It should be emphasized that the rule of reciprocity comes into play only in the absence of a valid treaty, for if a treaty existed it would be unreasonable to bypass it and use reciprocity as a basis. However, the rule of reciprocity is a legal basis, explicit or implicit, of any treaty concerned with international cooperation. The principle is included in the mutual obligations of the parties. The only limits to the application of this principle arise when its requirements are in contradiction with the legal order of the requested State or would infringe its sovereignty, security, public order or any other of its basic interests.

In the absence of a treaty, States may negotiate simple declarations of reciprocity. This is even more important for States that are not bound by a legal relationship, such as emerging States or States newly recognized in the international arena. An example is the judgement of 23 April 2003 (1A.49-54/2002/col.) of the First Court of Public Law of the Swiss Federal Supreme Court concerning the guarantee of reciprocity within the framework of mutual legal assistance between Switzerland (the requested State) and Nigeria (the requesting State) (unofficial translation):

“Within the framework of prosecutions for theft, breach of trust, participation in a criminal organization and money-laundering, the judicial authorities of Nigeria request a mutual legal assistance measure, specifically the seizure of bank accounts, from the Swiss judicial authorities. The defendant appeals, based in particular on the lack of a valid reciprocity declaration. The Federal Tribunal rejects the argument on the grounds that, as a general rule, a foreign request is only admissible if the requesting State assures reciprocity. The Federal Office requires a guarantee of reciprocity if deemed necessary. It has wide discretionary power in this matter. In most cases, as in this case, where no treaty governs the relations between Switzerland and the requesting State, a declaration of reciprocity is required. According to the principle of confidence that pervades throughout relations between States, the Swiss authorities are not required to verify the compliance of the declaration of reciprocity to the procedural rules of foreign law, nor the competence of the authority from which the declaration of reciprocity emanates, except for obvious abuses. ... In this case, the requesting State has spontaneously provided a declaration of reciprocity with the request for mutual assistance. This clear and simple document leaves no doubt concerning the commitment made by the requesting State. There is also no objection to the fact that the assurance of reciprocity has been expressed in the customary form of a diplomatic note.”

It should be noted that certain countries base extradition mainly on reciprocity, as for example, Argentina and also Spain, whose constitution specifies the requirement for reciprocity. Nevertheless, it should also be noted that this practice

⁸¹ For example, Canada, Extradition Act (1999, chapter 18) (<http://laws.justice.gc.ca/en/E-23.01/>).

of States of assuring one another equal treatment is best achieved through international agreements, as they more than any other instrument assure every State that in similar conditions the other party would act in the same manner; bilateral and multilateral treaties are consequently seen as a genuine expression of the principle of reciprocity, since under them States commit themselves to equal treatment.

1.B.8. The comity of nations (*comitas gentium*)

Lastly, decisions relative to international cooperation in criminal matters fall under the sovereign right of States and certain types of cooperation, with the exception of forms that would infringe the powers and rights of other Governments or their citizens, can therefore be granted whether or not this is based on a treaty, on the basis of the comity, or courtesy, of nations. Without being legally mandatory, the courtesy of nations contributes to maintaining good relations between States.

An example of how the courtesy of nations played a role at the transnational level was when the American judicial authorities made a request to the French judicial authorities for an examining magistrate, in France, to question a simple witness face to face with the defence attorney of the accused, even though such a procedure is not provided for by the provisions of the French Code of Criminal Procedure. Nevertheless, the French authorities consented by courtesy, as the provision was not proscribed by French law.

1.C. Obligations as regards international cooperation against terrorism

Objective: To describe the obligations in matters of international cooperation against terrorism, having established that prevention is one of the first obligations in the fight against terrorism. The following is a non-exhaustive list of basic obligations in this area:

- 1.C.1. The obligation to extradite or prosecute
- 1.C.2. The obligation to establish jurisdiction in order to prosecute perpetrators of acts of terrorism
- 1.C.3. The obligation to bring perpetrators of acts of terrorism to justice
- 1.C.4. Ban on invoking political grounds for the act as a reason to refuse a request for cooperation
- 1.C.5. Respect for the rule of law
- 1.C.6. Respect for the principle of dual criminality
- 1.C.7. The rule of limited use/rule of speciality, by which documents obtained by international cooperation may not be used for reasons or proceedings other than those for which the cooperation was requested
- 1.C.8. The *ne bis in idem* rule, banning a second prosecution for the same offence

Prerequisite: prevention

- **The obligation of the State to prevent terrorism.** In the preamble to resolution 1373 (2001), the Security Council expresses its determination to prevent all acts of terrorism and calls on States to work together urgently towards that end, in particular through increased cooperation.
- The recent **universal instruments against terrorism** recall this commitment of States to take all practicable measures for the prevention of terrorist offences.⁸² (See annex III for offences defined in the universal instruments.) Taking “practicable measures” means to be in compliance with international law, which includes international human rights, refugee and humanitarian law.
- The importance of the international and regional dimension of policies of prevention is thus stressed: international and regional organizations and States are encouraged to cooperate in order to exchange information for the prevention of terrorist activities.⁸³

1.C.1. Obligation to extradite or prosecute (*aut dedere aut judicare*)

- **Contents of the obligation.** The extradite or prosecute (*aut dedere aut judicare*) principle requires that a State establish jurisdiction based solely upon the presence in its territory of a person suspected of having committed an act of terrorism, regardless of the nationality of the offender and the place where the offence was committed, if the national authorities decide not to extradite the alleged perpetrator of the offence.
- **Purpose.** The purpose of this principle is to ensure that no safe haven exists for terrorists.
- **Legal basis.** The *aut dedere aut judicare* principle is clearly established in the universal instruments.⁸⁴ It is, in any case, binding, as it is provided for in Security Council resolution 1373 (2001) (paragraph 2 (c) and (e)).⁸⁵

⁸² For examples, see article 10 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; article 4 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, and of the International Convention against the Taking of Hostages; the preambles to the Convention on the Physical Protection of Nuclear Material and to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, as well as article 13 of the latter; the preamble to the Convention on the Marking of Plastic Explosives for the Purpose of Detection; article 15 of the International Convention for the Suppression of Terrorist Bombings; paragraphs 1 (a), 2 (a), (b), (d), 3 (b) and (c) of Security Council resolution 1373 (2001); and article 18 of the International Convention for the Suppression of the Financing of Terrorism.

⁸³ Pursuant to the Organized Crime Convention, Member States provide the Secretary-General with the contact information of the authorities responsible for policies of prevention, in order to exchange their most effective preventive practices (see article 31, paragraph 6).

⁸⁴ Thus, for example, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation states (article 7): “The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, 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.” Similarly, the Financing of Terrorism Convention provides (article 10): “The State Party in the territory of which the alleged offender is present shall ... if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay

- **Application of the principle.** The obligation to extradite or prosecute is imposed on the custodial State (and hence on the judicial authorities within their competence) in whose territory an alleged offender is present. The custodial State has an obligation to take action to ensure that such an individual is prosecuted either by its own national authorities or by another State that indicates that it is willing to prosecute the case by requesting extradition.⁸⁶

The custodial State is in a unique position by virtue of the presence of the alleged offender in its territory and therefore has an obligation to take the necessary and reasonable steps to apprehend the alleged offender and to ensure the prosecution and trial of such an individual by a competent jurisdiction.

The obligation to extradite or to prosecute applies to the State in which the alleged offender is present.

to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.” Also see article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft; article 7 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; article 8 of the International Convention against the Taking of Hostages; article 8, paragraph 2, of the Convention on the Physical Protection of Nuclear Material; article 5 (2 bis) of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, as amended by its 1988 Protocol; article 10 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; article 3, paragraph 4, of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; article 8 of the International Convention for the Suppression of Terrorist Bombings; and article 9, paragraph 4, of the International Convention for the Suppression of Acts of Nuclear Terrorism.

⁸⁵ Paragraph 2 (c) can be analysed in the following manner: a State may refuse to extradite a perpetrator of a terrorist act or an alleged perpetrator for several reasons (see section 3.E.5 (c) below on grounds for refusing extradition). If the State does not have a law enabling it to establish jurisdiction in order to prosecute the perpetrator and where it also is unable to expel him legally, this State runs the risk of becoming a safe haven for alleged terrorists. Nevertheless, paragraph 2 (c) prohibits States from becoming safe havens for terrorists by requiring States either to prosecute or to extradite alleged terrorists. Paragraph 2 (e) of resolution 1373 (2001) provides that 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. The principle is also mentioned in paragraph 3 of the annex to Security Council resolution 1456 (2003) (“States must bring to justice those who finance, plan, support or commit terrorist acts or provide safe havens, in accordance with international law, in particular on the basis of the principle to extradite or prosecute”); in paragraph 2 of Council resolution 1566 (2004), in which States are called upon to cooperate fully in the fight against terrorism, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens; as well as in resolution 1624 (2005), in which the Council recalls that all States must cooperate fully in the fight against terrorism, in accordance with their obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens.

⁸⁶ Report of the International Law Commission on the work of its forty-eighth session (A/51/10 and Corr.1), chapter II, draft code of crimes against the peace and security of mankind, commentary on article 9, paragraph 3. (See also the comments and information received from Governments on the obligation to extradite or prosecute in document A/CN.4/579 and Add.1.)

- **Security Council resolution 1373 (2001) and the universal instruments therefore require that, upon receiving information that an offender or an alleged offender may be present in its territory, the judicial authorities of a State investigate the information brought to its attention.** Upon being satisfied that the circumstances so warrant, the judicial authorities shall ensure that person's presence and inform the judicial authorities of the other States parties that have established their jurisdiction concerning the offence, and shall indicate whether it intends to exercise jurisdiction and prosecute the person concerned.⁸⁷ If the custodial State in which the offender or alleged offender is present does not agree to extradite that person to the State party that has established its jurisdiction, it is required, without any exception whatsoever, to submit the case to its competent authorities for prosecution.⁸⁸ Thus, whatever the reason for denying a request for extradition, the obligation to prosecute remains.

For the purpose of prosecution, the application of the *aut dedere aut judicare* rule must include full judicial assistance. In the absence of such mutual assistance, there is a major risk that the State that has chosen to prosecute will not be able to fulfil its obligation.⁸⁹ Consequently, the judicial authorities of the requesting State are advised to transmit the items of evidence in their possession together with an official request to prosecute (see section 4.B below).

- **What the principle does not mean.** The obligation to prosecute does not mean, however, that, after investigation, an allegation proved to have no basis must be prosecuted. The constitutional law, substantive rules and procedural rules of the States concerned will determine to what extent prosecutions should be pursued.⁹⁰

1.C.2. Jurisdiction: universality of application, “the broadest jurisdiction possible”⁹¹

The **universal instruments** lay down simple and precise rules that enable judges and prosecutors to determine the basis on which they may establish their jurisdiction for the purpose of bringing to justice the perpetrators of acts of terrorism.

⁸⁷ Article 9, paragraphs 1 and 2, of the Financing of Terrorism Convention.

⁸⁸ Article 10, paragraph 1, of the Financing of Terrorism Convention states:

“The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.”

⁸⁹ At its session in Cambridge, United Kingdom, on 1 September 1983, the Institute of International Law adopted a resolution entitled “New problems of extradition” (http://www.idi-il.org/idiE/resolutionsE/1983_camb_01_en.PDF; also cited in an International Law Commission preliminary report (A/CN.4/571)).

⁹⁰ Thus, article 10, paragraph 1, of the Financing of Terrorism Convention states:

“Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.”

⁹¹ See A/CN.4/571.

Other than the *aut dedere aut judicare* principle, establishing jurisdiction does not mean exercising it. To actually exercise jurisdiction is left to the discretion of States, that is States are required to establish jurisdiction within their legislation, but not to prosecute.

There are four **rules for determining jurisdiction** in the universal instruments:⁹² the territorial principle; the nationality principle; jurisdiction linked to the nature of the offence; and the jurisdiction applying the *aut dedere aut judicare* principle.

Positive concurrent jurisdiction.⁹³ By their very nature, acts related to an international terrorist offence concern several countries. It is therefore advisable to settle potential cases of concurrent jurisdiction and to determine as quickly as possible which State is in the best position to judge the perpetrators or alleged perpetrators of the act or acts of terrorism.

In order to resolve such conflicts, in particular positive ones where there are multiple jurisdictions, the authorities concerned are responsible for determining which national authorities are in the best position to effectively prosecute the alleged offender or offenders. An example is given below:

Arrested in November 2002 in the United Kingdom of Great Britain and Northern Ireland and initially pursued for an attempted attack on the London underground (the “ricine case”), R. K. was condemned in London for forgery by the Old Bailey’s Crown Court on 23 October 2003. He was also sentenced in France in December 2004 by default to six years’ imprisonment for his complicity in an attempted attack on the Christmas market in Strasbourg, France, in December 2000. The judgement was based on evidence obtained from Germany. R. K. was extradited to France by the United Kingdom in June 2006 and served the sentence handed down in France.

Coordination between three countries allowed the positive concurrent jurisdiction. Indeed, Germany could also assert its jurisdiction as acts preparatory to the attempted attack in Strasbourg had been committed on German territory.

1.C.2 (a) *Mandatory jurisdictions*

There are four types of mandatory jurisdiction: the territorial principle; in some cases the nationality principle; jurisdiction related to the nature of the offence; and the jurisdiction applying the *aut dedere aut judicare* principle.

⁹² It should be noted that a general clause included in the universal instruments recalls that States may exercise their right to prosecute on criteria that they freely choose, based on their national criminal policies.

⁹³ Given the above, it should be noted that there cannot be negative concurrent jurisdiction between Member States of the United Nations.

1.C.2 (a)(i) *The territorial principle*

- **Legal basis.** The territorial principle is a type of mandatory jurisdiction set forth in all of the universal conventions and applicable to their supplementary protocols.⁹⁴
- **Definition and scope of application.** The territorial principle is a principle of jurisdiction according to which a State is competent to exercise jurisdiction over any offences committed in its territory, that is, as soon as a constitutive act has been committed in the national territory (land, air and maritime territory). The notion of a constitutive act can be greatly extended. It can in fact overlap the simple notion of constitutive elements. Thus it is that preparatory acts or the precondition of an offence, if they are committed in the territory, can set in motion the jurisdiction of national law. It is possible for an act of complicity in a principal offence committed in the territory of the State to be committed abroad. Furthermore, an extended concept of the territorial principle leads to the assimilation of certain spaces to the territory of the State, namely, ships and aircraft.⁹⁵ National law is applicable to offences committed

⁹⁴ The Convention on Offences and Certain Other Acts Committed on Board Aircraft (article 3); the Convention for the Suppression of Unlawful Seizure of Aircraft (article 4); the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (article 5) and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to that Convention; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (article 3); the International Convention against the Taking of Hostages (article 5); the Convention on the Physical Protection of Nuclear Material (article 8); the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (article 6) and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; the International Convention for the Suppression of Terrorist Bombings (article 6); the International Convention for the Suppression of the Financing of Terrorism (article 7); and the International Convention for the Suppression of Acts of Nuclear Terrorism (article 9).

⁹⁵ The Convention on Offences and Certain Other Acts Committed on Board Aircraft (article 3) requires States to establish jurisdiction with regard to offences committed on board aircraft according to the State of registration. The Convention for the Suppression of Unlawful Seizure of Aircraft (article 4) provides for establishing jurisdiction on the basis of the State of registration, as is also the case of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (article 5) and its Protocol of 1988 for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, which adds the requirement for States parties to establish jurisdiction on a territorial basis with regard to offences defined in the said instruments. This new rule of territorial jurisdiction is a reflection of the nature of the two instruments, drafted in order to prevent attacks against aircraft not in flight and before and after flight, as well as against ground facilities, such as airports. According to article 5, paragraph 1 (d), of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the courts of a State shall have jurisdiction if the offence was committed on board or against an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (article 3), also requires States parties to establish jurisdiction with regard to offences committed in their territory as well as on board ships flying their flag or aircraft registered in that State, as does the case in the International Convention against the Taking of Hostages (article 5). The Convention on the Physical Protection of Nuclear Material (article 8) emphasizes the protection and transporting of nuclear material and stipulates that States parties should establish

on board or against ships and aircraft flying the national flag, wherever they may be.

1.C.2. (a)(ii) *Jurisdiction applying the aut dedere aut judicare principle*

- **Legal basis.** See section 1.C.1. above on the *aut dedere aut judicare* principle. All terrorist offences are included in this type of jurisdiction as they result from both Security Council resolution 1373 (2001) and the universal instruments that include criminalizing elements.
- **Definition and scope of application.** This jurisdiction authorizes national jurisdiction against alleged perpetrators of acts of terrorism or perpetrators of an attempted terrorist offence arrested in the national territory when the State does not extradite that person to any of the States parties that have established their jurisdiction.⁹⁶

The simple presence of a person who has been convicted or is alleged to have committed an act of terrorism in the territory of a State requires that State to consider exercising its jurisdiction, regardless of the nationality of the offender and the place where the offence was committed, if the national authorities decide not to extradite the perpetrator of the alleged offence.

1.C.2 (a)(iii) *The nationality principle*

- **Legal basis.** Some of the universal instruments make the nationality principle entail mandatory jurisdiction (see footnotes 92 and 93 below).

jurisdiction with regard to offences concerning such material, on the basis of territoriality and the flag of the ship or State of registration of the aircraft involved. The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (article 6) and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf indicate that States parties are required to establish jurisdiction on the basis of territoriality (i.e. the location of the continental shelf of the State in the case of the protocol) and the flag of the ship on board of which the offence is committed. The International Convention for the Suppression of Terrorist Bombings (article 6) and the International Convention for the Suppression of the Financing of Terrorism (article 7) stipulate that States parties are required to establish jurisdiction on the basis of territoriality as well as the flag of the ship or the State of registration of the aircraft, as does the International Convention for the Suppression of Acts of Nuclear Terrorism (article 9).

⁹⁶ Article 4, paragraph 2, of the Convention for the Suppression of Unlawful Seizure of Aircraft; article 5, paragraph 2, of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation and its article 5, paragraph 2 bis, as amended by its 1988 Protocol; article 3, paragraph 2, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; article 5, paragraph 2, of the International Convention against the Taking of Hostages; article 8, paragraph 2, of the Convention on the Physical Protection of Nuclear Material; article 6, paragraph 4, of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and article 3, paragraph 4, of its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; article 6, paragraph 4, of the International Convention for the Suppression of Terrorist Bombings; article 7, paragraph 4, of the International Convention for the Suppression of the Financing of Terrorism; and article 9, paragraph 4, of the International Convention for the Suppression of Acts of Nuclear Terrorism.

- **Definition and scope of application.** This principle of jurisdiction is linked to the nationality of the perpetrator (active nationality)⁹⁷ or that of the victim (passive personality)⁹⁸ of the criminal acts.

1.C.2 (a)(iv) *Jurisdiction linked to the nature of the offence*

- **Legal basis.** One of the universal instruments makes this a mandatory jurisdiction: article 5, paragraph 1 (c) of the International Convention against the Taking of Hostages expressly requires all States parties to establish their jurisdiction over an offence committed in order to compel a third party to do or abstain from doing any act.
- **Definition and scope of application.** The nature of the offence has consequences for the determination of jurisdiction. A terrorist offence committed abroad may, in fact, affect the fundamental interests of another State or specific interests, which can justify that State establishing its jurisdiction.

1.C.2.(b) *Optional jurisdictions*

There are many types of optional jurisdiction and the universal instruments do not exclude any criminal jurisdiction exercised in accordance with national legislation. There are two types of optional jurisdiction set forth in the universal instruments: the nationality principle; and jurisdiction related to the nature of the offence.

1.C.2 (b)(ii) *The nationality principle*

- **Legal basis.** Some of the universal instruments make the nationality of the perpetrator (active nationality) or the victim (passive personality) of the criminal acts an optional jurisdiction.
- **Definition and scope of application.** For the offences established by the universal instruments, each State party may establish its jurisdiction when: the offence is directed towards a national of that State;⁹⁹ and/or the offence is

⁹⁷ Article 3, paragraph 1 (b), of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; article 5, paragraph 1 (b), of the International Convention against the Taking of Hostages; article 8, paragraph 1 (b), of the Convention on the Physical Protection of Nuclear Material; article 6, paragraph 1 (c), of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; article 3, paragraph 1 (b), of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; article 6, paragraph 1 (c), of the International Convention for the Suppression of Terrorist Bombings; article 7, paragraph 1 (c), of the International Convention for the Suppression of the Financing of Terrorism; and article 9, paragraph 1 (c), of the International Convention for the Suppression of Acts of Nuclear Terrorism.

⁹⁸ Article 3, paragraph 1 (c) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.

⁹⁹ Article 6, paragraph 2 (b), of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation provides that a State may establish its jurisdiction over an offence when during its commission a national of that State is seized, threatened, injured or killed; see also article 3, paragraph 2 (b), of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; article 6, paragraph 2 (a), of the International Convention for the Suppression of Terrorist Bombings;

committed by a stateless person who has his or her habitual residence in the territory of that State.¹⁰⁰

Two comments should be made here:

(a) The instruments do not define the concepts of nationality and habitual residence. Such definitions are thus at the discretion of the concerned States;

(b) The concept of a stateless person must correspond to the definitions given in the international texts relating to this issue.¹⁰¹

1.C.2 (b)(ii) *Jurisdiction related to the nature of the offence*

- **Legal basis.** Some of the universal instruments make the nature of the acts an optional jurisdiction.
- **Definition and scope of application.** The State party may establish its jurisdiction over an offence when it is committed in an attempt to compel that State to do or abstain from doing any act or when the offence is committed against a facility mentioned in one of the instruments concerned.¹⁰²

article 7, paragraph 2 (a), of the International Convention for the Suppression of the Financing of Terrorism; and article 9, paragraph 2 (a), of the International Convention for the Suppression of Acts of Nuclear Terrorism.

¹⁰⁰ Article 5, paragraph 1 (b), of the International Convention against the Taking of Hostages; article 6, paragraph 2 (a), of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; article 3, paragraph 2 (a), of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; article 6, paragraph 2 (a), of the International Convention for the Suppression of Terrorist Bombings; article 7, paragraph 2 (a), of the International Convention for the Suppression of the Financing of Terrorism; and article 9, paragraph 2 (c), of the International Convention for the Suppression of Acts of Nuclear Terrorism.

¹⁰¹ Article 1 of the Convention relating to the Status of Stateless Persons (United Nations, *Treaty Series*, vol. 360, No. 5158) defines a stateless person as “a person who is not considered as a national by any State under the operation of its law”.

¹⁰² Article 6, paragraph 2 (c), of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation provides that a State party may establish its jurisdiction when the offence is committed in an attempt to compel that State to do or abstain from doing any act. The same provision can be found in article 3, paragraph 2 (c), of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. Furthermore, article 6, paragraph 2 (b), of the International Convention for the Suppression of Terrorist Bombings mentions the possibility of establishing jurisdiction when an offence is committed against a State or government facility of the State party outside of its territory, including an embassy or other diplomatic or consular premises of that State or (article 6, paragraph 2 (d)) when the offence is committed in an attempt to compel that State to do or abstain from doing any act. The International Convention for the Suppression of the Financing of Terrorism gives States the possibility of establishing jurisdiction when (article 7, paragraph 2): (a) the offence was directed towards or resulted in the carrying out of an offence set forth by the Convention in its territory; (b) the offence was directed towards or resulted in the carrying out of an offence set forth against a State or government facility of that State abroad, including diplomatic or consular premises of that State; or (c) the offence was directed towards or resulted in an offence set forth, committed in an attempt to compel that State to do or abstain from doing any act. The International Convention for the Suppression of Acts of Nuclear Terrorism also provides for these two possibilities in its article 9, paragraph 2 (b) and (d).

1.C.3. Obligation to prosecute

- The prosecution of any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is an obligation resulting from Security Council resolution 1373 (2001) (paragraph 2 (e)). It confirms what is usually stated in the universal instruments.¹⁰³ This obligation must be fulfilled in accordance with human rights.

1.C.3 (a) *Obligation to ensure the presence/to detain*

1.C.3 (a)(i) *Ensuring the presence*

- **Principle. Ensuring the presence in court of the alleged perpetrators of offences** set forth by the universal instruments is a necessity in the fight against terrorism that States can foresee in the operation of their national law. This presence is essential, in particular during the judgement stage. In common law States, it is almost impossible to judge the offenders if they are not present at their trial. On the other hand, judgement in absentia is possible in some civil law systems, but in such a case, a balance must be found with regard to the accused's right to defend him- or herself.
- **Legal basis.** The universal instruments include provisions aimed at ensuring the presence or the detention of the offender or alleged offender of the offence. The wording is along these lines:

“upon being satisfied that the circumstances so warrant, any Contracting State in whose territory the offender or alleged offender is present shall take custody or other measures so as to ensure that person's presence. The custody and other measures shall be as provided in the law of that State, but may only be continued for such a time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted”.¹⁰⁴
- In fact, it could be necessary for the requested judicial authorities, when there is a request for extradition, to take custody of a fugitive or to take other appropriate measures to ensure his or her presence for the purpose of extradition. The treaties and laws concerning extradition usually include provisions relative to arrest and detention, and States must have an appropriate legal basis for this type of measure.

¹⁰³ See, for example, article 9 of the Financing of Terrorism Convention.

¹⁰⁴ See article 13, paragraph 2, of the Convention on Offences and Certain Other Acts Committed on Board Aircraft; article 6, paragraph 1, of the Convention for the Suppression of Unlawful Seizure of Aircraft; article 6, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; article 9 of the Convention on the Physical Protection of Nuclear Material; article 7, paragraph 1, of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; article 7, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings; article 9, paragraph 2, of the International Convention for the Suppression of the Financing of Terrorism; and article 10, paragraph 2, of the International Convention for the Suppression of Acts of Nuclear Terrorism.

1.C.3 (a)(ii) *Detention/extraditional detention*

In compliance with international and regional standards, the implementation of detention regimes is to be done with respect for certain conditions, in particular for extraditional detention.¹⁰⁵

- **Conditions of detention: respect of human rights, prohibition of torture, inhuman and degrading treatment, and respect for the inherent dignity of the human person.** Detention must be implemented in a manner respectful of the rights of the person and thus must not entail inhuman treatment or torture (article 7, of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex).¹⁰⁶ All prisoners shall be treated with humanity (article 10, paragraph 1). As mentioned in the same text (article 4), no derogation from this right is permitted.
- **Examples**¹⁰⁷
 - *United Nations.* The report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt on the situation of detainees at Guantánamo Bay submitted to the Commission on Human Rights at its sixty-second session (E/CN.4/2006/120, paragraph 90) states:

“The lack of any impartial investigation into allegations of torture and ill-treatment and the resulting impunity of the perpetrators amount to a violation of articles 12 and 13 of the Convention against Torture.”
 - *Human Rights Committee.* See, for example, *Polay Campos v. Peru, Case No. 577/1994*, views adopted on 6 November 1997 (paragraphs 8.4, 8.6 and 8.7), in which it is stated that not being allowed to speak or to write to anyone and being kept in a cell for 23 ½ hours a day in freezing temperatures are conditions of detention that violate article 10 of the European Covenant on Human Rights and Fundamental Freedoms and correspond to inhuman treatment as defined by article 7 of the Covenant.

¹⁰⁵ The prisoner in extraditional detention is a person who has been arrested in the territory of the requested State for whom a requesting country has requested extradition, because he or she is being or has been prosecuted in its territory. The person may be incarcerated in the territory of the requested State while the request is being examined, that is, placed in extraditional detention.

¹⁰⁶ Available at http://www.unhcr.ch/html/menu3/b/a_ccpr.htm.

¹⁰⁷ Office of the United Nations High Commissioner for Human Rights (UNHCR), *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism* (Geneva, 2003), pp. 36-38, 42-45 and 48-50 (<http://www.ohchr.org/Documents/Publications/DigestJurisprudenceen.pdf>).

- *European Court of Human Rights*. The judgement in the case of *Öcalan v. Turkey*, European Court of Human Rights, 12 March 2003 (paragraphs 231-232), indicates that the complete isolation, coupled with total social isolation, constitutes a type of inhuman treatment that cannot be justified by the requirements of security or any other reason.

See also *Labita v. Italy*, 6 April 2000, paragraph 119:¹⁰⁸

“Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.”

Kudla v. Poland, 26 October 2000:

“Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 [of the European Covenant on Human Rights and Fundamental Freedoms]. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim.”

- *Inter-American System*. In the case of *Suárez-Rosero v. Ecuador* before the Inter-American Court of Human Rights, the judgement of 12 November 1997 (paragraphs 90-91), states that the mere fact of detaining someone for 36 days and depriving him of any form of communication, spoken or written, constitutes inhuman and degrading treatment.
- **Preventive detention (pretrial and administrative detention): prohibition of arbitrary detention, right to effective appeal and limitation of detention time.**

Prohibition of arbitrary detention, Judicial channels offer essential guarantees regarding the rights of the prosecuted person in the fight against terrorism.

- *European Court of Human Rights*. The judgement in the case of *Sakik and Others v. Turkey*, 26 November 1997 (paragraph 44) states that article 5 of the European Convention on Human Rights and Fundamental Freedoms establishes the protection of the individual (right to liberty and security) as a fundamental right “against arbitrary interferences by the State with his right to liberty”.

Also see the judgement in *Megyeri v. Germany*, 12 May 1992,¹⁰⁸ which opines that where a person is confined in a psychiatric institution on the ground of having committed acts that constituted criminal offences should – unless there are special

¹⁰⁸ See <http://www.echr.coe.int/echr/en/hudoc>.

circumstances – receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention.

- *Inter-American System*. In the *Gangaram Panday Case* before the Inter-American Court of Human Rights, the judgement of 21 January 1994 (paragraphs 46-47) declares that a detention may be considered arbitrary, although the arrest or imprisonment is classified as legal, if the legal regime of such a measure is incompatible with respect for fundamental rights as it is unreasonable, unforeseeable or lacking in proportionality.
- *African Commission on Human and Peoples' Rights*. In the case of *Annette Pagnoulle (on behalf of Abdoulaye Mazou)* (Comm. No. 39/90, 10th Annual Activity Report 1996-1997 (paragraphs 17 and 21)), it was stated that detention on the mere suspicion that an individual might cause problems was a violation of his or her right to be presumed innocent.
 - Right to an effective appeal. The right to appeal has to exist and should be effective.
- Article 9, paragraph 4, of the International Covenant on Civil and Political Rights states:

“Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”
- *Inter-American System*. *The Inter-American Court of Human Rights, Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency, 6 October 1987* (paragraphs 25 and 41), states that the declaration of a state of emergency cannot entail the suppression or ineffectiveness of the judicial guarantees that the American Convention on Human Rights requires the States parties to establish for the protection of rights not subject to derogation.
 - Limitation of length of detention. Pretrial detention should not be the rule (article 9, paragraph 3, of the International Covenant on Civil and Political Rights) and the trial should take place within a reasonable period of time.
- *United Nations*. In its concluding observations on the fourth periodic report of Spain under the International Covenant on Civil and Political Rights (CCPR/C/79/Add.61, paragraphs 12 and 18), the Human Rights Committee commented that the maximum duration of pretrial detention should not be proportionate to the maximum duration of the applicable sentence.
- *Inter-American System*. Case 11.205, Report No. 2/97, *Bronstein case, Annual Report of the IACHR 1997* (paragraphs 12, 23 and 24), states that the right to the presumption of innocence requires that the duration of preventive detention not exceed a reasonable period of time. Otherwise, such imprisonment takes on the nature of “premature punishment” and thus constitutes a violation of the American Convention on Human Rights.

1.C.3 (b) *Time of arrest: the right to information and communication*

- **Principle: the legality of the proceedings.** In order to ensure the legality of the proceedings and due process, practitioners should ensure the right to information and communication of anyone arrested and/or detained in the case of proceedings using the means of cooperation in criminal matters. In fact, the respect of procedural rules is an essential element of the proceeding in the fight against terrorism as it is based on the rule of law, the basic principle underlying the fight against terrorism.
- **From the time of arrest, all individuals have the right to information and communication.** Thus, according to the terms of article 9, paragraph 2, of the International Covenant on Civil and Political Rights, “anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”. In addition, the Covenant provides in article 14, paragraph 3 (a), that “everyone charged with a criminal offence has the right, in full equality, to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”.
 - *The universal instruments* mention the obligation concerning the notification of rights to the individual and of his or her right to communication, in particular with the consular authorities.

For the provisions specifying this obligation in the universal instruments, see annex VIII.

Thus, for example, article 9, paragraph 3, of the International Convention for the Suppression of the Financing of Terrorism states that the person being prosecuted is entitled to “communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person’s rights or, if that person is a stateless person, the State in the territory of which that person habitually resides” and to “be visited by a representative of that State”. And also to be informed of his or her rights and to invite the International Committee of the Red Cross to communicate with and visit the alleged offender (article 9, paragraph 5).

- Furthermore, article 36, paragraph 1 (b) and (c), of the Vienna Convention on Consular Relations¹⁰⁹ provides that:

“If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

“Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and

¹⁰⁹ United Nations, *Treaty Series*, vol. 596, No. 8638 (available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf).

correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”

- **In cases involving refugees or asylum-seekers**, the authorities of the host country should inform the Office of the United Nations High Commissioner for Refugees (UNHCR) and permit UNHCR staff to visit such persons. This would enable the Office to exercise its mandate (which includes, inter alia, providing surrogate international protection) as well as its supervisory responsibility, as provided for under the Convention relating to the Status of Refugees¹¹⁰ and the Statute of the Office.¹¹¹ In such cases, the authorities of the host country should abstain from disclosing the fact that the person concerned is a refugee or has applied for asylum in their contacts with their counterparts in the country of origin or a third country, unless authorized by law (on confidentiality, see section 1.C.5 (b) (iv) below).

The rights to information and communication should be implemented by the responsible national authority.

- **Examples¹¹²**
 - *United Nations*. In its concluding observations on the third periodic report of India (CCPR/C/79/Add.81, paragraph 24), the Human Rights Committee stated:

“While noting the State party’s reservation to article 9 of the Covenant, the Committee considers that this reservation does not exclude ... the obligation to comply with the requirement to inform promptly the person concerned of the reasons for his or her arrest.”
 - *European Court of Human Rights*. In *Fox, Campbell and Hartley v. the United Kingdom* (30 August 1990 (paragraph 32)), the Court stated that the difficulties inherent in investigations and prosecutions of terrorist offences could not justify that the essence of the safeguard secured by article 5, paragraph 1 (c), of the Convention was impaired.
- **Notification of the arrest or detention of the alleged offender to all States and/or authorities concerned by the universal instruments**. Naturally, all the provisions of the universal instruments relative to this right are followed in the framework of the national laws and regulations of the State in the territory of which the offender or alleged offender is present, on the understanding that those laws and regulations allow for the full realization of the purpose for which they are included in the relevant universal instruments.

For the provisions specifying this obligation in the universal instruments, see annex IX.

¹¹⁰ Ibid., vol. 189, No. 2545, article 35.

¹¹¹ General Assembly resolution 428 (V), annex, paragraph 8 (a).

¹¹² UNHCR, *Digest of Jurisprudence ...*, p. 49.

1.C.4. Refusal of political grounds

Principle. No considerations of a political or ideological nature can, under the terms of national legislation, justify acts of terrorism as defined by the universal instruments. **Therefore, acts of terrorism may not be considered political offences¹¹³ or be justified by a political motive.¹¹⁴**

- The universal instruments therefore include provisions requiring parties not to recognize the validity, in their domestic political and legal order, of any political justification for the acts of terrorism set forth in those instruments. For example, article 5 of the International Convention for the Suppression of Terrorist Bombings stipulates:

“Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature.”

Consequently, such elements may not be considered extenuating circumstances in determining the penalty, in the same manner that they may not be invoked as grounds for exemption from criminal liability.

In addition, article 11 of the International Convention for the Suppression of Terrorist Bombings and article 14 of the International Convention for the Suppression of the Financing of Terrorism, for example, stipulate:

“None of the offences set forth in article 2 [which is, in both Conventions, the article that defines the offences] shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.”

- **Consequences for international judicial cooperation.** For the purposes of mutual legal assistance and extradition, none of the offences set forth in the universal instruments can be considered a political offence, an offence related to a political offence or an offence inspired by political motives. Consequently, a request for mutual legal assistance or extradition based on such an offence cannot be rejected for the sole reason that it concerns a political offence, an offence related to a political offence or an offence inspired by political motives.

¹¹³ Attacks against the security of a State or against the political order are commonly considered political offences.

¹¹⁴ Attacks against private interests perpetrated by a person having political motives are commonly considered as ordinary law crimes having a political motive.

- **Legal basis.** In paragraph 3 (g) of its resolution 1373 (2001), the Security Council expressly calls upon all States to ensure that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists. This exclusion, which also affects mutual legal assistance, is also present in the negotiated instruments.¹¹⁵ All States that have ratified those universal instruments are consequently bound by that obligation.
- The existing treaties are, if necessary, automatically modified.

1.C.5. Respecting the rule of law in international cooperation in criminal matters

- **Context**
 - In all legal proceedings using mechanisms of international cooperation, the unifying thread is between the need to be efficient and quick in apprehending the perpetrators of terrorist crimes and the need to respect international standards in the application of the rules of international cooperation in criminal matters.
 - The application of such rules actually promotes an effective fight against terrorism. There is no conflict of interest between human rights and collective security. The very principle of the rule of law requires respect for justice and democracy. Human rights play a central role in the protection of international peace and security, just as the fight against terrorism does.¹¹⁶

¹¹⁵ See article 11 of the International Convention for the Suppression of Terrorist Bombings and article 14 of the International Convention for the Suppression of the Financing of Terrorism. The International Convention for the Suppression of Acts of Nuclear Terrorism, the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf all include the same prohibition. Furthermore, in paragraph 3 of its resolution 1566 (2004), the Security Council recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, 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, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

¹¹⁶ In paragraph 133 of his report entitled “In larger freedom: towards development, security and human rights for all” (A/59/2005), the Secretary-General declared his strong belief that: “Every nation that proclaims the rule of law at home must respect it abroad and that every nation that insists on it abroad must enforce it at home. Indeed, the Millennium Declaration reaffirmed the commitment of all nations to the rule of law as the all-important framework for advancing human security and prosperity. The rule of law as a mere concept is not enough. New laws must be put into place, old ones must be put into practice and our institutions must be better equipped to strengthen the rule of law.” See also resolution 59/191, entitled “Protection of human rights and fundamental freedoms while countering terrorism”, in which the General Assembly welcomed the report of the Secretary-General submitted pursuant to resolution 58/187 (A/59/404), in which it was stated that it was imperative that all States work to uphold and protect the dignity of individuals and their fundamental freedoms, as well as democratic practices and the rule of law, while countering terrorism.

- **Principle in matters of international cooperation.** Strengthening the rule of law and building fair criminal justice systems are important components in countering terrorism and need to be integrated into technical cooperation activities in those areas. Terrorists benefit from a weak or absent State and have an interest in countering the efforts of law enforcement and government agencies.¹¹⁷

If the rule of law is not respected, there is a major risk that proceedings will not be concluded, that procedural measures will be considered non-valid (at the internal level as well as from the point of view of cooperation and of recognition of the measures by another State) and that procedures that have been followed will be declared invalid.

- **The likelihood of a serious risk of violation of the rule of law.** States would be contravening international obligations by giving assistance, through mutual legal assistance or extradition, to proceedings that do not guarantee the prosecuted person a minimal degree of protection corresponding to that which is offered by democratic States, in particular those rights as defined in the International Covenant on Civil and Political Rights, or that would violate standards recognized as part of the international public order. However:

“The judge in cooperating should be particularly cautious. It is not enough for the defendant in the criminal proceedings of the requesting State to claim that he is threatened ...; it is his responsibility to demonstrate the likelihood of a serious and objective risk of a grave human rights violation in the requesting State, likely to affect him in a specific manner. ... The person who is the subject of the request and who raises the grievance cannot restrict himself to denouncing a particular politico-legal situation; it is his responsibility to demonstrate the likelihood of a serious and objective risk of a prohibited discriminatory treatment.”¹¹⁸

I.C.5 (a) Fair treatment

1.C.5 (a)(i) Fair trial

- **Legal opinion.** The Human Rights Committee has examined the different aspects pertaining to fair trial in terrorist matters.
 - It has declared that, even if it is not among the guarantees mentioned in article 14 of the International Covenant on Civil and Political Rights, from which derogation is not permitted, certain provisions of article 14 relative to fair trial had to be applied by States even during a state of emergency. Among those provisions is the presumption of innocence as well as the basic guarantees of a fair trial inherent to the principle of legality and the rule of law. It emphasized that only courts of law may try and convict a person for a criminal offence.¹¹⁹ The Committee was particularly concerned by the use of military courts and other special courts to prosecute crimes related to terrorism. It criticized procedures in

¹¹⁷ E/CN.15/2005/13, paragraph 30.

¹¹⁸ Extract for the judgement of 23 April 2003 of the First Court of Public Law of the Swiss Federal Supreme Court (1A.49-54/2002/col) (unofficial translation).

¹¹⁹ See CCPR/C/21/Rev.1/Add.11 and HRI/GEN/1/Rev.6, chap. II, General Comment No. 13.

which the accused person was judged by the military force that had arrested and indicted him or her and the fact that the members of the military courts were officers in active service and that no provision allowed for the revision of the conviction by a higher jurisdiction. Considering that those flaws raised serious doubts as to the independence and the impartiality of judges in military courts,¹²⁰ the Committee demanded that civilians be judged in all cases by civil courts of law and that those laws and provisions which provided otherwise be modified.¹²¹ It stressed the importance of the right of the accused to appeal his or her conviction and his or her sentence in a higher independent court in accordance with the law.¹²²

- In addition to the International Covenant on Civil and Political Rights, article 10 of the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)) recalls that everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal.
- *The universal instruments against terrorism* mention the guarantee of fair treatment.¹²³

¹²⁰ See CCPR/C/79/Add.67 and CCPR/C/79/Add.76.

¹²¹ See CCPR/C/79/Add.78 and CCPR/C/79/Add.79.

¹²² See CCPR/C/79/Add.61 and CCPR/C/79/Add.80.

¹²³ Thus, article 9 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973, is worded as follows: “Any person regarding whom proceedings are being carried out in connection with any of the crimes set forth ... shall be guaranteed fair treatment at all stages of the proceedings.” The Convention on the Physical Protection of Nuclear Material includes an identical provision as that of the 1973 Convention, while the International Convention against the Taking of Hostages, in its article 8, paragraph 2, added the following: “including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present”. This version was used in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the following was added in the International Convention for the Suppression of Terrorist Bombings: “and applicable provisions of international law, including international law of human rights”. Article 14 of that Convention specifies that “any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights”. Article 17 of the International Convention for the Suppression of the Financing of Terrorism indicates that “any person ... 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”. Furthermore, article 12 of the International Convention for the Suppression of Acts of Nuclear Terrorism specifies that “any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international law of human rights”.

- **Examples**¹²⁴

- *Presumption of innocence.* This principle is set forth in article 14, paragraph 2, of the Covenant. Its scope of application goes beyond the framework of the criminal proceedings.

- United Nations. Human Rights Committee, General Comment No. 29 (CCPR/C/21/Rev.1/Add.11), paragraphs 11 and 16 (2001). See also General Comment No. 13 (on article 14 of the Covenant):

“The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected.”

- European Court of Human Rights. See for example the case of *Allenet de Ribemont v. France*, 23 January 1995 (paragraph 36 of the judgement):

“The presumption of innocence may be infringed not only by a judge or court but also by other public authorities.”

- Inter-American System. See for example the statement of the Inter-American Court of Human Rights (OEA/Ser.L/V/II.53, doc. 25, ch. IV, 30 June 1981 (paragraph 9)) that:

“The right of every person accused of a criminal offence to be presumed innocent until his guilt is fully proven is a principle set forth ... in the American Convention on Human Rights.”

- *Military courts and special courts.* Courts of justice must be independent and impartial.

- United Nations: Human Rights Committee.

- See for example *Polay Campos v. Peru*, Case No. 577/1994, views adopted on 6 November 1997 (paragraph 8.8); and *Gutierrez v. Peru*, Case No. 678/1996, views adopted on 26 March 2002:

“In a court of justice made up of ‘faceless judges’, neither the independence nor the impartiality of the judges is guaranteed, especially when the court may include members of the armed forces.”

- The report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention on the situation of detainees at Guantánamo Bay (E/CN.4/2006/120, paragraph 85) states:

“The executive branch operating as judge, prosecutor and defence counsel of the detainees constitutes serious violations of various guarantees of the right to a fair trial before an independent tribunal as provided for by article 14 of the Covenant.”

¹²⁴ UNHCR, *Digest of Jurisprudence ...*, pp. 53 ff.

- Inter-American System. See for example *Castillo Petruzzi et al. Case*, Inter-American Court of Human Rights, judgement of 30 May 1999 (paragraphs 128-131 and 172):

“Transferring jurisdiction from civilian courts to military courts means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases.”

- African Commission on Human and People’s Rights. See for example *Media Rights Agenda case, Comm. No. 224/98, 14th Annual Activity Report 2000-2001* (paragraphs 59-62):

“The Commission finds the selection of serving military officers, with little or no knowledge of law, as members of the Tribunal in contravention of the principle of the independence of judges.”

The institution of criminal procedures specific to the fight against terrorism is not incompatible with the independence and impartiality of the courts, provided that these do not unjustly discriminate. Thus, whereas in certain States serious crimes are judged by courts with juries, the constitution of courts without juries in terrorist matters is not in conflict with human rights nor with the right to a fair trial.¹²⁵

- *The right of the accused to appeal the judgement.* Inter-American System: see for example *Castillo Petruzzi et al. Case*, Inter-American Court of Human Rights, judgement of 30 May 1999 (paragraph 161):

“The right to appeal the judgement is not satisfied merely because a higher court may hear the case. For a true ‘review’ of the judgement, the

¹²⁵ For example, in France, the Constitutional Court held in 1986 that:

“Considering that it is possible for the legislator competent to set rules of criminal procedure under article 34 of the Constitution to provide for different procedural rules in accordance with the facts, the situations and to the persons to whom they will apply, provided that these differences do not unjustifiably discriminate and that equal guarantees will be assured for all persons, in particular the respect of the right to defend oneself; considering that the different treatment set forth by article 706-25 of the new Criminal Code of Procedure (concerning all perpetrators of terrorist crimes) tends, according to the intentions of the legislator, to counter the effect of the pressure and the threats that can alter the serenity of the jurisdiction of judgement; that this difference of treatment is therefore not based on an unjustifiable discrimination; in addition, by its composition, the Court of Assize set up by article 698-6 of the Code of Criminal Procedure provides for the required guarantees of independence and impartiality; that before this jurisdiction the rights to defend oneself are protected; that, under these conditions, the argument based on the violation of the principle of equal protection before the law must be rejected.”

(*Décision n° 86-213 du 3 septembre 1986, Loi relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l’Etat* available at: <http://www.conseil-constitutionnel.fr/decision/1986/86213dc.htm>). The French Court of Cassation decided in a similar manner on 7 May 1987, considering that the establishment of the special Court of Assize in terrorist matters did not call into question the principle defined by article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms nor article 14 of the International Covenant on Civil and Political Rights (Crim. 7 May 1987, *Schleicher case*, *Bulletin de la Cons de Cassation*, No. 186).

higher court must have real jurisdictional authority and be constituted in an independent and impartial manner.”

1.C.5 (a)(ii) *Respect for the rights of the defence*

- The individual rights, and in particular, the right to defend oneself recognized in the International Covenant on Civil and Political Rights¹²⁶ and the international conventions relative to human rights must be respected. The Member States are free to take measures limiting a person’s privacy, on condition that the restrictions remain in compliance with international human rights standards, that is, that they are provided for by law, have a legitimate purpose and are necessary in a democratic society. During operations carried out in order to apprehend persons suspected of having committed serious offences, States shall take all possible measures to take precautions regarding the organizing and control of the operation. Once apprehended, the persons benefit from the same guarantees of criminal proceeding as other detainees. Even if some rights may be restricted (such as the right to defend oneself, as well as the right to communication), such restrictions may not undermine the basic freedoms protected by international standards.
- **Right to a lawyer, to counsel.** The universal instruments and regional agreements recognize the right to access to a lawyer or to counsel in legal proceedings.
 - *United Nations:*¹²⁷ *Human Rights Committee.* See for example CCPR/CO/73/UK-CCPR/CO/73/UKOT, paragraph 19; and A/55/40, paragraphs 422-451 (2000):

“The Committee regrets that legal assistance and advice may not be available until a person has been charged.”

The Human Rights Committee also commented in connection with the third periodic report of France (CCPR/C/79/Add.80, paragraph 23):

¹²⁶ Article 14, paragraph 3, of the Covenant States:

“In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

“1. To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

“2. To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

“3. To be tried without undue delay;

“4. To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

“5. To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

“6. To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

“7. Not to be compelled to testify against himself or to confess guilt.”

¹²⁷ Cited in UNHCR, *Digest of Jurisprudence* ..., pp. 66 ff.

“The Committee is concerned that the accused has no right to contact a lawyer during the initial 72 hours of detention in police custody.”

- *European Court of Human Rights*. See for example *Magee v. United Kingdom*, 6 June 2000 (paragraph 44):

“To deny access to a lawyer for such a long period [48 hours] and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused.”

- *Inter-American System*. See for example *Castillo Petruzzi et al. Case*, Inter-American Court of Human Rights, judgement of 30 May 1999 (paragraphs 139-141 and OEA/Ser.L/V/II.102 doc. 9, rev.1, 26 February 1999 (paragraph 97)):

“All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.”

1.C.5 (b) Principle of the respect of human rights, humanitarian and refugee law

1.C.5 (b)(i) Compatibility of the measures in the fight against terrorism with human rights, humanitarian and refugee laws

- **Context.** The fight against terrorism and respect for human rights are in no way contradictory; they mutually reinforce one another and fall under the responsibility of States. Whatever one’s concept of the fight against terrorism, this action must be carried out in accordance with the universal instruments, in the framework of the rule of law and taking human rights fully into account.¹²⁸ No person can be placed outside the protection of human rights, international and refugee laws.
- Respect for human rights in the fight against terrorism necessarily includes the respect of a number of guarantees for persons suspected of having committed acts of terrorism. These are, in particular, the right to life and the prohibition of torture and cruel, inhuman or degrading treatment or punishment.
- Even during a period of armed conflict (international or internal), a State may not suspend fundamental non-derogable human rights as defined in the applicable international instruments on human rights, humanitarian and refugee laws. This would include, in particular, non-refoulement obligations under international human rights and refugee law, as well as the requested State’s obligation under the law of neutrality not to return a person to a State that is a party to an armed conflict.
- *United Nations*. In its resolution 59/195, entitled “Human rights and terrorism”, the General Assembly urged the international community to enhance cooperation at the regional and international levels in the fight

¹²⁸ See Economic and Social Council resolution 2005/19 and the Bangkok Declaration on Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice (General Assembly resolution 60/177, annex).

against terrorism in all its forms and manifestations, in accordance with relevant international instruments, including those relating to human rights, with the aim of its eradication; called upon States to take all necessary and effective measures, in accordance with relevant provisions of international law, including international human rights standards, to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever and by whomever it is committed, and also called upon States to strengthen, where appropriate, their legislation to combat terrorism in all its forms and manifestations.

- *The Human Rights Committee* states that legislation enacted pursuant to Security Council resolution 1373 (2001) must be in conformity with the International Covenant on Civil and Political Rights.¹²⁹
- *European Court of Human Rights*. See for example the judgement in *Klass and Others v. Germany*, 6 September 1978 (paragraph 49):¹³⁰

“The Court affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.”
- *Inter-American System*. See for example the *Annual Report of the IACHR 1990-91*, chapter V, part II, article 512:¹³¹

“The argument that human rights violations are inevitable because they are the consequence of the ‘war’ created by armed groups is invalid. Unqualified respect for human rights must be a fundamental part of any anti-subversive strategies.”

1.C.5 (b)(ii) *Right to life within the framework of criminal prosecution*

- The right to life is protected by article 6 of the International Covenant on Civil and Political Rights.¹³² This is of particular importance in the arrest of an alleged terrorist and in proceedings that may result in sentencing to capital punishment. As regards the death sentence, the Human Rights Committee has stated, in a general observation, that, as derogation from the right to life is not permitted, any death sentence imposed (even during a state of emergency) should be in accordance with the provisions of that Covenant, including its provisions relative to guarantees of judicial proceedings and fair hearings.¹³³
- *United Nations*. The Human Rights Committee examined a case in which seven people were killed during a police raid because they were suspected of being members of a guerrilla organization having kidnapped

¹²⁹ CCPR/CO/77/EST, paragraph 8; CCPR/CO/75/NZL, paragraph 11; CCPR/CO/76/EGY, paragraph 16; CCPR/CO/75/MDA, paragraph 8; CCPR/CO/73/UK, paragraph 6; and UNHCR, *Digest of Jurisprudence ...*, pp. 13 ff.

¹³⁰ UNHCR, *Digest of Jurisprudence ...*, pp. 14-15.

¹³¹ *Ibid.*, p. 15.

¹³² Article 6, paragraph 1: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”
(See http://www.unhcr.ch/html/menu3/b/a_ccpr.htm.)

¹³³ See CCPR/C/21/Rev.1/Add.11.

a former ambassador (*Suarez de Guerrero v. Colombia*, Case No. 45/1979, views adopted on 31 March 1982 (paragraphs 12.2, 13.1 and 13.3)).¹³⁴ The Committee reached the conclusion that the action was disproportionate and did not respect the right to life, as no process aimed at enforcing such a right was implemented.

- *European Court of Human Rights.*
 - A violation of the right to life was invoked in the case *McCann and Others v. the United Kingdom*,¹³⁵ in which the claimants contested the legality of a preventive military operation during which three people suspected of preparing a terrorist attack in Gibraltar were killed. In this case, the Court raised issues concerning the proportionality of the State's response to the perceived threat of a terrorist attack and considered that the use of force by agents of the State could be justified in relation to article 2, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms where it was based "on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others". However, the Court reproached the State for not having paid sufficient attention to the possibility of using different means, which led to a fault by the agents, who did not take the proper precautions in the use of their firearms, including during an action against the terrorists who were considered dangerous. This negligence by the authorities was also a result of a lack of appropriate care in the control and organization of the arrest operation. National authorities are required to conduct an effective investigation when the use of force has led to a person's death.
 - As specified by the European Court of Human Rights in its judgement *Ergi v. Turkey*, the State must take all feasible precautions during operations to protect civilian lives.¹³⁶
 - The issue of the organization and control of operations was also raised in the case *Andronicou and Constantinou v. Cyprus*.¹³⁷ In the Court's view the planned operation fully justified the decision to use a special police unit. Furthermore, the use of the unit was considered one of last resort to be implemented only when negotiations failed. The unit was issued with clear instructions as to when to use weapons, providing for the principle of proportionate

¹³⁴ UNHCR, *Digest of jurisprudence ...*, pp. 27-28.

¹³⁵ See *McCann and Others v. the United Kingdom*, judgement of 27 September 1995 (<http://www.echr.coe.int/echr>).

¹³⁶ See *Ergi v. Turkey*, 28 July 1998, paragraph 81 (<http://www.echr.coe.int/echr>).

¹³⁷ See *Andronicou and Constantinou v. Cyprus*, 9 October 1997. A special police unit carried out a rescue operation in order to save the life of a young woman who was threatened by her fiancé, an operation that resulted in both their deaths (<http://www.echr.coe.int/echr>).

force, and to fire only if the woman's life or their own lives were in danger. Concerning the use of firearms, the agents believed in good faith that it was necessary to kill the man in order to save the young woman's life as well as their own. The agents were authorized to shoot in order to save a life and to take all measures that they believed in good faith to be necessary to eliminate any risk to the life of the young woman as well as to their own.

- Also see *McKerr v. the United Kingdom*, European Court on Human Rights, 4 May 2001 (paragraph 160).¹³⁸

➤ *Inter-American System*¹³⁹

- Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* (OEA/Ser.L/V/II.116, Doc. 5, rev.1 corr., 22 October 2002), paragraphs 87 and 89.
- *Neira Alegria Case*, Inter-American Court of Human Rights, Judgement of 19 January 1995 (paragraphs 74-75).
- Inter-American Court of Human Rights Advisory Opinion (OC-16/00) on the right to information on consular assistance, in the framework of the guarantees of the due process of law, 1 October 1999 (paragraph 136).
- Case 12.243, Report No. 52/01, *Garza Case*, *Annual Report of the IACHR 2000* (paragraph 100).

1.C.5 (b)(iii) *Ban on torture and other inhuman or degrading treatment*

No one may be subjected, or exposed to a risk of, torture or other cruel, inhuman or degrading treatment or punishment. The right to be free from such treatment is absolute and non-derogable, and applies in all circumstances. ¹⁴⁰
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- *United Nations*. In spite of the difficulties linked to the fight against terrorism, no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture.¹⁴¹
 - **Examples**
 - Decision of the Committee against Torture in *Agiza v. Sweden* (communication 233/2003 (CAT/C/34/D/233/2003), adopted on 20 May 2005).

¹³⁸ UNHCR, *Digest of Jurisprudence ...*, p. 29.

¹³⁹ *Ibid.*, pp. 30-31.

¹⁴⁰ See the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (<http://www.ohchr.org/english/law/cat.htm>).

¹⁴¹ The Committee against Torture has examined the use of torture or ill treatment within the framework of the fight against terrorism (A/51/44, paragraph 211).

- Views of the Human Rights Committee in *Alzery v. Sweden* (communication 1416/2005 (CCPR/C/88/D/1416/2005), adopted on 25 October 2006).
 - Concluding observations of the Human Rights Committee on the second and third reports of the United States, adopted on 27 July 2006 (CCPR/C/USA/CO/3/Rev.1, paragraph 10).
 - Human Rights Committee, General Comment No. 31 (2004) entitled “The nature of the general legal obligation imposed on States parties to the Covenant” (CCPR/C/21/Rev.1/Add.13, paragraph 12).
 - Human rights obligations also apply in the context of armed conflict.
- **Examples**
- Human Rights Committee, General Comment No. 31 (2004) entitled “The nature of the general legal obligation imposed on States parties to the Covenant” (CCPR/C/21/Rev.1/Add.13, paragraph 11).
 - Conclusions and recommendations of the Committee against Torture on the second report of the United States (CAT/C/USA/CO/2, paragraph 14).
 - International Court of Justice, “Legality of the threat or use of nuclear weapons”, Advisory Opinion, *I.C.J. Reports 1996*, p. 226, paragraph 25; and the judgement of 19 December 2005 in the *Case concerning armed activities on the territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *I.C.J. Reports 2005*, paragraphs 215-219.
- *European Court of Human Rights*
- The European Court of Human Rights has emphasized many times that: “Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment”. See the cases of *Selmouni v. France*, judgement of 28 July 1999 (paragraph 95), and *Berktaş v. Turkey*, judgement of 1 March 2001 (paragraph 162).
 - One of the fundamental judgements in this area is the case of *Ireland v. the United Kingdom*.¹⁴² Concerning the five particular

¹⁴² See the judgement of 18 January 1978. The Northern Ireland authorities, in order to fight against terrorism in Ireland, exercised a series of special powers of arrest, detention and internment from August to December 1975. In 1971, the police and the army initiated an operation to apprehend persons susceptible of participating in terrorist acts. During the time of detention, the police and army admitted having used, among others, the following five interrogation techniques: (a) wall-standing for long periods of time (hours in a “stress position”); (b) hooding (covering the suspect’s head throughout the detention); (c) subjection to noise (exposing the subject to loud noise for a prolonged period); (d) deprivation of sleep; and (e) deprivation of food and drink.

techniques used on suspects, the Court observed that, although they did not reach the level of torture, applied in combination, they undoubtedly amounted to inhuman and degrading treatment, aimed at extracting confessions, the naming of others and/or information, and were used systematically.

- Also see *Chahal v. the United Kingdom*, 15 November 1996 (paragraph 79) and *Tomasi v. France*, 27 August 1992 (paragraph 115).¹⁴³
- *Inter-American System*.¹⁴⁴ An essential aspect of a person's right is the absolute prohibition of torture, a standard of international law that is imposed *erga omnes*: Inter-American Court of Human Rights, *Report on the situation of human rights of asylum-seekers within the Canadian Refugee Determination System* (OEA/Ser.L/V/II.106, doc. 40 rev., 28 February 2000 (paragraph 118)); and that Court's judgement in the *Loayza Tamayo Case* (17 September 1997 (paragraph 57)).

1.C.5 (b)(iv) *Refugees, denial of safe haven to terrorists*

International refugee law protects refugees against forcible removal to a risk of persecution (principle of non-refoulement) and requires that persons seeking international protection be given access to fair and efficient asylum procedures. The institution of asylum must not, however, be abused by persons responsible for acts of terrorism. The proper application of existing provisions in international refugee law ensures that international protection is not extended to such persons.

- **Context.** Criminals may attempt to avoid prosecution by fleeing to another State and may seek asylum in other countries. Under the terms of international refugee law, States are bound to assess the claims of persons seeking international protection and to extend such protection to persons fleeing persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Most importantly, States must respect the fundamental principle of non-refoulement, which protects refugees against forcible removal to a country where they would face a risk of persecution or from where they may be sent on to such a risk.
- **Legal basis**
 - The international refugee instruments – that is, the Convention relating to the Status of Refugees of 1951 and its 1967 Protocol¹⁴⁵ – do not provide a safe haven for terrorists. On the contrary, these instruments provide for a system of checks and balances that takes full account of the security interests of States and host communities while protecting the rights of persons.
 - International refugee law does not render persons involved in acts of terrorism immune to criminal prosecution, nor does it prevent extradition in all circumstances. Existing provisions of the relevant instruments

¹⁴³ UNHCR, *Digest of Jurisprudence ...*, p. 34.

¹⁴⁴ *Ibid.*, p. 35.

¹⁴⁵ United Nations, *Treaty Series*, vol. 606, No. 8791.

ensure that international refugee protection is not extended to those who have committed, or participated in the commission of, acts of terrorism.

- Firstly, refugee status may be granted only to those who fulfil the criteria as set out in the definition of the term “refugee” contained in article 1, section A, paragraph 2, of the 1951 Convention, that is, those who have a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. In many cases, persons responsible for acts of terrorism do not qualify for refugee status because they flee legitimate prosecution rather than persecution for a 1951 Convention reason.
- Secondly, even if these “inclusion” criteria are met, an exclusion clause of article 1, section F, of the 1951 Convention may apply. Under this provision, refugee status is denied to persons who would otherwise come within the refugee definition of article 1, section A, paragraph 2, but with regard to whom there are serious reasons to believe that they have committed certain serious crimes and who are therefore considered undeserving of international refugee protection.¹⁴⁶ UNHCR encourages States to use the article 1, section F, exclusion clauses rigorously, albeit appropriately.¹⁴⁷
- In addition, under article 2 of the 1951 Convention, persons who have been recognized as refugees, as well as asylum-seekers who are awaiting a decision on their claims, are bound to conform to the laws and regulations of the host country. If they do not do so, they may be prosecuted.
- Article 32 allows for the expulsion of a refugee to a country where the refugee is not in danger of persecution on grounds of national security or public order.
- Moreover, protection against refoulement under the 1951 Convention is not absolute. While article 33, paragraph 1, prohibits the expulsion or return of a refugee to a country where he or she would be at risk of persecution,¹⁴⁸ article 33, paragraph 2, provides

¹⁴⁶ The acts that may give rise to exclusion from refugee status are listed exhaustively in article 1, section F, of the 1951 Convention: crimes against peace, war crimes, crimes against humanity (article 1, section F, subparagraph (a)); serious non-political crimes committed outside the country of refuge prior to admission to that country as a refugee (article 1, section F, subparagraph (b)); and acts contrary to the purposes and principles of the United Nations (article 1, section F, subparagraph (c)).

¹⁴⁷ This requires an assessment of the context and circumstances of the individual case in a fair and efficient procedure before a decision is taken. Detailed guidance on the interpretation and application of the exclusion clauses can be found in UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (HCR/GIP/03/05), 4 September 2003, and the accompanying Background Note; see also UNHCR, “UNHCR note on the impact of Security Council resolution 1624 (2005) on the application of exclusion under article 1F of the 1951 Convention relating to the Status of Refugees” of 9 December 2005 (available at <http://www.unhcr.org/home/RSDLEGAL/440ff6944.pdf>).

¹⁴⁸ Article 33, paragraph 1, of the 1951 Convention provides: “No Contracting State shall expel or

for exceptions to the principle of non-refoulement on national security grounds or if the refugee has been convicted of a particularly serious crime and constitutes a danger to the community of the host country.¹⁴⁹

Thus, the 1951 Convention and its 1967 Protocol offer a comprehensive framework that enables States to give effect to Security Council resolutions calling on them to take appropriate measures in conformity with the relevant provisions of 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.¹⁵⁰

Efforts to fight terrorism should not suggest any automatic linkage between refugees and terrorists. Such a linkage would be prejudicial to the institution of asylum and is also unwarranted because existing provisions of the 1951 Convention ensure that international refugee protection is not extended to those who have induced, facilitated or perpetrated acts of terrorism.¹⁵¹

- **International cooperation in criminal matters and international refugee law.** Measures taken by States to counter terrorism, including all forms of international cooperation in criminal matters, must be in conformity with international refugee law.¹⁵²

- *Principle of non-refoulement*

- The principle of non-refoulement constitutes the cornerstone of international refugee protection. Provided for under article 33 of the 1951 Convention¹⁵³ and customary international law, it prohibits the involuntary removal, including through extradition, of a refugee to a risk of persecution.

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."

¹⁴⁹ Article 33, paragraph 2, of the 1951 Convention provides: "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country." For more detailed information, see E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement: opinion", *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, E. Feller, V. Türk and F. Nicholson, eds. (Cambridge, Cambridge University Press, 2003), pp. 87-177; see also UNHCR, Advisory Opinion on the extraterritorial scope of non-refoulement obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007 (<http://www.unhcr.org/refworld/pdfid/45f17a1a4.pdf>).

¹⁵⁰ Security Council resolutions 1269 (1999) (paragraph 4) and 1373 (2001) (paragraph 3 (f)); see also General Assembly resolution 49/60 (annex, paragraph 5 (f)).

¹⁵¹ See, for example, UNHCR, Addressing Security Concerns without Undermining Refugee Protection: UNHCR's Perspective, 29 November 2001 (<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3c0b880e0>).

¹⁵² See, for example, Security Council resolutions 1373 (2001), 1456 (2003), 1535 (2004), 1566 (2004) and 1624 (2005); see also General Assembly resolutions 57/219, 60/1 and 60/288.

¹⁵³ See above, footnotes 143, 144, 146 and 147.

- As asylum-seekers may be refugees, they are protected under article 33, paragraph 1, of the 1951 Convention against return to the country from which they have fled pending a final decision on their asylum claim.
- Non-refoulement obligations under international human rights law are also fully applicable to refugees and asylum-seekers.¹⁵⁴
- *Fair and efficient asylum procedures*
 - In order to give effect to the right to seek and enjoy asylum¹⁵⁵ as well as to their obligations under international refugee law, States must provide fair and efficient procedures for the examination of claims for international protection.¹⁵⁶ This fully applies also in extradition cases involving asylum-seekers.
 - The existence of a request for extradition does not of itself render the asylum claim inadmissible, nor would it as such justify a determination that the asylum-seeker does not meet the inclusion criteria or that he or she should be refused international refugee protection. Eligibility for refugee status needs to be determined on the basis of a careful evaluation of all facts and circumstances pertaining to the individual case, including any relevant information obtained in the context of the request for extradition.
- *Confidentiality*
 - It is the view of UNHCR that, as a general rule, no information regarding an asylum application, or an individual's refugee status, should be shared with the country of nationality or, in the case of stateless persons, the country of former habitual residence, as this may breach the individual's right to privacy¹⁵⁷ or may infringe the requested State's protection obligations by exposing the person concerned or persons associated with him or her to a risk of persecution.
 - Should it be necessary in exceptional circumstances to contact the authorities in the country of origin, there should in principle be no disclosure of the fact that the individual has applied for asylum or is a refugee. For example, the requested State may need additional

¹⁵⁴ For a discussion of non-refoulement obligations under international human rights law/grounds for refusal, see section 3.E.5 (c) below.

¹⁵⁵ Article 14, paragraph 1, of the Universal Declaration of Human Rights.

¹⁵⁶ For an overview of core elements that are necessary for decision-making in keeping with international protection standards, see UNHCR, Asylum Processes (Fair and Efficient Asylum Procedures) (EC/GC/01/12), 31 May 2001 (<http://www.unhcr.org/refworld/pdfid/3b36f2fca.pdf>).

¹⁵⁷ International human rights law guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference (see, for example, article 12 of the Universal Declaration of Human Rights and article 17, paragraph 1, of the International Covenant on Civil and Political Rights). Effective measures need to be taken to ensure that information concerning a person's private life does not reach the hands of third parties who might use such information for purposes incompatible with human rights law. See paragraph 10 of General Comment No. 16, adopted by the Human Rights Committee, on article 17 of the International Covenant (A/43/40, annex VI).

information in order to decide on the request for extradition or to enable it to provide mutual legal assistance or some other form of international cooperation.

- **Refugee protection and extradition procedures**

- *Refugees.* The authorities responsible for taking a decision concerning the request for extradition are bound to ensure that the requested State's non-refoulement obligations under international refugee and human rights law are fully respected. The extradition process must offer adequate and effective safeguards, including an opportunity for the wanted person to submit information relevant to his or her situation as well as the right to appeal against a decision to extradite.
- *Asylum-seekers.* The scope of the requested State's *international* legal obligations is different depending on whether the wanted person is, or is not, a refugee. Thus, if a request for extradition concerns an asylum-seeker, the requested State must determine his or her eligibility for refugee status. This does not necessarily require a suspension of the extradition proceedings. It does mean, however, that a final decision on the person's right to asylum needs to be made before it can be determined whether or not extraditing the person would be in keeping with the principle of non-refoulement. Given the specialist knowledge and skills required in determining eligibility for refugee status, the asylum claim should be determined by the asylum authorities of the requested country and not as part of the extradition process.

1.C.6. Dual criminality

Rule. According to the dual criminality principle, the offence concerned in the request for cooperation must constitute an offence in the law of both countries concerned in order for the request to be accepted¹⁵⁸ (at least in extradition, not always in mutual assistance).

The condition of dual criminality must be fulfilled on the date of commission of the offence on the basis of which the cooperation in criminal matters is requested, or on the date of the request, depending upon the law of the requested State.

- **Application**

- *In mutual legal assistance matters*
 - *Non-coercive nature of the measure.* In mutual legal assistance matters, the absence of dual criminality need not be a justification for refusal where the measure requested is not of a coercive nature (witness hearing, provision of procedural documents, etc.).

¹⁵⁸ Accordingly, article 2, paragraph 1, of the Model Treaty on Extradition states: "For the purposes of the present Treaty, extraditable offences are offences that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty." (http://www.unodc.org/pdf/model_treaty_extradition.pdf)

- *Coercive nature of the measure.* On the other hand, where the requested measure is of a coercive nature (mainly search and seizure, but also, for certain States, seizure of banking documents),¹⁵⁹ the absence of dual criminality often justifies a refusal.
- *In matters of extradition*
 - In traditional extradition law,¹⁶⁰ the absence of dual criminality is a mandatory ground for refusal: the requested State may not provide assistance if the offence concerning which the request for extradition is formulated is not punishable under domestic law.
 - In the fight against terrorism, dual criminality exists as soon as two States have incorporated a universal instrument into national law and use the definition of the offence set forth in that instrument as the basis for an extradition procedure.

It should be noted that the requested State is never required to accept the definition given by the requesting State: it verifies that the acts described in the request for cooperation constitute a criminal offence under its domestic law.

• **Useful tools in applying the dual criminality principle**

- *The universal instruments*
 - The condition of dual criminality shall be considered satisfied as soon as two States that have ratified a multilateral instrument use the definition of the offence in that instrument as the basis for cooperation procedures in criminal matters (mutual assistance or extradition).
 - The universal instruments against terrorism can be considered a legal basis for cooperation, in particular since all the existing extradition treaties linking States parties shall be considered automatically modified and including the offences set forth in the universal instruments themselves.
- *Interpretation of the principle.* The notion of dual criminality within the framework of international cooperation in criminal matters needs to be flexible. Thus, as regards mutual legal assistance and/or extradition, the need to have two identical offences is required less and less frequently, especially in connection with offences related to terrorism.

It is important that the offences committed are punishable in both States (requesting and requested), whatever the penal definition under which those offences are punished in either of the countries. Thus, for the purpose of cooperation, differences in terminology should be ignored, as the dual criminality

¹⁵⁹ This is, for example, the case of Switzerland.

¹⁶⁰ The European arrest warrant does not include this rule (see section 4.1 below).

rule should be based on the examination of all the acts and omissions, rather than on a simple comparison of offences.¹⁶¹

In other words, for the needs of international cooperation, practitioners are encouraged to examine whether the constitutive elements of the offence are also criminalized in their legislation, rather than if the act concerning which cooperation is requested is criminalized under the same definition.

It is in fact enough for the acts to be punishable under the terms of the requesting and requested States' law in order to ensure the effectiveness of the cooperation.

- **Examples**

- *Case study.* Judgement of the Italian Supreme Court of Cassation of 2 July 2000:¹⁶²

“This case concerns an extradition request by France to Italy in order to obtain the transfer of an alleged terrorist belonging to the Algerian terrorist group GIA [Armed Islamic Group].

“The Court interprets the dual criminality condition in a very flexible fashion: what matters is not the legal definition of the offence (in this case a criminal association for terrorist purposes), but rather the fact that the act in question is punishable in both legal systems. It is not necessary for such an act to constitute the same offence or to be punishable by the same penalties.”

- The *European arrest warrant*¹⁶³ excludes the need to verify dual criminality for offences or a series of offences that are listed based on the assumption that they are punishable in the entire territory of the European Union.¹⁶⁴

1.C.7. Rule of limited use and rule of speciality¹⁶⁵

Principle. According to the rule of limited use and rule of speciality,¹⁶⁶ the materials obtained through international cooperation in criminal matters may not be used for other purposes and proceedings other than those for which cooperation was requested.

¹⁶¹ Article 2, paragraph 4, of the Model Treaty on Extradition.

¹⁶² Available in Italian at <http://www.unodc.org/tldb/showDocument.do?documentUId=3321>.

¹⁶³ See Council of the European Union framework decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member States (*Official Journal of the European Communities*, L 190, 18 July 2002) (<http://europa.eu.int/scadplus/leg/en/lvb/l33167.htm>).

¹⁶⁴ *Ibid.*, article 2.

¹⁶⁵ The term “rule of limited use” is used in mutual legal assistance proceedings; the term “rule of speciality” is used in extradition proceedings. Mutual legal assistance proceedings also sometimes refer to a “rule of speciality”.

¹⁶⁶ In French-speaking countries the term “specialty” is usually used to describe “limited use” in both mutual legal assistance and extradition.

As regards extradition, normally¹⁶⁷ the person may only be detained or judged for the acts that were the subject of the request for extradition.

- **Application**

- *In matters of mutual legal assistance.* The evidence received through mutual legal assistance may not be transmitted or used for proceedings other than those stated in the request.¹⁶⁸
- *In matters of extradition,* the rule of speciality requires that the person be detained or judged only for the acts that were the subject of the request for extradition,¹⁶⁹ unless the requested State gives its consent to prosecution for other acts.
 - If the person was extradited as a result of a conviction, only the sentence handed down by the decision for which the extradition was granted can be executed.
 - If the requesting State discovers, subsequent to the request for extradition, that acts that were committed prior to the extradition also need to be prosecuted, it applies for the authorization of the requested State to prosecute based on those new facts (request for extension of the extradition).

1.C.8. *Ne bis in idem*

- **Context:** Faced with the rising internationalization of criminality, criminal justice is confronted increasingly with situations in which several States have jurisdiction to prosecute the same act. At present, there is a higher probability of plurality of criminal proceedings in matters of international terrorism, also known as “positive” conflicts of jurisdiction.

¹⁶⁷ Some extradition instruments provide that the rule of speciality no longer applies if the wanted person leaves the requested country and voluntarily returns to it, or after a certain amount of time.

¹⁶⁸ Certain conventions mention the rule of specialty, in particular the Financing of Terrorism Convention (article 12, paragraph 3): “The requesting Party shall not transmit or use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party”; the 1988 Convention (article 7, paragraph 13); and the Organized Crime Convention (article 18, paragraph 19). Similarly, under article 8 of the Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolutions 45/117, annex, and 53/112, annex I):

“The requesting State shall not, without the consent of the requested State, use or transfer information or evidence provided by the requested State for investigations or proceedings other than those stated in the request. However, in cases where the charge is altered, the material provided may be used in so far as the offence, as charged, is an offence in respect of which mutual assistance could be provided under the present Treaty, or restrict use of evidence only where the requested State makes an express request to that effect.”

¹⁶⁹ This universal rule is based on the respect of the will of the requested State that has complied with the request of the requesting State for a specific request and not necessarily for another. It is included in several extradition treaties, such as in article 14 of the European Convention on Extradition (United Nations, *Treaty Series*, vol. 359, No. 5146) and in article 14 of the Model Treaty on Extradition.

Contents of the principle

The *ne bis in idem* principle expresses the impossibility of more than one prosecution for the same act(s).

Plurality of criminal proceedings is detrimental to the rights and interests of persons, with the risk, among other things, that the proceedings may be rendered redundant and the inconvenience of having to subpoena or summon for hearing persons charged in a criminal proceeding, as well as the victims and witnesses, before jurisdictions in several countries.

- **Legal basis.** The principle is well known in national legal regimes. It is also clearly defined in article 14, paragraph 7, of the International Covenant on Civil and Political Rights, according to which “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

This principle is, however, not established in any of the universal instruments related to the fight against terrorism. Its respect can nevertheless contribute to a certain degree of legal security.

- **Concurrent jurisdiction and *res judicata* (thing adjudged).** Concurrent jurisdiction may occur in the case of a plurality of criminal proceedings between two or more States. The *ne bis in idem* principle does not itself prevent the institution of two concurrent proceedings for the same acts before two jurisdictions, a situation that can perfectly well happen when two national legal systems have jurisdiction to prosecute the persons for the same acts. Thus, concurrent national proceedings are definitely not contrary to the *ne bis in idem* principle. The principle prevents from being re-judged a person already the subject of a final judgement by another court on the merits of the same offence (a foreign decision constituting a bar).¹⁷⁰ It can thus play a role by obviating the opening of a second proceeding on the same merits, when a decision puts an end to the proceeding in one State and constitutes from that point a bar on any further prosecution (thing adjudged or *res judicata*).
- **Textual example of application of the principle at the regional level**

Article 50 of the Charter of Fundamental Rights of the European Union¹⁷¹ states the general principle of the right to *ne bis in idem* (the right not to be tried or punished twice in criminal proceedings for the same criminal offence), based on the principles of the thing adjudged and individual liberty. It is recognized by national jurisdictions, as well as international conventions, but with a national guarantee, that is, for sentences handed down by jurisdictions of a same State. The European Convention on Extradition nevertheless considers the principle a motive for non-extradition. Within the framework of the European Union, this rule is included in several conventions (Convention implementing the Schengen Agreement;¹⁷² the Convention,

¹⁷⁰ Opinion of the representative of France concerning the case *Certain criminal proceedings in France (Republic of the Congo v. France)* pending before the International Court of Justice.

¹⁷¹ *Official Journal of the European Communities*, C 364, 18 December 2000.

¹⁷² *Ibid.*, L 239, 22 September 2000.

drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests;¹⁷³ and the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union¹⁷⁴). The wording of article 50 recognizes the principle “within the Union”, thus including decisions of jurisdictions from several member States, which contributes to the creation of a legal space. This recognition is only applicable to decisions of a criminal nature. Together, those rules applicable to criminal sanctions contribute to the implementation of the principle of legal certainty, or “legitimate expectations”, that, in certain constitutional systems, limits the legislative powers.¹⁷⁵

- **Case study example.** Decision of the Criminal Chamber of the Court of Cassation of France of 13 October 2004 concerning an Italian request for extradition of an alleged terrorist.¹⁷⁶

“The Examining Chamber of Paris on 20 June 2004 handed down a favourable opinion concerning the extradition of Cesare Battisti. Mr. Battisti’s lawyer argued that the request for extradition by Italy violated the rule of *res judicata* since a previous request dated 8 January 1991 had already been refused. The Court held that the principle of “thing adjudged” in criminal matters prevented a new prosecution of a person for the same offence where the person has already been subject to a final decision (i.e. the decision can no longer be appealed either because such appeal has been rejected or the action has not been carried out within the legal time limits). This is the rule of *ne bis in idem*. However, there are exceptions to this rule. For the rule to apply, the request must be the same: it must be against the same person, concerning the same acts and having the same legal grounds. In this case, however, the Court of Appeal of Paris held that the 1991 request, which was rejected, was based on three warrants of arrest issued by Italian investigating magistrates. The case was being investigated. The request for extradition that was issued was based on the 1993 final conviction handed down by the Court of Assize of Milan. The legal basis not being the same, the Appellate Court could consider the new request. This decision was confirmed by the Criminal Chamber of the Court of Cassation.

1.D. Rules for effective cooperation

Objectives

- 1.D.1. To promote the development of informal, spontaneous and direct contacts, and exchanges for the purpose of coordinating investigations and proceedings, and for sharing information.

¹⁷³ Ibid., C 316, 27 November 1995.

¹⁷⁴ Ibid., C 195, 25 June 1997.

¹⁷⁵ See the Charter of Fundamental Rights of the European Union at http://www.europarl.eu.int/charter/default_en.htm.

¹⁷⁶ Judgement of the Criminal Chamber of the Court of Cassation of France, 20 June 2004, No. 04-84470 (<http://www.legifrance.gouv.fr/WAspad/Visu?cid=127406&indice=1&table=CASS&ligneDeb=1>) (unofficial translation).

1.D.2. To simplify procedures in order to accelerate international cooperation and to render it more effective.

1.D.1. Promotion of exchanges and contacts

- It is essential for the effectiveness of international judicial criminal cooperation to prioritize informal, spontaneous and direct contacts. Such a framework allows for:
 - Coordination of efforts and jurisdictions in the fight against terrorism
 - Improvement in standards of cooperation with regard to the rule of law
 - Better coordination of investigations and prosecutions
 - Settlement of cases of conflicting jurisdiction
 - Facilitation of the exchange of information and succinct legal opinions before a request is made
 - Organization of information exchanges after the request has been made and before, during and after execution of the request
 - Acceleration of exchange of information of use in investigations in each country
- If these elements are in place, the practitioners involved in the penal cooperation can:
 - Contact their counterparts directly
 - Ensure appropriate ties between national cooperation agencies
 - Request the organization of periodic strategic and operational meetings between those involved in cooperation in the fight against terrorism
- **Developing spontaneous provision of information.** Mutual legal assistance may be based on reciprocity (see section 1.B.7 above) and make possible spontaneous mutual legal assistance.¹⁷⁷ For example, the national authorities of one State are informed of the activities of a criminal group subject to

¹⁷⁷ An innovation of the Organized Crime Convention is concerned with spontaneous mutual legal assistance. How it may be implemented is described in article 18, paragraphs 4 and 5:

“4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

“5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.”

prosecution in another State. The authorities of the first State then spontaneously give their counterparts in the other State information they may have on the group without a prior request.

The development of informal and direct contacts between law enforcement services can be encouraged by various methods, for example through the police attachés present abroad in embassies, through the national central bureaux of INTERPOL and through other points of contact established by the various regional or international organizations of police bodies.¹⁷⁸

- **Example.** At the regional level, the European Union has established Eurojust,¹⁷⁹ the purpose of which is to promote and improve the coordination of investigations and prosecutions, to improve the implementation of provisions that govern suppressive mutual assistance and to support the competent authorities of the member States in order to strengthen the effectiveness of transnational procedures. This formally created entity is thus a support for the improvement of interaction between partners in the framework of terrorist affairs, in particular by supporting the organization and preparation of strategic, operational and other meetings and by giving assistance at meetings for operational coordination.¹⁸⁰
- **Example.** “In Sweden in 2005 two Iraqi nationals, with connections to Ansar al-Islam, alias Ansar al-Sunna, and the network around Abu Musab al-Zarqawi, terrorist organizations internationally recognized and linked to Al-Qaida, were indicted and subsequently arrested for financing of terrorism ... They were charged with preparation of a terrorist crime and with preparations to endanger public safety, and alternatively with financing particularly serious criminal acts. This was the first time anyone in Sweden was prosecuted under the Swedish terrorist act. Apparently a variety of terrorist organizations had been involved in this operation ... Financial support for the proposed terrorist crime was collected between 2002 and 2004 in mosques in Sweden and later transferred to Iraq, using the so-called Hawala banking system, and via couriers. Part of the proceeds were suspected to be set aside to prepare a deadly bomb attack in Arbil, Iraq, which took place at the beginning of 2004. International cooperation was of the utmost importance in conducting this investigation. The Swedish prosecutor, who is also a correspondent for Eurojust, informed Eurojust at an early stage about the ongoing investigation in Sweden. [He] needed evidence concerning the connection to or membership of the two perpetrators in the terrorist organizations and evidence concerning how the money was sent to Iraq. Swedish judicial authorities required important relevant information to be gathered in another EU Member State. As

¹⁷⁸ For example, INTERPOL has developed a network of focal points specialized in terrorism matters within the framework of the “Fusion Task Force”. (For more information, contact the General Secretariat of INTERPOL.)

¹⁷⁹ See Council of the European Union decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (*Official Journal of the European Communities*, L 63, 6 March 2002); and Council of the European Union decision 2005/671/JHI of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences (*Official Journal of the European Union*, L 253, 29 September 2005).

¹⁸⁰ See the annual reports of Eurojust at <http://eurojust.europa.eu>.

this information was part of an undercover operation, the requested Member State was not willing to share this information with Sweden. After several meetings and coordination through Eurojust, the two Member States agreed upon an extensive exchange of information and executed the related [mutual legal assistance] requests. Sweden received more information and evidence than expected. Among other things, it was proved that [a large sum] was transferred to Iraq just before the bomb attack in northern Iraq. Some evidence originating from another EU Member State was presented before the District Court in Stockholm and the Court of Appeal in Sweden. The two perpetrators were finally convicted by the Court of Appeal of preparation of a terrorist crime, preparation of endangering public safety and of financing particularly serious criminal acts. The Court of Appeal did not find sufficient proof that the financial support was specifically meant for the bomb attack in Arbil, but for terrorism in general. The judgement has come into force.

“The Swedish prosecutor in charge was also called as a witness to another EU Member State to give a statement concerning the court hearings in Stockholm.”¹⁸¹

Furthermore, the European Union has created a network of judicial contact points between EU Member States, the European Judicial Network, intended to be active intermediaries in facilitating judicial cooperation, in particular by providing legal and practical information needed by local judicial authorities of their own country and other countries.¹⁸²

1.D.2. Simplification of procedures

- Speed is required for effective cooperation related to requests for mutual legal assistance and/or extradition, especially in the execution of such requests. In the absence of rapid procedures, which is often the case when the cooperation procedures involve a great deal of formality, it is very tempting to resort to methods that do not respect the rule of law in order to reach the objectives of cooperation. In addition, it is essential to act quickly in order to prevent the commission of acts of terrorism. The simplification of procedures is thus of utmost importance in relation to terrorism. For example, direct communication between legal authorities should be made possible, through, for example, liaison magistrates or the use of new means of communication, such as the questioning of witnesses or suspects by videoconference.

The simplification of procedures will be considered throughout this *Manual*.

- It should be noted that the universal instruments against terrorism do not provide for simplified procedures in matters of international mutual legal assistance. However, the simplification and speeding up of the procedures of cooperation in criminal matters are included in other international instruments in the fight against crime such as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988¹⁸³ and the

¹⁸¹ Eurojust, *Annual Report 2005* (The Hague, 2005), pp. 63-64.

¹⁸² See Joint action 98/428/JHA of 29 June 1998, adopted by the Council of the European Union on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network (*Official Journal of the European Communities*, L 191, 7 July 1998).

¹⁸³ For an in-depth analysis of the 1988 Convention, see *Commentary on the United Nations*

Organized Crime Convention.¹⁸⁴ These instruments require in particular the simplification of evidentiary requirements in extradition procedures, but also of procedural requirements and means of transmission of requests for extradition.¹⁸⁵ Such procedures should not be interpreted as interfering in any manner with the fundamental rights of the defence.¹⁸⁶

1.E. Competent national authorities

Objectives

A number of institutions are competent in criminal matters in the fight against terrorism:

- 1.E.1. Law enforcement agencies
- 1.E.2. Prosecutors and judges
- 1.E.3. Foreign offices
- 1.E.4. Central authorities
- 1.E.5. Financial intelligence units

The specific role played by the competent institutions in matters of cooperation will be examined throughout this *Manual*.

It is important to distinguish between competent agencies, agencies responsible for collecting legal evidence and those in charge of gathering general information concerning trends in terrorism or intelligence-gathering.

- **Specialization of agencies.** It should be noted that certain national legislations have favoured the specialization of agencies and centralization in the fight against terrorism,¹⁸⁷ although the organization of national agencies in charge

Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (United Nations publication, Sales No. E.98.XI.5).

¹⁸⁴ For an in-depth commentary on the Organized Crime Convention and its Protocols, see the *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2).

¹⁸⁵ See article 6 of the 1988 Convention and article 16, paragraph 8, of the Organized Crime Convention.

¹⁸⁶ See the interpretative notes to the official records (*travaux préparatoires*) of the negotiations for the Organized Crime Convention and its Protocols on article 16, paragraph 8, of the Convention (*Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.06.V.5), p. 162).

¹⁸⁷ Such as France and Switzerland. There is also an anti-terrorism agency in the United Kingdom, the Anti-Terrorist Branch, created in 1970. The Scotland Yard department for the fight against terrorism, the Counter-Terrorism Command, is part of this agency and the objective of its agents is to provide assistance and advice to several sectors of activity in order to prevent terrorist acts. The following may be given assistance and advice: pharmaceutical companies, financial institutions, industries, tourist areas and commercial organizations. The agency works primarily in the London area. The National Criminal Intelligence Service was created in 1992 to fight against terrorism at the national level, but in April 2006 the Prime Minister launched a new

of this fight is in certain States carried out in a segmented fashion, each agency having a specific competence.

- **Respect for human rights.** The specialization of national agencies in the fight against terrorism does not necessarily mean that jurisdictions and procedures of exception must be set up. These agencies follow rules of competency and function in manners that are adequate and specific to the fight against terrorism in complete respect for the rule of law and, in particular, human rights. Especially when it is a matter for competent agencies to work “upstream” (on the prevention of terrorist offences), the issue of respecting human rights becomes even more important.

1.E.1. Law enforcement agencies

- “The term ‘law enforcement officials’ includes all officers of the law, whether appointed or elected, who exercise police powers, especially the powers of arrest and detention. In countries where police powers are exercised by military authorities, whether uniformed or not, or by state security forces, the definition of ‘law enforcement officials’ shall be regarded as including officers of such services.”¹⁸⁸ These elements especially reflect the powers of judicial police and investigation in matters linked to the fight against terrorism. Prosecutorial agencies may be included in these services in common law countries.
- **Examples of two national systems**
 - *France.* The mission of the National Anti-Terrorist Division is to detect and suppress terrorist activities. It coordinates the activities of the judicial police services aimed at identifying, locating and questioning the offenders of and accomplices in attacks committed in the national territory. It is organized into two sections and has national jurisdiction.
 - *United States.* The Federal Bureau of Investigation (FBI), a federal judicial police agency, is in charge of judicial investigations into federal crimes and, in particular, terrorism. The FBI is under the authority of the United States Department of Justice.

1.E.2. Prosecutors, judges and prosecuting agencies

- Depending on the legal tradition, the status and mission of the department of public prosecutions differ greatly. However, all departments of public prosecutions share values based on accepted international commitments that

agency, the Serious Organised Crime Agency, which now handles the functions of several British institutions, notably the National Criminal Intelligence Service.

In Germany, a special agency was set up in 2000 within the Bundeskriminalamt (Federal Criminal Police Office), the Gemeinsames Terrorismusabwehrzentrum (Joint Counter-Terrorism Centre), which is specialized in consolidating and analysing information received by all of the authorities on international terrorism. In 2005, the Abteilung International Koordination (International Coordination Division) was created within the Federal Office for the purpose of promoting international cooperation.

¹⁸⁸ Definition given in the Code of Conduct for Law Enforcement Officials (General Assembly resolution 34/169, annex); see also article 1 of the Code and its Commentary (subparagraphs (a) and (b)) at <http://www2.ohchr.org/english/law/codeofconduct.htm>.

determine to a large extent the powers given to authorities responsible for criminal proceedings.

- In common law and some other systems, prosecutorial agencies (prosecutors) are often a part of the agencies that apply the law.
- In many other systems (in particular in civil law countries) prosecutors and judges are recognized as belonging to the judicial authority.¹⁸⁹
- Judges and prosecutors often become involved after the transmission of requests for mutual legal assistance by the minister of justice or the minister for foreign affairs.¹⁹⁰ However, in certain countries, judges and prosecutors are the first to act.¹⁹¹

¹⁸⁹ *Example of a national system.* In France, examining magistrates work to establish the truth. They are in charge of an investigation, not the police. The judicial police work under the direction and control of the prosecutors and, when a preliminary investigation is opened, under that of the examining magistrate. The prosecutors are part of a hierarchical organization, as they are responsible for implementing the criminal policies defined by the minister. They nevertheless have real freedom in the organization of criminal policies in their jurisdiction and broad powers of decision in evaluating the course of action to take. In addition, in the most difficult or serious cases an examining magistrate will be designated, who in this situation will direct the activities of the judicial police, that is, a completely independent magistrate who will carry out the investigation to establish the truth in a more in-depth manner.

¹⁹⁰ For example, in Estonia, the Code of Criminal Procedure, part X. International cooperation, chapter 35. International cooperation in the field of criminal procedure, articles 398 and 400, state:

“398. *Legal authorities*

“The courts, the Public Prosecutor’s Office, the Ministry of Justice and the Ministry of Internal Affairs of the Republic of Estonia are the legal authorities that submit applications to foreign States for legal assistance and adjudicate, according to their competence, the applications for legal assistance received from foreign States.

“... ”

“400. *Activities of a prosecutor in the Public Prosecutor’s Office upon receipt of an application for extradition of a person to a foreign State*

“1. The Minister of Justice shall send an application received from a foreign State for the extradition of a person immediately to the Public Prosecutor’s Office. If an application for extradition is received directly by the Public Prosecutor’s Office, a prosecutor in the Public Prosecutor’s Office shall notify the Ministry of Justice of the application immediately.

“2. A prosecutor in the Public Prosecutor’s Office is required to review any application for extradition received immediately and to verify whether all the necessary documents have been annexed to the application. If necessary, additional information is requested from the foreign State through the mediation of the Ministry of Justice and a deadline for reply is determined.

“3. A properly prepared application for extradition is sent immediately to the court by a prosecutor in the Public Prosecutor’s Office.”

¹⁹¹ In Kazakhstan, the Criminal Code in its article 523, Procedure for legal assistance, states:

“Applications to conduct investigations shall be channelled through the Public Prosecutor of Kazakhstan (or his deputy, where appropriate), and applications for judicial proceedings shall be channelled through the Minister of Justice of Kazakhstan (or his deputy, where appropriate). Such applications may also be channelled through authorized officials, who may if necessary call upon the Ministry of Foreign Affairs of Kazakhstan to act as an intermediary.”

1.E.3. Foreign offices

- Requests and transmissions in matters of international cooperation must be exchanged between designated authorities. States may insist on the use of diplomatic channels in order to do so.¹⁹² In practice, this often leads to the involvement of both embassy services¹⁹³ and departments of justice and foreign offices of the interested countries.
- It should be noted that although this channel of transmission sometimes has the disadvantage of being slow, it nevertheless provides for secure transmission of the request.
- **Consular protection: information concerning detainees.** According to article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations: “Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.”

¹⁹² *Examples of countries that use diplomatic channels:*

(a) *Algeria.* The Code of Criminal Procedure, book VII, chapter II, Letters rogatory and notification of acts and judgements, article 721, and chapter III, Communication of exhibits or of documents, article 723 states:

“721. In the event of non-political criminal prosecutions by a foreign country, letters rogatory emanating from foreign authorities are received through diplomatic channels and transmitted to the Minister of Justice in the forms provided for by article 703. Letters rogatory are executed, if necessary, and in conformity with Algerian law, on the condition of reciprocity.

“... ”

“723. When, during a foreign criminal preliminary investigation, the foreign Government judges necessary the communication of exhibits or documents held by the Algerian authorities, the request is carried out through diplomatic channels. The request is executed with the obligation to return the exhibits and documents as soon as possible, unless there are special considerations that oppose this.”

(b) *The former Yugoslav Republic of Macedonia.* The Code of Criminal Procedure, chapter 30, Procedure for approval of international judicial assistance and execution of international treaties in criminal cases, article 503, states:

“1. Applications of the domestic courts for judicial assistance in criminal cases are delivered to the foreign agencies through diplomatic channels. Applications by foreign agencies for judicial assistance are delivered in the same manner to the domestic courts.

“2. In emergencies, if there is reciprocity, applications for judicial assistance may be delivered by the Ministry of Internal Affairs.

“3. It will be determined by law which courts will be competent to give international judicial criminal assistance and one court may be assigned to perform the work for all the courts of a certain region.”

¹⁹³ Thus, the Vienna Convention on Consular Relations, in its article 5 (j), concerning consular functions, states that consular functions consist of “transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State.”

1.E.4. Central authorities

- The appointment of a **central authority** for purposes of mutual legal assistance entails the establishment of an organism that will centralize all the requests received for mutual legal assistance. Such an organism will ensure the coordination of and follow-up to the requests received and transmitted.
- **Legal basis.** The essential role of the central authority is recognized in the instruments on mutual legal assistance, both bilateral treaties and multilateral conventions, as well as in the framework of the observations and recommendations formulated by international authorities or expert meetings on matters of mutual legal assistance.¹⁹⁴
- **Structure**
 - *A simple structure.* It should be noted that the establishment of a central authority for mutual legal assistance does not require the implementation of a very elaborate structure endowed with extensive resources. There are a number of central authorities that function very well and their types are as diverse as the States that have established them. This could be, for example, a central authority constituted by virtue of a law or a group of civil servants officially delegated for that purpose from a government department already in existence or a person who, according to the practice in effect, is responsible for coordinating this type of request, such as a public prosecutor.
 - *A single central authority.* Although there can be several competent authorities in all States, it is advisable whenever possible to appoint a single central authority that could, for example, be a member of the department of justice, an organ of the police authorities or a governmental body, or perhaps an independent body. In certain national legal systems, the power to execute requests for cooperation in legal matters does presuppose the existence of judicial functions. Furthermore, it is possible to appoint more than one authority in federal or composite States or States ensuring the foreign affairs of dependent territories. This should not be taken as an encouragement to increase the number of authorities having different functions or being responsible for different types of issue.
- **Advantages.** The appointment of a central authority in charge of the transmission and execution of requests for mutual legal assistance has several practical advantages. It allows judges and prosecutors to establish a working relationship with their counterparts in other States and to study how the

¹⁹⁴ See article 18, paragraph 13, of the Organized Crime Convention; the Naples Political Declaration and Global Action Plan against Organized Transnational Crime, adopted by the World Ministerial Conference on Organized Transnational Crime, held in Naples, Italy, from 21 to 23 November 1994 (A/49/748, annex, section I.A.); the *Report of the Oxford Conference on Mutual Legal Assistance* (Oxford, September 1994); the Recommendations of the Senior Experts Group on Transnational Organized Crime of the Political Group of Eight (Economic and Social Council resolution 1997/22, annex I); and article 14 of the revised draft convention against transnational organized crime (A/AC.254/4/Rev.2). See also the Model Treaty on Mutual Assistance in Criminal Matters (article 3) and section II, paragraph 9 (a), of General Assembly resolution 52/88.

specific demands of a national legal system can be satisfied if the request is properly drafted. The mechanisms of assistance are thus able to function more effectively. (A list of national central authorities in the fight against terrorism is provided in annex XVI.)

Certainly, countries may wish to consider providing for direct communications between central authorities and for those authorities to play an active role in ensuring the speedy execution of requests, controlling quality and setting priorities. Countries may also wish to agree that the central authorities are not the exclusive channel for assistance between the Parties and that the direct exchange of information should be encouraged to the extent permitted by domestic law or procedures.¹⁹⁵

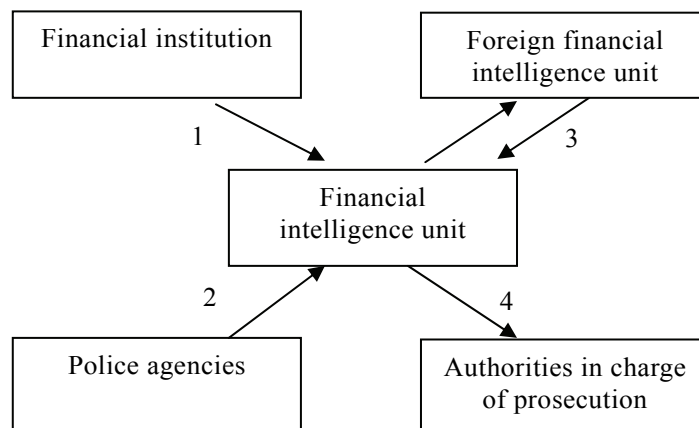
1.E.5. Financial intelligence units

- **Basis.** The Counter-Terrorism Committee of the Security Council considers that the effective implementation of paragraph 1 of Security Council resolution 1373 (2001) requires that States set up an effective mechanism in order to prevent and abolish the financing of terrorism. Furthermore, the States parties to the Financing of Terrorism Convention are obliged to establish and maintain channels to exchange information between their competent organisms and agencies (which could be financial intelligence units) for the purpose of facilitating a reliable and speedy exchange concerning the offences set forth by the Convention.¹⁹⁶
- **Mechanism.** In addition to exchanges of information on financing of terrorism through mutual legal assistance arrangements, countries exchange such information through links between financial investigation agencies, often called financial intelligence units, capable of identifying and tracing suspicious funds.¹⁹⁷ The following figure shows an example of a basic concept for a financial intelligence unit:

¹⁹⁵ Complementary provisions for the Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolution 53/112, annex I, article 3, paragraph 4).

¹⁹⁶ See article 18, paragraph 3 (a), of the Convention.

¹⁹⁷ *Source:* International Monetary Fund, Legal Department, *Suppressing the Financing of Terrorism: a Handbook for Legislative Drafting* (Washington, D.C., 2003) (<http://www.imf.org/external/pubs/nft/2003/SFTH/pdf/SFTH.pdf>). It should be noted that the Organized Crime Convention and the United Nations Convention against Corruption require the setting up of such services to act as national centres for the collection, analysis and dissemination of information regarding potential money-laundering activities and to allow States to exchange information at both the national and the international level (see article 7, paragraph 1 (b), of the Organized Crime Convention and articles 1 (b) and 58 of the Convention against Corruption (United Nations, *Treaty Series*, vol. 2349, No. 42146)).



1. Declaration of suspicion transmitted to the financial intelligence unit.
2. The financial intelligence unit receives additional information from police agencies.
3. Potential exchanges with counterparts in foreign financial intelligence units.
4. After analysis, the financial intelligence unit sends the case to the prosecutor for follow-up.

- **Origin: special recommendation IV, “Reporting suspicious transactions related to terrorism”, of the Financial Action Task Force on Money Laundering.** These units have been established in a large number of countries as a central national agency responsible for receiving (and, as permitted, requesting), analysing and disseminating to the competent authorities disclosures of financial information: (a) concerning suspected proceeds of crime; or (b) required by national legislation or regulations, in order to counter money-laundering.¹⁹⁸ In fact, while the original purpose of establishing a financial intelligence unit was the detection of transactions suspected of being related to money-laundering, they are now also being used to detect transactions suspected of being linked to terrorism. Thus, the recommendation of the Financial Action Task Force sets the standard that such transactions must be reported to “competent authorities”.
- **The Egmont Group.** Financial intelligence units are grouped in an informal association called the Egmont Group of Financial Intelligence Units, which has adopted the above-mentioned definition of a financial intelligence unit and uses it as the basis for deciding on the admission of new members. Financial intelligence units exchange information among themselves on the basis of the Egmont Group’s Principles for Information Exchange between Financial Intelligence Units for Money-Laundering and Terrorism Financing Cases of 13 June 2001.

¹⁹⁸ Money-laundering and financing of terrorism are criminal activities that can be related, but which should not be confused: the money subject to money-laundering is generated by criminal activities, whereas the resources used for financing terrorism are not necessarily illegal. Indeed, capital and profits acquired through legal means and sometimes even declared to the fiscal authorities may be used to finance terrorism. Such resources may even be generated through donations to charitable, social or cultural organizations that are then misappropriated for use in financing terrorism.

The Egmont Group has taken steps to improve its information collection and sharing in relation to financing of terrorism.¹⁹⁹ The Principles for Information Exchange state that financial intelligence units should be able to exchange information freely with other units on the basis of reciprocity or mutual agreement and that such exchange should produce any available information that may be relevant to an analysis or investigation of financial transactions and other relevant information and the persons or companies involved.²⁰⁰

- **Rule of limited use in the exchange of financial information.** Information received by one financial intelligence unit from another may be used only for the purposes for which it was requested and the receiving unit may not transfer it or make use of it in an administrative, investigative, prosecutorial, or judicial purpose without the consent of the unit that provided it. Such information must be subject to strict safeguards so as to protect its confidential nature.

For a list of financial intelligence units, see annex X.

¹⁹⁹ At a special meeting in October 2002, the Egmont Group agreed: (a) to work to eliminate impediments to information exchange; (b) to make financing of terrorism a form of suspicious activity to be reported by all financial sectors to their respective financial intelligence unit; (c) to undertake joint studies of particular vulnerabilities to money-laundering, especially when they may have some bearing on counter-terrorism, such as hawala; and (d) to create sanitized cases for training purposes (see James S. Sloan, Director, Financial Crimes Enforcement Network (FinCEN) in the Department of the Treasury, statement before the Subcommittee on Oversight and Investigations of the United States House of Representatives Committee on Financial Services, 11 March 2003).

²⁰⁰ See paragraph 6 of the Principles for Information Exchange, annexed to the Statement of Purposes of the Egmont Group of Financial Intelligence Units.

Module 2

Mutual legal assistance in criminal matters

Objectives

- 2.A. To determine the goals of mutual legal assistance.
- 2.B. To define types of mutual legal assistance.
- 2.C. To show the details of mutual legal assistance in the fight against the financing of terrorism concerning identification, detection, freezing, seizure and confiscations.
- 2.D. To provide the contents and forms of requests for mutual legal assistance.
- 2.E. To describe methods of carrying out joint investigations.

2.A. Goals of mutual legal assistance

Mutual assistance in criminal matters is a process by which States seek and provide assistance in gathering evidence for use in criminal investigations and proceedings.

- **The greatest measure of mutual legal assistance possible**

- In the context of the fight against terrorism, mutual legal assistance constitutes a vital instrument of the legal system as, upon simple request, a State authorizes another State to take measures that are often coercive within the framework of investigations, criminal proceedings or other legal procedures concerning the offences set forth by the international conventions and agreements. One of the main and binding principles of Security Council resolution 1373 (2001) is to afford one another the greatest measure of assistance possible in the fight against terrorism.
- Mutual legal assistance for the purpose of investigations and the suppression of terrorist offences is of great importance in achieving the objective of Security Council resolution 1373 (2001), namely, cooperation in order to prevent and suppress acts of terrorism and to take measures against the perpetrators of such acts. Thus, in paragraph 2 (f) of resolution 1373 (2001): States are required to afford one another the greatest measure of assistance, including assistance in obtaining evidence in their possession necessary for the proceedings. It should be noted that this is a mandatory provision, as paragraph 2 of the resolution begins with the word “decides” (see section 1.A above on binding resolutions).

The same objective of communication of all items of evidence is also found in the universal instruments.¹

¹ See, for example, article 11 of the International Convention against the Taking of Hostages, and subsequent universal instruments.

- **Example at the national level.** The importance of mutual legal assistance has been noted by the high courts. Thus in a 1989 judgement, *United States of America v. Cotroni* ([1989] 1 R.C.S. 1469; 48 C.C.C. (3d) 193), the Supreme Court of Canada stated: “The investigation, prosecution and suppression of crime for the protection of the citizen and the maintenance of peace and public order is an important goal of all organized societies. The pursuit of that goal cannot realistically be confined within national boundaries. That has long been the case, but it is increasingly evident today.”²
- **Removing the obstacles resulting from sovereignty.** One of the challenges for law enforcement authorities is that sovereignty, a fundamental principle in state relations, is also a major tool for criminal elements. Criminals in fact often use sovereignty as a shield allowing them to conceal their deplorable acts. By creating transnational organizations, criminal groups can better protect both their interests and those of their networks: they can take advantage of differences between legal systems, the lack of coordination between institutions from different countries, the concern for sovereignty and, often, the inability of nations to work together to overcome their differences.³
- **How to remove those obstacles**

- By developing mechanisms for sharing information and evidentiary elements
- By introducing speedy procedures
- By proper channelling of requests
- By ensuring that the contents of requests are relevant
- By providing mutual assistance according to the needs of the requesting State

- *Mutual assistance mechanisms.* “Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability” (International Convention for the Suppression of the Financing of Terrorism, article 12, paragraph 4).
- *Speedy and proper channelling of procedures.* A request for mutual legal assistance should often be initiated within a short time period. Mutual legal assistance will never produce its potential results if its implementation is not both quick and easy. To act rapidly is, in fact, essential if one wishes to fight successfully against delinquency.
- In order to initiate effective assistance, a request for mutual legal assistance has to be properly channelled from the start.
- It needs to include all the necessary information:⁴

² *United States of America v. Cotroni*, pp. 193-215.

³ See Kimberly Prost, *op. cit.*

⁴ Within the framework of its legal advisory programme for States in their fight against drugs and crime, UNODC has created a tool that automatically generates mutual legal assistance request

(a) To facilitate a positive response and allow for execution of the request;

(b) To avoid difficulties linked to interpretation and obstacles where States with different legal systems have to cooperate.

- The request should be communicated and dealt with promptly. Delays in the cooperation process between States are beneficial only to the offenders.
- *Operational knowledge.* It is particularly important for practitioners to analyse the mutual assistance treaties binding their State to other States and the national legislation in force in order to determine in what ways the types of mutual assistance mentioned in this *Manual* can be provided upon request from other members of the international community. One should keep in mind that the very purpose of mutual legal assistance can be frustrated if the cooperation in question is not given in a manner that takes into account the needs, in evidentiary and other matters, of the requesting party. It should also be kept in mind that the ideal situation is to reach a point at which the assistance received from other States can be used in the context of domestic investigations, prosecutions and criminal proceedings. It is then necessary to be flexible enough to take into account the specific procedures required by the requesting State, for example in connection with securing sworn testimony, the participation of foreign agents or counsel, or the use of non-traditional procedures such as examination or cross-examination by judges.⁵
- *In order to reach the widest measure of mutual legal assistance,* criminal justice professionals are thus required to research legal documents for the means and the types of assistance (see section 1.B above) at their disposal (the legal basis is described in section 2.B).

2.B. Types of mutual legal assistance currently in use

Objectives

Broad interpretation of the scope of mutual assistance

The purpose of the expression appearing in certain universal instruments “to afford one another the greatest measure of assistance”⁶ is to encourage States, and thus their competent legal authorities, to interpret broadly, without worrying about technical issues, the scope of the mutual assistance that can be given, even if it includes forms that are not expressly mentioned in resolution 1373 (2001) and the universal instruments against terrorism.

forms. The purpose of this tool is to help practitioners send relevant requests, to receive useful answers and to accelerate the judicial process (see annexes XI-XV for examples of hypothetical cases using the UNODC software).

⁵ *Commentary on the United Nations Convention against Illicit Traffic...*, p. 172.

⁶ Article 12 of the International Convention for the Suppression of the Financing of Terrorism states: “States Parties shall afford one another the greatest measure of assistance”; also see article 10 of the International Convention for the Suppression of Terrorist Bombings.

- In accordance with the relevant Security Council resolutions, in particular resolution 1373 (2001), which requires the greatest measure of cooperation possible, and the universal instruments, it is advisable to use the appropriate tools in order to establish an effective framework for mutual legal assistance, which includes the currently used types of international cooperation in criminal matters discussed here.
- The scope of application of the conventions concerning mutual assistance in criminal matters depends on how closely requests for mutual assistance comply with substantive conditions, the non-respect of which could lead the requested State to refuse execution of the request. However, the scope of application of the conventions is often defined very broadly as regards what measures can be requested. For this reason, it is permissible for judicial authorities to request an investigation, even if it is not expressly provided for by the applicable convention. They may decide – regarding the measures requested – that what is not expressly excluded by the convention or by their domestic law is legal.
- **Texts dealing with current types of mutual legal assistance and determining the legal basis for mutual assistance**
 - Some texts describe current forms of mutual assistance and can be particularly useful to practitioners. Such texts are the conventions against the major evils of our time, the Organized Crime Convention, the Convention against Corruption and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance of 1988.
 - Finding the adequate legal basis and mutual assistance procedures. Where a link is established between the terrorist offence being prosecuted and an offence related to transnational organized crime, the Organized Crime Convention may be used.
- **Advantages of using current tools of cooperation.** Countries have long assisted each other in gathering information and evidence for criminal investigations and prosecutions. There are in fact well-established police-to-police channels through which much essential information has been and continues to be shared. These channels range from direct relationships between police officers and police forces to the posting of police liaison personnel in foreign States or the mechanism for exchange of information between police agencies offered by INTERPOL. All of these measures are of critical importance for cooperation and have not been replaced by more restrictive procedures of mutual legal assistance.
 - There are certain types of assistance that cannot be provided between States through police or non-binding mechanisms, however. One example is where the type of assistance sought will require resort to judicial process in the requested State, where some type of judicial order or compulsory measure must be obtained to produce the desired information or evidence in an acceptable form. For example, where a State needs to obtain bank statements or a warrant to search a residence, the proper authorization must of course be to hand.

- For many years, States were required to rely entirely upon traditional letters rogatory, submitted through diplomatic channels by the judicial authorities of one country to those of another, in order to gain access to such evidence. However, this method was sometimes very slow and inefficient. Letters rogatory did not always provide for the scope of assistance required, nor were they effective in helping to obtain evidence in a reasonable amount of time. That is why a new concept of cooperation between States regarding investigations was developed.

This section of the *Manual* describes a number of proposed tools for mutual legal assistance, but it should be understood that the list is not exhaustive.

2.B.1. Gathering evidence, statements and testimony

- A requesting State may ask that a person be heard in order to provide testimony concerning a criminal matter or that evidence be given by the person for use at trial.⁷

- **Form**

- *As regards the need for a formal request:*
 - Mutual legal assistance in matters of obtaining evidence or testimony does not always require a formal request for mutual assistance. Evidence can be gathered by means of a simple statement or other forms of recording that do not require the decision or presence of a judicial authority.
 - It is the responsibility of the authority issuing the request to contact its counterpart to find out what forms could possibly be required to satisfy such a request.
 - However:
 - (a) If the presence or decision of a judicial authority of the requested State is required, a formal request is usually advisable or required;
 - (b) If it is foreseeable that the person in possession of the evidence or the witness will not collaborate without a formal decision, a formal request should be made;
 - (c) If the evidence sought is in the form of bank or business records held by professionals, such as lawyers or accountants, a formal request is advised. This enables them to provide evidence without the risk of being held civilly liable for breach of contract or other professional or fiduciary relationships.

⁷ See article 11 of the Model Treaty on Mutual Legal Assistance (for an exhaustive explanation of this article, see *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*, pp. 73 ff (http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf). Furthermore, article 18, paragraph 3, of the Organized Crime Convention cites this type of mutual assistance as to be provided by a State.

- *Execution according to the law of the requested State.*⁸ The requested State should be able to obtain the statement or evidence in the appropriate form for the requesting State as long as this is not contrary to its own domestic law. For example, if the requesting State requires that the witness statement be taken under oath or affirmation, it shall so indicate in its request and the requested State will be able to respond to that request, considering that what is not forbidden by the national law of the requested State may be considered lawful.
- **Competent authority to record the witness testimony: distinction depending on legal systems**
 - Generally, in common law legal systems, police and prosecutors are responsible for the questioning of witnesses. During the investigation, police or, in some systems, prosecutors will gather witness statements; during the trial, the prosecutor and defence counsel conduct the examination and cross-examination of each witness. While a judge may occasionally ask a question during a trial, by the law of those States judges do not gather the evidence of witnesses or conduct examinations before the court.
 - In many civil law systems, examining magistrates take witness testimonies and may include or summarize evidence in the preparation of their files or dossiers.
 - *Compatibility between common law and civil law systems*
 - If an examining magistrate seeks to question a witness in a common law State, strictly speaking this would be inconsistent with the law of the requested State. If the judge were allowed to conduct the questioning, it would not however be a violation of domestic law. In such an instance, success or failure would depend entirely on whether the authorities in the requested State allowed the evidence to be gathered in an appropriate form for the requesting State, even where this was inconsistent with the normal process employed in the requested State.
 - A similar example arises in the reverse scenario. In a civil law system, very often an examining magistrate, or the police officer delegated by him, who is hearing a witness will prepare a summary or official report of what the witness has said.
 - In common law, when a witness is examined and cross-examined before the court his evidence must be recorded verbatim. A summary or official report is not admissible.
 - If a request is made by common law authorities to take the evidence of a witness based on letters rogatory in the foreign State and to record the evidence verbatim, once again that process would be inconsistent with the practice of the requested State. However, the foreign authorities would not be violating the law if they kept a verbatim record of the statement.

⁸ For further information, see section 2.D.4 below.

The success of the request depends on the flexibility and philosophy of the requested State.

Models of hypothetical reports to obtain written evidence and to obtain testimony are provided in annexes XI and XII.

Use of videoconferencing

- Traditionally, statements are obtained in the form of an official report or verbatim record, with the witness being questioned by the requested State (with or without the participation of the authorities of the requesting State) or by facilitating the appearance of the witness in the requesting State.
- However, the use of video and satellite link for the purpose of transmitting witness statements from one State to another has recently become more common.
- Thus, wherever possible and consistent with the fundamental principles of domestic law, witness hearings can be given via videoconference.⁹ It should be noted that audio-conferencing (via telephone) may be requested on the same basis as videoconferencing.

• Advantages of videoconferencing

- Difficulties in moving a witness. If it is impossible or inadvisable for the witness to be moved, videoconferencing enables a competent authority to officially hear a witness “live” while in another country.
- *Protection of the witness.* This method of hearing testimony also makes for better protection of witnesses, which is essential in terrorist cases. If the procedure could lead to legal problems, the hearing could be conducted by the judicial authority of the requesting State and a judicial authority of the requested State may be present.

• This process involves:

- (a) The existence of legislative provisions enabling the authorities to compel a witness to appear and to take an oath, subject to sanction if he does not comply (for example, for refusal to appear or a similar offence);
- (b) The existence of rules of evidence in order to render the testimony by videoconference admissible and to set technical standards as regards reliability and verification (for example, identification of the witness);
- (c) Broadening the definition of offences connected to false testimony, through the adoption of legislative provisions according to which:

⁹ This technique is provided for in article 18, paragraph 18, of the Organized Crime Convention. Furthermore, under the complementary provisions for the Model Treaty on Mutual Assistance in Criminal Matters (see General Assembly resolution 53/112, annex I, paragraph 12), the following footnote is added to the end of article 11, paragraph 2, of the Model Treaty: “Wherever possible and consistent with the fundamental principles of domestic law, the Parties should permit testimony, statements or other forms of assistance to be given via video link or other modern means of communication and should ensure that perjury committed under such circumstances is a criminal offence.”

- (i) A witness who is physically present in the State who gives false testimony during a foreign judicial proceeding is criminally liable;
- (ii) A witness present in a foreign country who gives false testimony in a videoconference hearing during an internal legal proceeding is criminally liable;
- (iii) A person who allegedly gave false testimony in a videoconference can be extradited from or to the country concerned, depending on the case.

During the negotiations that led to the adoption of the Organized Crime Convention, the Italian delegation presented a proposal concerning the issue set forth in paragraph 18 of article 18.¹⁰ During the debate on the proposal, it was considered that the section reproduced below could be used as the guiding principle for the application of paragraph 18:¹¹

“(a) The hearing shall be conducted by a judicial authority of the requesting State in accordance with the domestic law of that State and shall be attended by a judicial authority of the requested State; the latter shall be responsible for the identification of the person to be heard and shall, on conclusion of the hearing, draw up minutes indicating the date and place of the hearing and any oaths taken; the hearing shall be conducted without any physical or mental pressure on the person questioned;

“(b) If the judicial authority of the requested State considers that during the hearing the fundamental principles of the law of that State are infringed, he or she has the authority to interrupt or, if possible, to take the necessary measures to continue the hearing in accordance with those principles;

“(c) The person to be heard and the judicial authority of the requested State shall be assisted by an interpreter as necessary;

“(d) The person to be heard may claim the right not to testify as provided for by the domestic law of the requested State or of the requesting State; the domestic law of the requested State applies to perjury.

“3. All costs of the videoconference shall be borne by the requesting State, which may also provide as necessary for technical equipment.”¹²

- **Compatibility with domestic law.** One of the problems linked to this technique comes from the fact that the law in many States does not allow the use of video recordings in a legal action instituted on the basis of its domestic law, which therefore makes it difficult, and in some instances impossible, for the requested State to authorize the video recording of a witness statement.

¹⁰ See *Travaux Préparatoires of the Negotiations...*, p. 184.

¹¹ *Ibid.*, footnote 249.

¹² Concerning the last point, regarding costs, another interpretative note indicates that the costs arising in connection with compliance with requests under article 18, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature. Developing countries may encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article (*Travaux Préparatoires of the Negotiations ...*, p. 199). See section 2.D.6 below on the cost of mutual legal assistance.

- In certain cases, the issue is left to the judgement of the judicial authorities concerned. It is then necessary to convince the court that although the process is rarely used in domestic law, it would be advisable to authorize it in order to gather evidence for another State.
 - In other cases, this requires the consent of the witness.
 - In still other cases the law of the requested State may completely prohibit such recordings, which obviously excludes use of this type of technique.
- **Example. Refusal of mutual legal assistance via videoconference.** Judgement of 15 December 2004 of the Swiss Federal Tribunal¹³ in a case regarding a hearing via videoconference within the framework of mutual legal assistance between Switzerland (requested State) and India (requesting State):

“The Indian authorities requested a hearing via videoconference from the Swiss authorities. The Swiss authorities, through the Federal Tribunal, gave a negative response, as it considers videoconference hearings inadmissible. In this particular case, the Swiss authority was to hear bank account administrators, who had given prior consent for the hearing via videoconference and for their official report to be sent to India. At the other end of the videoconference was a public hearing by a court. However:

“1. The process had no basis in Switzerland (neither the exchange of letters between Switzerland and India, the domestic Swiss law concerning mutual assistance, nor the federal criminal procedure provide for the possibility of organizing a hearing via videoconference).

“2. According to Swiss rules for mutual legal assistance in criminal matters, the person the subject of a mutual assistance request has the right to appeal the granting of the mutual assistance (for example if the requesting country does not respect human rights) or his hearing, under the respect of proportionality (if the evidence collected is completely extraneous to the case and does not fulfil the criteria of potential utility for the foreign authority; it is potentially useful if it first appears to be of a nature to advance the investigation of the requesting authority). It is not the administrators of the accounts who have appealed, but rather the account holder (their right to appeal is recognized under Swiss law, as well as where the administrator is called to testify and explain the contents of transactions carried out on the account). The Federal Tribunal considered that this operation, other than the fact that it did not rest on any legal basis, did not permit the verification of the respect of the principle of proportionality, since one cannot foresee, before the hearing, the questions and answers that will be given. There was therefore the risk of a possible violation of the principle of proportionality.

“Finally, Switzerland does not grant its collaboration for certain cases of tax evasion (in Switzerland, not all types of tax evasion are considered criminal). Within the rule, and under the principle of reciprocity, Switzerland only grants mutual assistance on condition that the acts examined abroad also constitute a criminal offence in Switzerland. In this particular case, the Federal Tribunal once again feared a violation of the rule of specialty; the

¹³ *Collection des arrêts du Tribunal fédéral suisse* (1A.206/2004/svc).

circumstances in which the session was being carried out in India in a public hearing before a court did not make it possible to determine, for example, whether a tax department employee had made his way into the public and consequently, if he would have access to the information.”

- **Practical considerations.** Before preparing a request, it is advisable, if the witness is facing criminal prosecution, to ask him directly, or his lawyer where appropriate, if he gives his consent to the videoconference or also to issue a request for mutual assistance for the purpose of getting that consent. A protocol on the following points should then be drawn up in cooperation with the required authority:

(a) Technical aspects of the hearing (place, date, hour, technical conditions, expected length of the hearing, whether or not recorded); to that end, it is advisable for the technicians of the requested State and requesting State to be in direct contact;

(b) Measures relative, where appropriate, to the protection of the person being heard (for example, voice alteration);

(c) Legal protocol (presence of a lawyer, of an interpreter, oath taking);

(d) Financial protocol (payment for calls, for the possible rental of equipment).

2.B.2. Serving of judicial documents¹⁴

- **Obtaining a subpoena, notice or judgement.** A requesting State may seek service of judicial documents such as a subpoena, notice or judgement. The requested State is required to serve the documents.¹⁵
- **Form**
 - *Respect for the law of the requesting party.*¹⁶ Although the request concerning service of documents is traditionally executed in accordance with the domestic law of the requested State, the requesting State may specify the procedure that should be followed in order to meet the requirements of its domestic law.
 - *Delivery*
 - Under article 5 (j) of the Vienna Convention on Consular Relations, one of the consular functions is transmitting “judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State.”

¹⁴ The expression “judicial documents” also includes subpoenas concerning witnesses and other persons.

¹⁵ Such are the provisions of article 10 of the Model Treaty on Mutual Assistance in Criminal Matters of 1990. For an exhaustive explanation of this article, see the *Revised Manuals on the Model Treaty...*, pp. 77 ff.

¹⁶ For further information see section 2.D.4 below.

- A party may regularly deliver documents received from foreign sources by non-formal means (for example, via mail) or by more formal means of service of process (for example, through an authorized agent, a process server or a person duly authorized who can bring acceptable evidence that the service of the documents has been effected).¹⁷

2.B.3. Search and seizure

- The requesting State may ask for premises in the foreign State to be searched and any relevant evidence seized and transferred to it.¹⁸
- **Compatibility with national law.** Often, different provisions of the national law of the requested State, concerning, for example, issuing a warrant to enter private premises, will often regulate, and in some cases limit, the scope of the mutual assistance that may be provided. The grounds for the request are then essential.
- **Grounds for the measure: the reasons for the request must be specified.** In order to justify the request, it is advisable to take the law of the requested State into account, concerning both the applicable procedure and the basic conditions for search and seizure. Thus, the following wording can be used: “The requested State shall execute requests for search and seizure and delivery of any material to the requesting State if the request includes the grounds for which the search and seizure is requested with regard to the legislation of the requested State.” Such a justification for the request thus requires a minimum knowledge of the rules governing search and seizure in the requested State.
 - *Depending on the legal system* and on the grounds, it will be necessary to establish:
 - (a) Probable and reasonable cause. In most States the possibility of exercising procedural acts is given on the basis of established facts and/or specific standards. For example, in countries with common law systems,¹⁹ the requirement of justification is of particular importance, where any infringement of a person’s rights, and notably search and seizure, is normally conditional on the existence of a warrant issued by the authority with local jurisdiction. The issuing of that warrant is subject to showing the proportionality of the measure to the offence in question; the need for it; and that there are reasonable grounds for believing that there is material on the premises that is likely to be of substantial value in the investigation of the offence;²⁰ or,

¹⁷ Some countries do not accept this method of delivery, such as China and Switzerland.

¹⁸ Article 17 of the Model Treaty on Mutual Assistance in Criminal Matters sets forth the conditions for execution of search and seizure; see also the *Revised Manuals on the Model Treaty ...*, pp. 77 ff. Moreover, article 18, paragraph 3 (c), of the Organized Crime Convention states that this type of mutual assistance shall be provided by States.

¹⁹ The United Kingdom and all the other countries of the Commonwealth, the United States and Israel have such systems.

²⁰ See United Kingdom, Police and Criminal Evidence Act 1984 (c. 60), section 8 (<http://www.statutelaw.gov.uk/content.aspx?LegType=All+Primary&PageNumber=41&NavFrom=2&parentActiveTextDocId=1871554&activetextdocid=1871566>).

(b) A simple presumption. In some systems, such probable and reasonable cause can be presumed if the request for search and seizure emanates from a judge or a court in the requesting State.

- **Describing the measures to be taken and the items to seize**

- An exact description of the evidence sought and of the premises in which the investigations will be carried out is required.
- In certain cases, in particular where certain details cannot be provided when the request for mutual assistance is drafted, the inclusion in the request of the requesting judicial authority's contact information enables the requested authority to request, at any time, any additional information it feels may be necessary or to suggest any additional measures to the requesting State.

- **Authorities to be present during the search**

- In most States, it is unlikely that foreign police or officers will be authorized to participate in the search, other than as observers. In fact, although all legal systems recognize the right to carry out searches and seizures under specific conditions, it may be that certain States have never had to use such powers on behalf of another State in the absence of evidence leading to the belief that the national law has been violated. One should then examine in depth the multilateral or bilateral treaties that regulate how this type of mutual assistance may be executed.
- If the authorities concerned wish to carry out coordinated searches, it is useful to call upon liaison magistrates,²¹ if possible (only some States have liaison magistrates), as they can contribute to the preparation of such operations. Thus, preparatory meetings with the requesting magistrate, the requested magistrates, the investigators and the liaison magistrates are sometimes necessary.

- **Special requests relative to seizure.** It may be useful for the requesting State to ask the competent authority of the requested State to provide an attestation or official report:²² (a) indicating what the seized item is; (b) mentioning every official having been entrusted with the seized item; and (c) indicating the conditions in which the item is being held.

- **Delivery of items.** It is essential to take the necessary precautions concerning both the transmission to the requesting party of items seized following a search and to ensure that the rights of bona fide third parties are protected.²³

A model of a hypothetical request for seizure is provided in annex XIII.

²¹ For further information, see section 2.D.2 (d) below.

²² Such a possibility is provided for in certain mutual legal assistance treaties, such as for example, the Treaty on Mutual Legal Assistance in Criminal Matters between France and the United States of America, done at Paris on 10 December 1998 (United Nations, *Treaty Series*, vol. 2172, No. 38120).

²³ Article 17 of the Model Treaty on Mutual Assistance in Criminal Matters sets forth the modalities of execution of search and seizure; see also *Revised Manuals on the Model Treaty...*, pp. 77 ff.

2.B.4. Examining items and sites

The requesting State can request the examination of specific items and sites in the requested State.

- *Competent authorities*
 - In civil law States, such an action is usually carried out by or under the supervision of a magistrate.
 - In common law States, a consensual inspection or examination can be carried out by the police without an order from the judicial authorities.

2.B.5. Providing information, items of evidence and expert evaluations

- The requested State may supply information, items of evidence and expert evaluations, upon request from a requesting State, on the same conditions as such documents or files are provided to its own law enforcement or judicial authorities.²⁴
- *Significance of terms.* Although it can be broadly interpreted, the term “information” should be taken to mean information and items that the authorities of the requested party can collect without adopting measures such as searches, seizures or testimonies and statements. It can thus mean, for example, the transmission, for use in a legal proceeding instituted in the requesting State, of information already in its possession and possibly already used as evidence in a trial instituted for a related case in the requested State, or of documents accessible to the public as public acts or other elements or for other reasons, or that are accessible for purchase or public inspection.
- However, the measure does not apply to items in the possession of private citizens, concerning whom searches or seizures may be carried out in compliance with the conditions mentioned above in relation to search and seizure.

2.B.6. Providing originals and/or certified copies of relevant documents and records, including administrative, bank, financial, corporate or business records

- Upon request from a requesting State, the requested State may provide originals and/or certified copies of relevant documents and records, including administrative, bank, financial, corporate or business records.²⁵
- *Documents concerned.* This includes documents and items already in the possession of the competent authorities of the requested State as well as

²⁴ Specific reference to such assistance is made in article 18, paragraph 3 (e), of the Organized Crime Convention. See also article 16 of the 1990 Model Treaty on Mutual Assistance in Criminal Matters and for an exhaustive explanation of this article, see *Revised Manuals on the Model Treaty ...*, pp. 80 ff.

²⁵ See article 16 of the Model Treaty on Mutual Assistance in Criminal Matters. For an exhaustive explanation of this article, see *Revised Manuals on the Model Treaty ...*, pp. 81 ff. Furthermore, article 18, paragraph 3 (f), of the Organized Crime Convention states that this type of mutual assistance shall be provided by States.

others that will need to be obtained on the basis of an explicit request to the banks, financial institutions or companies operating in the territory of the requested party.

- *Bank secrecy.* In the fight against terrorism, mutual assistance cannot be refused on the ground of bank secrecy.

A request for such mutual assistance can necessarily only be made if an investigation or criminal proceeding has already been instituted.

- **Example of a form**

Certification of business records

I, [*surname, name*], with the understanding that I am subject to criminal penalty under the laws of [*country name*] for an intentionally false declaration, declare that I am employed by/associated with [*name of business from which documents are sought*] in the position of [*business position or title*] and by reason of my position am authorized and qualified to make this declaration.

I solemnly declare that each of the records attached hereto is a record in the custody of the above-named business that:

- (a) Was made at or near the time of the occurrence of the matters set forth therein by (or from information transmitted by) a person with knowledge of those matters;
- (b) Was kept in the course of a regularly conducted business activity;
- (c) Was made by the business as a regular practice; and
- (d) If not an original record, is a duplicate of the original.

The originals or duplicates are kept in the following location:

Date of signature: _____

Place of signature: _____

Signature: _____

2.B.7. Identifying or locating proceeds, property, instrumentalities or other elements derived from crime for the purpose of obtaining evidence

- *Different objective from that of confiscation measures.* This type of mutual assistance²⁶ completes the one that requires States to take, at the request of another State, measures to identify, trace and freeze or seize proceeds of crime, property, instrumentalities or other items for the purpose of confiscation (see section 2.C below). The purpose of this is

²⁶ Article 18, paragraph 3, of the Organized Crime Convention states in subparagraph (g) that this type of mutual assistance shall be provided by States.

not to facilitate confiscation, but rather to gather items of evidence. This does not, however, exclude a request for confiscation, although this must be specified in the request.

- *Bank secrecy.* A request for mutual assistance with regard to offences relating to the financing of terrorism cannot be refused on the ground of bank secrecy. Indeed, according to article 12, paragraph 2, of the International Convention for the Suppression of the Financing of Terrorism, bank secrecy cannot be invoked in order to refuse mutual assistance. When such a ground for refusal is provided for in a mutual legal assistance treaty binding a State party, the very fact that this State becomes party to the Financing of Terrorism Convention, through treaty law, nullifies the provisions of treaties that conflict with that Convention.

2.B.8. Facilitating the voluntary appearance in court of persons in the requesting State

- *Situations concerned.* This type of mutual legal assistance covers various situations in which persons located in the territory of the requested State can be useful in investigations or prosecutions in the territory of the requesting party. The most common example is where the authority of the State, for the purpose of its investigation, wishes to question a person having useful information but who is in the territory of another State. The requested State is then asked to organize such questioning or to facilitate it.

A model of a hypothetical request for the voluntary appearance of persons in the requesting State, is provided in annex XIV.

2.B.9. Facilitating the voluntary transfer (as witnesses) of persons in temporary custody or sentenced for the purpose of obtaining evidence

- **Possibility of transfer of detained persons for testimony.** A person who is being detained or is serving a sentence in the territory of one State party whose presence in another State party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by the Organized Crime Convention may be transferred.²⁷ A situation may arise where a person serving a prison sentence is required as a witness in court for a trial being held in another State. The authorities of the State in which the person is serving his sentence are then asked to authorize the transfer of the prisoner to the requesting State for that purpose.²⁸
- **Legal basis.** In the absence of an applicable convention, the request may be carried out on grounds of reciprocity.
 - *Guarantees.* The transferred person summoned by the judicial authorities of the requesting party shall not be prosecuted or detained for any offence

²⁷ The issue of detained witnesses is dealt with in article 18, paragraphs 10-12, of the Convention.

²⁸ This should be distinguished from the transfer of convicted persons: one should not confuse these procedures with the transfer of persons who have been sentenced to definite prison terms, and who may, under certain conditions, serve their sentence in a State other than the one that convicted them.

committed before his departure from the territory of the requested party and shall not be cited in the summons (unless the State party from which the person was transferred gives its consent).

- **Conditions prior to transfer.**²⁹ The person concerned must freely give his or her informed consent. Before issuing the request, it is advisable to make a direct request for consent to the transfer from the person concerned or his or her lawyer, or to submit a request for mutual assistance for the purpose of obtaining that consent. The competent authorities of both States must agree, subject to such conditions as those States may deem appropriate.
- **Procedure to be followed**
 - The parties concerned are required to agree on rules regarding various details, in particular concerning the transport of the person and measures to be taken to prevent an escape, the conditions of detention in the requesting State and the effect of such a transfer on the statute of limitations.
 - The authorities concerned shall determine the conditions of the transfer that they deem appropriate.²⁹
 - The State party to which the person is transferred has the authority and the obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred.²⁹
 - The State party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States.²⁹
 - The State party to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person.²⁹
 - The person transferred shall receive credit for the service of the sentence being served in the State from which he was transferred for the time in the custody of the State to which he was transferred.²⁹
- **Grounds for refusal.** The transfer can be refused by the requested State:
 - If the person detained does not give his or her consent;³⁰
 - If the authorities of either of the two States concerned do not consent;²⁹
 - If the presence of the person is necessary for criminal proceedings ongoing in the territory of the requested State;
 - If the transfer of the person is liable to extend his or her detention;

²⁹ Conditions specifically provided for in article 18, paragraph 10, of the Organized Crime Convention.

³⁰ Grounds for refusal specifically provided for by article 18, paragraph 10, of the Organized Crime Convention.

- If other “peremptory” factors stand in the way of the transfer (such as refugee status).
- *Alternative solution.* It should be noted that the use of videoconference testimony helps avoid the difficulties linked to this type of transfer.

2.B.10. Communication of previous convictions or of criminal records³¹

- **Giving effect to previous convictions.** The implementation of mutual legal assistance implies adequate dissemination among the competent State authorities of information concerning convictions and/or forfeiture of rights of the person who is in the territory of the State and the possibility of those measures being taken into consideration outside the State that issued them. Some conventions include the possibility for the competent authorities of States to take into consideration previous convictions issued by a foreign jurisdiction.³²
 - *Prevention of the breach of the ne bis in idem principle.* The communication of previous convictions can be a preventive measure with regard to the *ne bis in idem* principle in order to prevent dual convictions (see section 1.C.8 above).
- **Processing requests for criminal records.** This type of judicial request can certainly be sent through INTERPOL channels (see section 2.D.2 (d) below) or, if there is one, via a liaison officer (see section 3.C.2 (c) below). Otherwise, conventional cooperation channels shall be used, such as embassy and consular authority channels.
- **Example at the European level.** Information concerning convictions issued in other EU member States is governed by articles 13 and 22 of the European Convention on Mutual Assistance in Criminal Matters,³³ modified by article 4 of the Additional Protocol to that Convention.³⁴

In addition there are two projects. Firstly, a project for the creation of a European criminal court, on the subject of which there are: (a) a proposal for Council decision, presented by the European Commission, which is a limited measure, as it is only designed to secure improvements in the current mechanisms for exchanging information between member States; and (b) a white paper of the Commission of the European Communities, that should lead to broader action, notably with the implementation of a European index of persons convicted.

The purpose of the second project, on interconnection of national criminal records, is: (a) to facilitate access by judicial authorities from each partner country to all criminal convictions handed down against any Belgian, French, German or Spanish person in any of those countries. The current separation between the national criminal records of Belgium, France, Germany

³¹ It should be noted that in certain countries, criminal records have no legal value. In addition, many different ways of recording convictions exist in national registers, as well as differences in the nature, aim and contents of such registers and the conditions of access to them.

³² See article 22 of the Organized Crime Convention.

³³ Council of Europe, *European Treaty Series*, No. 30.

³⁴ *Ibid.*, No. 99.

and Spain is eliminated in favour of an information network; and (b) to improve, in specific terms and without modifying existing law, the exchange of information. Judicial authorities of each country thus have the benefit of speedy, complete and immediately comprehensible information.

2.B.11. Other types of mutual assistance

- **The greatest measure of mutual legal assistance.** Mutual assistance can be provided in forms other than those already mentioned, when allowed by the law of the requested State, for example, special investigative techniques or other non-traditional evidence-gathering.
- **Special investigative techniques.** Practitioners may wish to use the following techniques, some of which are known in the fight against drug trafficking, on the basis of a treaty or, if included in national legislation, on the basis of a letter rogatory or other type of request for mutual assistance.

It should be noted that special investigative techniques must, in their implementation, respect the liberties and fundamental rights of persons, such as those guaranteed by international and national standards, in particular the right to privacy and the protection of data of a personal nature.³⁵

³⁵ See the guidelines for the regulation of computerized personal data files adopted by the General Assembly in its resolution 45/95 (<http://www.unhcr.ch/html/menu3/b/71.htm>).

An international document relative to this type of protection is currently being considered for the French-speaking world: see the Monaco Declaration of 5 September 2006 of the independent French-speaking authorities responsible for the protection of personal data acknowledging the final declaration of 27 November 2004 of the Tenth Summit of Heads of State and Government of French-speaking countries, in which they call for the creation or consolidation of rules ensuring the protection of fundamental liberties and rights of persons, in particular their privacy in the use of private files and databases, and encourage cooperation between independent authorities responsible of their application as well as the establishment of an international convention guaranteeing the effective right to data protection (see

http://www.cnil.fr/fileadmin/documents/La_CNIL/actualite/Declaration_Monaco_sept06.pdf).

Texts already exist at the regional level, in Europe, for example (non-exhaustive list):

(a) Council of Europe treaties (see

http://www.coe.int/t/e/legal_affairs/legal_co%2Doperation/data_protection/documents/international_legal_instruments/1Treaties.asp#TopOfPage:

(i) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Council of Europe, *European Treaty Series*, No. 108);

(ii) Amendment to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (approved by the Committee of Ministers in Strasbourg on 15 June 1999), which will enter into force following acceptance by all parties to the Convention;

(iii) Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows (Council of Europe, *European Treaty Series*, No. 181) and explanatory report;

(iv) European Parliament and the Council of the European Union directive 95/46/CE of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (*Official Journal of the European Communities*, L 281, 23 November 1995)

Such techniques may include the following:

- *Controlled delivery*
 - Advantages. This technique can be useful in enabling authorities to more easily identify, arrest and prosecute those who devise, organize and finance the offence. It is particularly useful where prohibited substances are located or intercepted while in transport and then delivered under surveillance for the purpose of identifying the recipients or to monitor subsequent distribution of the substances through a criminal organization.
 - Legal basis. It is often required, when carrying out this type of operation, to draw on particular legislative provisions, agreements or arrangements between States, because the delivery of prohibited substances by an agent of a detection or law enforcement agency or another person may constitute an offence under domestic law.³⁶ In the absence of agreements or arrangements, the decision to use such special investigative techniques at the international level should be made on a case-by-case basis, when such an operation does not violate the fundamental principles of the legal system of the concerned State. For a number of countries, this provision is sufficient to constitute legal authorization of case-by-case cooperation.
- *Undercover operations*
 - Advantages. An agent of a detection or law enforcement agency or another person is able to infiltrate a criminal organization to gather items of evidence.
 - Legal basis. The decision to use this technique in a specific case depends on the legislation of the State concerned and on agreements and arrangements between States. In the absence of agreements or arrangements, the decision to use such special investigative techniques at the international level should be made on a case-by-case basis, when such an operation does not violate the fundamental principles of the legal system of the concerned State. For a number

(<http://europa.eu/scadplus/leg/en/lvb/l14012.htm>);

(b) Organization for Economic Cooperation and Development Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (Paris, 1980) available at http://www.oecd.org/document/18/0,2340,en_2649_34255_1815186_1_1_1_1,00.html.

³⁶ Article 20, paragraph 1, of the Organized Crime Convention, provides for the use of controlled delivery, if permitted by the basic principles of the domestic legal systems of the States parties concerned. (This technique already exists in several States, at least to trace trafficking in narcotic drugs, as it is provided for in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988.) The decision to use such a technique in a specific case depends on the legislation, the judgement and the resources of the State concerned, as indicated by the phrase “within its possibilities and under the conditions prescribed by its domestic law”. Paragraph 4 specifies that methods of controlled delivery that can be used at the international level may include methods such as intercepting and allowing goods to continue intact or be removed or replaced in whole or in part. The choice of the method is left to the party concerned and will clearly depend on the particular circumstances.

of countries, this provision is sufficient to constitute legal authorization of case-by-case cooperation.

- *Electronic surveillance* using listening devices or interception of communications.
 - Advantages. The use of new technologies may appear to be a useful tool in the fight against terrorism.³⁷ However, there is considerable risk of infringing personal liberties. This is a useful technique when it is impossible to infiltrate a tightly knit group or if an undercover or surveillance operation would be too risky for the investigation or for the safety of those carrying it out.
 - Legal basis. Given that electronic surveillance can constitute an infringement of privacy, it is generally subject to strict judicial control and to a number of legal guarantees so as to avoid any violation.

This investigative technique must respect, in its implementation, the law of the requested State, which includes national standards relative to data protection.

The decision to use electronic surveillance in a specific case depends on the legislation of the State concerned and on agreements and arrangements between States. In the absence of agreements or arrangements, the decision to use such special investigative techniques at the international level should be made on a case-by-case basis, when such an operation does not violate the fundamental principles of the legal system of the concerned State. For a number of countries, this provision is sufficient to constitute legal authorization of case-by-case cooperation.

A model of a hypothetical request for interception or recording is provided in annex XV.

- **Example of compliance of such a measure with human rights.** In 1978, in a case relative to telephone tapping requested within the framework of the fight against terrorism, the European Court of Human Rights highlighted the need for States to supervise data processing while emphasizing that powers of secret surveillance of citizens, “characterizing as they do the police State, are tolerable ... only in so far as strictly necessary for safeguarding democratic institutions” and if they are accompanied by adequate and sufficient guarantees against abuse (invasive measures provided for by law, a control by independent institutions of the surveillance measures), as such a system poses a danger of “undermining or even destroying democracy on the ground of defending it”.³⁸
- **Non-traditional evidence-gathering.** This includes, in particular, exchanges of electronic documents or inventories of digital evidence, that is, data stored by computer or electronic systems that can be useful in a judicial case.
 - The growth of the Internet and of companies connected to that technology leads such companies, in their day-to-day activities, to collect, process and store information concerning the Internet user. In some cases, such

³⁷ For example, electronic surveillance was used in order to identify the perpetrators of the terrorist attacks of 7 July 2005 in London.

³⁸ *Klass and Others v. Germany*, judgement of 6 September 1978, A 28, paragraphs 42 and 49-50.

companies may divulge information concerning users. In fact, the use of Internet servers or other service providers is usually conditional upon the user's online acceptance of privacy policies. In most cases such policies include the acceptance of the disclosure of information to judicial authorities.

- **Example of provisions in a privacy policy**³⁹

Legal requirements

“We may disclose personal information to respond to legal requirements, enforce our policies, respond to claims that a listing or other content violates the rights of others, or protect anyone's rights, property, or safety.

“We may also share your personal information with law enforcement or other governmental officials, in response to a verified request relating to a criminal investigation or alleged illegal activity.

“In addition, we may also share your personal information with VeRO Program participants under a confidentiality agreement, as we in our sole discretion believe necessary or appropriate in connection with an investigation of fraud, intellectual property infringement, piracy, or other unlawful activity. In such an event we will disclose name, street address, city, state, zip code, country, phone number, e-mail, and company name.”

- Many companies have their own legal department, which communicates directly with the judicial authorities. It is advisable for judges and prosecutors to contact directly companies that use this technology before they draft their requests for information.

2.C. Mutual legal assistance in the fight against the financing of terrorism: identification, detection, freezing, seizure and confiscation

<p>Objective</p> <p>To ensure the highest possible level of cooperation between States with regard to offences relating to the financing of terrorism by determining:⁴⁰</p> <p>2.C.1. The legal basis relative to the fight against the financing of terrorism and cooperation in such matters.</p> <p>2.C.2. The exclusion of bank secrecy as grounds for refusal.</p> <p>2.C.3. The exclusion of the fiscal nature of the act of terrorism as grounds for refusal.</p> <p>2.C.4. A glossary of related terms.</p> <p>2.C.5. The methods of mutual assistance.</p> <p>2.C.6. Details as regards freezing and confiscation of funds.</p> <p>2.C.7. How to share the proceeds of crime.</p>
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³⁹ Information provided by the legal department of eBay to the authors of this *Manual*.

⁴⁰ See International Monetary Fund, Legal Department, *Suppressing the Financing of Terrorism: a Handbook*

2.C.1. Legal basis

There are two types of international provisions concerning freezing, seizure and confiscation of terrorist assets. One requires a mechanism enabling the freezing, seizure and confiscation of such assets (Security Council resolution 1373 (2001), paragraph 1 (c), and article 8, of the International Convention for the Suppression of the Financing of Terrorism).

The other requires the seizure of the assets of persons or entities included on the lists published pursuant to Security Council resolution 1267 (1999) and subsequent resolutions.

It is thus advisable to distinguish between:

(a) The provisions of Security Council resolution 1373 (2001) and those of resolution 1267 (1999) and subsequent resolutions;

(b) The provisions of the International Convention for the Suppression of the Financing of Terrorism;

(c) The possible ties between terrorism and transnational organized crime and, consequently, the provisions of the United Nations Convention against Transnational Organized Crime.

2.C.1(a) Resolutions of the Security Council

The Security Council resolutions are the subject of remarks on the criminalization of acts of terrorism (see section 1.A.1 above) and on the legal basis for international cooperation (see section 1.B.1).

2.C.1 (a)(i) Security Council resolution 1373 (2001): a general obligation

Resolution 1373 (2001) lays down a general obligation for States to freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, acts of terrorism or participate in or facilitate the commission of such acts (paragraph 1 (c)).

Entities owned or controlled directly or indirectly by such persons are also concerned.

- Under Security Council resolution 1373 (2001), States are required, for the purpose of fighting terrorism, to adopt measures to enable national authorities to detect, freeze⁴¹ and confiscate⁴² funds⁴³ involved in the commission of terrorist acts.⁴⁴

⁴¹ According to the Organized Crime Convention, the Convention against Corruption and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, “freezing” or “seizure” means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority.

⁴² According to the Organized Crime Convention, the Convention against Corruption and the 1988 Convention, “confiscation”, which includes forfeiture where applicable, means the permanent deprivation of property by order of a court or other competent authority.

⁴³ Article 1, paragraph 1, of the Financing of Terrorism Convention gives a very broad definition

- Resolution 1373 (2001) also provides: a legal basis for the freezing of funds (subparagraph 1 (c)); and the means for mutual legal assistance (subparagraph 2 (f)). Adopted under Chapter VII of the Charter of the United Nations, these provisions are binding.
 - *Freezing of funds and other financial assets*
 - Paragraph 1 (c) of resolution 1373 (2001) enjoins States to 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.
 - The obligation to freeze funds and suspicious accounts is general.⁴⁵ In fact, resolution 1373 (2001) does not mention prior Security Council resolutions that require the freezing of personal assets of specific persons and entities and does not mention a list of such persons and entities included in subsequent resolutions. It is consequently accepted that the resolution targets all persons and entities suspected of acts of terrorism, whether or not they are on the lists established by the Council or are identified as such by States.⁴⁶

of “funds”:

“‘Funds’ means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.”

⁴⁴ The legal basis for this requirement is subparagraph 1 (a) and (c) of resolution 1373 (2001) and articles 8 and 18, of the Financing of Terrorism Convention, as also article 12 of the Organized Crime Convention, article 31 of the Convention against Corruption and article 5 of the 1988 Convention.

⁴⁵ See J. W. Wainwright, “Some aspects of compliance with UN Security Council Resolution 1373” (<http://www.un.org/Docs/sc/committees/1373/wainwright.html>).

⁴⁶ In addition to the Security Council list, based on paragraph 4 (b) of resolution 1267 (1999) and paragraph 8 (c) of resolution 1333 (2000), the United States and the European Union, for example, have also created such lists. In the United States, the lists are based on Executive Order 13224 (<http://www.state.gov/s/ct/rls/fs/2002/16181.htm>), as amended by Executive Order 13268 (<http://fas.org/irp/offdocs/eo/eo-13268.htm>). For a current list, updated regularly, of terrorists and groups identified under Executive Order 13224, see <http://www.treasury.gov/offices/enforcement/ofac/programs/terror/terror.pdf>. In the European Union, such lists are based on Council of the European Union regulation 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (*Official Journal of the European Communities*, L 344, 28 December 2001), as amended by Council decision 2003/480/EC implementing article 2 (3) of regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing decision 2002/974/EC (*Official Journal of the European Union*, L 160, 28 June 2003).

➤ *Full cooperation*

- Paragraph 2 (f) of resolution 1373 (2001) provides that States must 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.
- No limitations of the mutual assistance may be imposed owing to the fiscal nature of the offence, the geographical scope or time limits for measures. Cooperation for the identification, detection, freezing and seizure of funds is absolute:
 - It may not be refused on the ground of bank secrecy;⁴⁷
 - Nor on the ground that the offence in question is a fiscal offence;⁴⁸
 - Nor can it be refused owing to the geographical origin of the request for the freezing of funds, as there are no limitations to the geographical scope of resolution 1373 (2001);
 - Furthermore, the resolution requires that States be in a position to freeze terrorist funds “without delay”.

2.C.1 (a)(ii) *Security Council resolution 1267 (1999)⁴⁹ and subsequent resolutions: an autonomous regime*

By its resolution 1267 (1999), the Security Council created a sanctions regime against the Afghan faction known as the Taliban (paragraph 1). Initially, the Council decided that States should freeze the funds and assets of the Taliban.⁵⁰ This regime was modified by subsequent resolutions,⁵¹ as regards both the sanctioned persons and the sanctions themselves.⁵²

⁴⁷ See article 12, paragraph 2, of the Financing of Terrorism Convention; see also articles 13, paragraph 3, and 18, paragraph 8, of the Organized Crime Convention, article 31, paragraph 7, of the Convention against Corruption and article 5, paragraph 3, of the 1988 Convention. Even without a foreign request, article 12, paragraph 6, of the Organized Crime Convention and article 31, paragraph 7, and article 40 of the Convention against Corruption indicate that bank secrecy may not be invoked at the national level.

⁴⁸ See article 13 of the Financing of Terrorism Convention; see also articles 13, paragraph 3, and 18, paragraph 22, of the Organized Crime Convention, article 46, paragraph 22, of the Convention against Corruption and article 3, paragraph 10, of the 1988 Convention.

⁴⁹ Resolution adopted by the Security Council on 15 October 1999 under Chapter VII of the Charter of the United Nations.

⁵⁰ States should also deny permission for any aircraft (owned, leased or operated by the Taliban) to take off from their territory.

⁵¹ Resolutions 1267 (1999), 1333 (2000), 1363 (2001), 1373 (2001), 1390 (2002), 1452 (2002), 1455 (2003), 1526 (2004), 1566 (2004) and 1617 (2005) (see <http://www.un.org/Docs/sc/committees/1267/1267ResEng.htm>).

⁵² This *Manual* describes the regime as currently in force.

The Security Council Committee established pursuant to resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities (the Sanctions Committee) maintains and updates a list of sanctioned persons.⁵³

- Security Council resolution 1267 (1999) requires Member States to freeze, without delay, the assets of persons and organizations that appear on the lists published under the authority of the Security Council.⁵⁴ Adopted under Chapter VII of the Charter of the United Nations, **these provisions are binding**. The resolution consequently transforms into a potentially indefinite measure what is usually a temporary measure used for the purpose of preventing certain assets from leaving a country during an investigation or legal proceeding.
- It should be noted that the provisions of Security Council resolution 1373 (2001) are applicable to persons established as being part of the Taliban or the Al-Qaida organization and individuals, groups, undertakings or entities associated with the Taliban or the Al-Qaida organization.⁵⁵
- The following are susceptible of being placed on the list of the Sanctions Committee:
 - Any individual, group, undertaking or entity associated with Al-Qaida, Osama bin Laden or the Taliban.
 - The term “associated with” is defined in Security Council resolution 1617 (2005) (paragraphs 2 and 3) as:
 - (a) Participating in the financing, planning, facilitating, preparing or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of Al-Qaida, Osama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof;
 - (b) Supplying, selling or transferring arms and related materiel to them;
 - (c) Recruiting for them;
 - (d) Otherwise supporting their acts or activities.

Furthermore, any undertaking or entity owned or controlled, directly or indirectly, by the above persons shall also be placed on the list.

⁵³ The Security Council Committee established pursuant to resolution 1267 (1999) is composed in the same manner as the Council itself (see <http://www.un.org/Docs/sc/committees/1267Template.htm>).

⁵⁴ A consolidated list is published in application of resolution 1390 (2002) (see <http://www.un.org/Docs/sc/committees/1267Template.htm>).

⁵⁵ See resolution 1390 (2002), paragraph 4, in which the Security Council recalls the obligation placed upon all Member States to implement in full resolution 1373 (2001), including with regard to any member of the Taliban and the Al-Qaida organization, and any individuals, groups, undertakings and entities associated with the Taliban and the Al-Qaida organization, who have participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts or in supporting terrorist acts.

- **The procedure to follow for an addition to the list**⁵⁶

- The Sanctions Committee shall consider expeditiously, in accordance with the following procedures, any listing request transmitted by Member States or regional or international organizations, and decides on the listing.
- Procedure for an addition to the list:
 - (a) The Committee regularly updates the consolidated list.⁵⁷ It thus considers any information on listed individuals or entities submitted to it by Member States, regional or international organizations directly or through the Analytical Support and Sanctions Monitoring Team;⁵⁸
 - (b) The Monitoring Team will, as appropriate, review any and all information received by the Committee in order to clarify or confirm such information. In that connection, the Team will use all sources available to it;
 - (c) The Monitoring Team will subsequently advise the Committee, within four weeks, if the information could be included in the consolidated list, or if further clarification is recommended in order to ascertain whether the information received can be incorporated into the list. The Committee shall decide whether and how such clarification should be obtained;
 - (d) Upon the decision of the Committee to incorporate additional information into the consolidated list, the Chairman of the Committee will inform the Member State or regional or international organization that submitted the additional information accordingly;
 - (e) When proposing a listing, States are required to provide a statement of case with details of any connection between the proposed designee and currently listed individuals and entities. States are requested to designate those parts of the statement which can be publicly released to the listed person and those which may be released to requesting States for operational reasons or to aid implementation.

⁵⁶ See the guidelines of the Committee for the conduct of its work, paragraph 7 (http://www.un.org/Docs/sc/committees/1267/pdf/1267_guidelines.pdf).

⁵⁷ Proposed additions should include, to the extent possible, a statement of case that will form the basis or justification for the measures taken in accordance with resolution 1390 (2002) and the relevant provisions of resolutions 1267 (1999), 1333 (2000), 1455 (2003), 1526 (2004), 1617 (2005) and 1735 (2006). Proposed additions to the list should include, to the extent possible, relevant and specific information to enable the accurate identification of the individual or entity by competent authorities:

(a) For individuals: family name, date and place of birth, nationality, aliases, place of residence and number of passport or other travel document;

(b) For groups, undertakings or entities: name, acronyms, address, headquarters, subsidiaries, affiliates, fronts, nature of activity and leadership.

⁵⁸ The Analytical Support and Sanctions Monitoring Team was established pursuant to resolution 1526 (2004) to assist the Committee in fulfilling its mandate.

- **The consequences for States of a listing**⁵⁹

- States are required to take the following measures⁶⁰ with respect to any person and entities included in the list:

(a) *Freezing of assets.* States must freeze without delay the funds and other financial assets or economic resources of the individuals, groups, undertakings and entities listed, including funds derived from the property owned or controlled, directly or indirectly, by them or by persons acting on their behalf or at their direction, and ensure that neither these nor any other funds, financial assets or economic resources are made available, directly or indirectly, for such persons' benefit, by their nationals or by any persons within their territory;

(b) *Travel ban.* States must prevent the entry into or the transit through their territories of these individuals;⁶¹

(c) *Arms embargo.* States must prevent the direct or indirect supply, sale or transfer, to these individuals, groups, undertakings and entities from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts therefor, and technical advice, assistance or training related to military activities, to designated individuals and entities.

- Exemptions from the asset freeze:⁶²

(a) Funds and other financial assets necessary for basic expenses (foodstuffs, rent, mortgage, medicines and medical treatment, taxes, insurance premiums and public utility charges) or exclusively for payment of reasonable professional fees,⁶³ after notification by States of their intention to authorize access to such funds and in the absence of a negative decision by the Committee within three working days of such notification;

(b) Funds necessary for extraordinary expenses, provided that such determination has been notified by the relevant State(s) to the Committee and has been approved by the Committee.

- **De-listing procedures:**⁶⁴

- (a) Without prejudice to available procedures, a petitioner (individual(s), groups, undertakings and/or entities on the consolidated list) may submit a petition to request review of the case. In this regard, the petitioner should provide justification for the de-listing request, offer relevant information and request support for de-listing;

⁵⁹ See resolution 1390 (2002), paragraph 2.

⁶⁰ These measures are summarized in paragraphs 1 and 2 of resolution 1617 (2005).

⁶¹ This cannot oblige a State to deny entry of its own nationals, nor transits necessary for the fulfilment of a judicial process.

⁶² Listed in resolution 1452 (2002), paragraph 1.

⁶³ For example, legal services and expenses for safekeeping and management of the frozen assets.

⁶⁴ See the guidelines of the Committee for the conduct of its work, paragraph 8.

(b) Petitioners seeking to submit a request for de-listing can do so either through the focal point process outlined in paragraph 8 (d) of the guidelines of the Sanctions Committee for the conduct of its work or through their State of residence or citizenship as outlined in paragraph 8 (e) of the guidelines;

(c) A State can decide that, as a rule, its citizens or residents should address their de-listing requests directly to the focal point. The State will do so by a declaration addressed to the Chairman of the Committee that will be published on the Committee's website;

(d) If a petitioner chooses to submit a petition to the focal point, the latter would perform the following tasks:

(i) Receive de-listing requests from a petitioner (individual(s), groups, undertakings and/or entities on the Committee's lists);

(ii) Verify if the request is new or is a repeated request;

(iii) If it is a repeated request and if it does not contain any additional information, return it to the petitioner;

(iv) Acknowledge receipt of the request to the petitioner and inform the petitioner of the general procedure for processing that request;

(v) Forward the request, for their information and possible comments, to the designating Government(s) and to the Government(s) of citizenship and residence. Those Governments are encouraged to consult with the designating Government(s) before recommending de-listing. To that end, they may approach the focal point, which, if the designating State(s) so agree(s), will put them in contact with the designating State(s);

(vi) a. If, after these consultations, any of these Governments recommend de-listing, that Government will forward its recommendation, either through the focal point or directly to the Chairman of the Sanctions Committee, accompanied by that Government's explanation. The Chairman will then place the de-listing request on the Committee's agenda;

b. If any of the Governments that were consulted on the de-listing request under subparagraph (v) above oppose the request, the focal point will so inform the Committee and provide copies of the de-listing request. Any member of the Committee who possesses information in support of the de-listing request is encouraged to share such information with the Governments that reviewed the de-listing request under subparagraph (v) above;

c. If, after a reasonable time (three months), none of the Governments that reviewed the de-listing request under subparagraph (v) above comment or indicate that they are working on the de-listing request to the Committee and require an additional definite period of time, the focal point will so notify all members of the Committee and provide copies of the de-listing request. Any member of the Committee may, after consultation with the designating Government(s), recommend

de-listing by forwarding the request to the Chairman of the Sanctions Committee, accompanied by an explanation. (Only one member of the Committee needs to recommend de-listing in order to place the issue on the Committee's agenda.) If, after one month, no Committee member recommends de-listing, then the request shall be deemed rejected and the Chairman of the Committee shall inform the focal point accordingly;

(vii) The focal point shall convey all the communications it receives from Member States to the Committee for its information;

(viii) Inform the petitioner:

a. Of the decision of the Sanctions Committee to grant the de-listing petition; or

b. That the process of consideration of the de-listing request within the Committee has been completed and that the petitioner remains on the list of the Committee;

(e) If the petitioner submits the petition to the State of residence or citizenship, the procedure outlined in the subparagraphs below shall apply:

(i) The State to which a petition is submitted (the petitioned State) should review all relevant information and then approach bilaterally the designating State(s) to seek additional information and to hold consultations on the de-listing request;

(ii) The designating State(s) may also request additional information from the petitioner's State of citizenship or residency. The petitioned and the designating State(s) may, as appropriate, consult with the Chairman of the Committee during the course of any such bilateral consultations;

(iii) If, after reviewing any additional information, the petitioned State wishes to pursue a de-listing request, it should seek to persuade the designating State(s) to submit jointly or separately a request for de-listing to the Committee. The petitioned State may, without an accompanying request from the designating State(s), submit a request for de-listing to the Committee, pursuant to the no-objection procedure;

(f) The Committee will reach decisions by consensus of its members. If consensus cannot be reached on a particular issue, the Chairman will undertake such further consultations as may facilitate agreement. If, after these consultations, consensus still cannot be reached, the matter may be submitted to the Security Council. Given the specific nature of the information, the Chairman may encourage bilateral exchanges between interested Member States in order to clarify the issue prior to a decision.

- **Implementation in States**

1. *Role and support of INTERPOL*

- INTERPOL and the United Nations concluded an exchange of letters on 5 January 2006 that constitutes a Supplementary Arrangement to implement the Cooperation Agreement between the United Nations and

INTERPOL.⁶⁵ This Agreement sets forth the methods of assistance by INTERPOL to the Sanctions Committee, methods that take two forms:

(a) *Improvement of the quality of the information contained in the consolidated list.* INTERPOL communicates to the Sanctions Committee personal data available concerning persons listed on the Committee's list as well as to its group of experts (Monitoring Team) created pursuant to Security Council resolutions 1526 (2004) and 1617 (2005). Thus, it improves the exactitude of the list;

(b) *Immediate access for law enforcement officials to the consolidated list and actions required by the Security Council*

(i) At the request of the Sanctions Committee, INTERPOL records in its database the names of the persons listed by the Committee and information on them. This information is thus immediately accessible through the INTERPOL global police communications system, I-24/7;

(ii) INTERPOL treats, as far as possible, available general information concerning persons listed by the Committee in conformity with the Rules on the Processing of Information for the Purposes of International Police Cooperation, adopted by the General Assembly of INTERPOL;

(iii) At the request of the Sanctions Committee, INTERPOL publishes a "special notice"⁶⁶ against persons listed by the Committee in order to alert law enforcement officials that such persons are subject to sanctions requiring a particular action by those law enforcement officials;

(iv) INTERPOL adds to any of its other notices a note indicating that the person is also listed by the Sanctions Committee.

2. *Measures at the national level*

- *The freezing of assets* is a sanction that requires a special administrative or judicial measure on the part of States.
- *The methods of implementation* are diverse:

⁶⁵ Cooperation Agreement between the United Nations and the International Criminal Police Organization (INTERPOL), signed at New York on 8 July 1997 (United Nations, *Treaty Series*, vol. 1996, No. 1200). For the text of the exchange of letters on 5 January 2006, see <http://www.interpol.int/Public/ICPO/LegalMaterials/cooperation/agreements/SupplementaryArrangementRKNAnnan.asp>. Context: Security Council resolution 1617 (2005), inviting the United Nations and INTERPOL to develop their cooperation to provide an assistance increased to the Committee in execution of its mandate; and resolution AG-2005-RES-05, adopted at the General Assembly of INTERPOL at its 74th session, held in Berlin from 19 to 22 September 2005, giving its agreement to reinforced cooperation with the United Nations on this matter. The General Secretariat of INTERPOL is in charge of this development (for more information on INTERPOL, see section I.B.2 above as well as www.interpol.int).

⁶⁶ For more information on special notices, see <http://www.interpol.int/Public/NoticesUN/default.asp>.

(a) Some States apply the sanctions directly (as is required by the Security Council);

(b) Some States have adopted special legislative measures;⁶⁷

(c) Other States only freeze funds and assets or only maintain the freezing after a judicial decision has been taken (the central bank often blocks funds for a short period of time and waits for confirmation of the measure from a judge):

(i) In some cases, an investigation shall be implemented and evidence will be necessary in order to confirm the freezing.⁶⁸ Such a procedure seems to contradict the sanctions regime decided by the Security Council. In this case, the jurisdictional control should only be concerned with factual elements, such as the identity of the person concerned by the measure, rather than with the advisability of the measure;

(ii) In other cases, a judicial decision based on the sanctions regime set up by the Security Council may confirm the freezing without having to institute a judicial investigation.

➤ *Preventing entry into or transit through States' territories*

(a) Under paragraph 1 (b) of Security Council resolution 1617 (2005), national authorities shall prevent the entry into or the transit through their territories of sanctioned individuals, provided that nothing in the paragraph shall oblige any State to deny entry or require the departure from its territories of its own nationals and the paragraph shall not apply where entry or transit is necessary for the fulfilment of a judicial process or the Sanctions Committee determines on a case-by-case basis only that entry or transit is justified;

(b) This measure is of particular interest to immigration agencies, which should, if necessary, coordinate with judicial authorities in order to determine whether or not the persons listed are subject to judicial prosecution.

⁶⁷ For example, Australia (see S/AC.37/2003/(1455)/13, paragraphs 10 and 25) and Singapore (see S/AC.37/2003/(1455)/17, paragraph 5). Reports of Member States to the Sanctions Committee are available at <http://www.un.org/sc/committees/1267/memstatesreports.shtml>.

⁶⁸ See the statement by the Chairman of the Sanctions Committee at the 5229th meeting of the Security Council, held on 20 July 2005 (S/PV.5229, pp. 5-6;

<http://daccessdds.un.org/doc/UNDOC/PRO/N05/431/30/PDF/N0543130.pdf?OpenElement>):

“It emerges from the reports of some Member States that there is apparently still a need to present sufficient evidence to judicial authorities as a condition of the freezing of assets. We wish to clarify that such systems are not in conformity with Member States’ obligations under Chapter VII of the United Nations Charter. For this reason, I urge States to ensure that assets can be frozen as soon as the Committee adds the name of an individual or an entity to the Committee’s list.”

2.C.1 (b) *International Convention for the Suppression of the Financing of Terrorism*

- **Freezing, seizure and confiscation of assets.** The Financing of Terrorism Convention requires the existence of a complete mechanism allowing for freezing, seizure and confiscation of terrorist assets:

“Article 8

“1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture.

“2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.”

2.C.1 (c) *Using the United Nations Convention against Transnational Organized Crime in the fight against terrorism*

- **If ties are established between transnational organized crime and terrorism**, the Organized Crime Convention can be used as the basis for suppression and cooperation concerning the financing of terrorism, provided that the offences are also covered by the Convention and committed by an organized criminal group as defined in it. Such a group may also be a group committing acts of terrorism.
- The Convention requires the existence of a complete mechanism allowing for the **freezing, seizure and confiscation of criminal assets**. Article 12 states that States parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable:
 - (a) Confiscation of proceeds of crime derived from offences covered by the Convention or property the value of which corresponds to that of such proceeds (paragraph 1 (a));
 - (b) Confiscation of property, equipment or other instrumentalities used in or destined for use in offences covered by the Convention (paragraph 1 (b));
 - (c) The identification, tracing, freezing or seizure of any item referred to in paragraph 1 of article 12 for the purpose of eventual confiscation (paragraph 2);
 - (d) The application of confiscation powers to property into which proceeds of crime have been transformed or converted, property acquired from legitimate sources with which it has been intermingled (up to the value of the said proceeds) and to income or other benefits derived from proceeds of crime (paragraphs 3-5);
 - (e) Empowerment of its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. States parties shall not decline to act under the provisions of paragraph 6 on the ground of bank secrecy (paragraph 6).

- This requires several measures. Article 13 provides that a State party is required, to the greatest extent possible within its domestic legal system:

(a) To submit to its competent authorities either the request for the confiscation of the proceeds of crime received from another State party, for the purpose of obtaining an order of confiscation and to give effect to it, or an order of confiscation issued by another State party, with a view to giving effect to it (paragraph 1);

(b) Following the request made by another State party, to identify, trace and freeze or seize the proceeds of crime, property, equipment or other instrumentalities set forth in the Convention, for the purpose of eventual confiscation (paragraph 2).

2.C.2. Bank secrecy

- **Exclusion of refusal of mutual assistance on the ground of bank secrecy.** Mutual assistance cannot be refused on the ground of bank secrecy.

- **Legal basis.** According to article 12, paragraph 2, of the Financing of Terrorism Convention, bank secrecy may not be used as the ground for refusal of mutual legal assistance. Consequently:

(a) When the legislation of a State party authorizes bank secrecy as a ground for refusal, it should be regarded as having no effect and the provisions of the Convention should take precedence;

(b) When such grounds for refusal are provided for in a mutual assistance treaty binding a State party, the very fact that the country becomes party to the Convention shall, according to treaty law, nullify the provisions of the treaties that conflict with the Convention;

(c) If the legal system of a State party provides that the treaties are not self-executing, it may be necessary to amend domestic law to remedy the situation.

2.C.3. Offences linked to the financing of terrorism are not regarded as fiscal offences

Offences linked to the financing of acts of terrorism may not be regarded as fiscal offences for the purpose of mutual legal assistance.⁶⁹

2.C.4. Glossary

Definition of terms:

- **“Confiscation/forfeiture”** means the permanent deprivation of property, of funds used or allocated for the purpose of committing offences, as well as the proceeds derived from offences,⁷⁰ by order of a court or other competent authority.
- **“Freezing”** or **“seizure”** means temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming

⁶⁹ See article 13 of the Financing of Terrorism Convention.

⁷⁰ See article 8 of the Financing of Terrorism Convention.

custody or control of property on the basis of an order issued by a court or other competent authority.

- **“Funds”** means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.
- **“Property or proceeds of crime used in or destined for use in”**. The words “used in or destined for use in” signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a crime.⁷¹ This includes cases in which the origin of the proceeds or the instruments are not immediately discernible, the offenders having made the detection more difficult by intermingling them with property acquired from legitimate sources or by converting them into other property. They require States parties to allow for the confiscation of property into which proceeds of crime have been converted as well as property with which they have been intermingled, up to the value of the said proceeds. The income or other benefits derived from proceeds of crime may also be confiscated. The words “other benefits” are intended to cover material benefits, as well as legal rights and interests of an enforceable nature that are subject to confiscation.⁷²

2.C.5. Preparing to request mutual legal assistance

- **Information to include in different types of request for mutual legal assistance:**
 - (a) A description of the property to be confiscated;
 - (b) An account of the facts and information on which the request is based and the conditions for execution of the request, so as to enable the requested party to take a decision concerning the confiscation in accordance with its domestic law;
 - (c) A legally admissible copy of the decision concerning the confiscation on which the request is based.

2.C.6. Details concerning identification and detection of funds

- **Definition.** “Identification” consists of identifying the holder of a given bank account; “detection” means identifying the bank accounts of a given person.
- **Recommendations:**
 - (a) The detection, freezing and confiscation of capital requires granting adequate resources to the special agencies established to manage such matters;

⁷¹ See the interpretative notes to the official records (*travaux préparatoires*) of the negotiations for the Organized Crime Convention and its Protocols on article 12, paragraph 1 (b), of the Convention (*Travaux Préparatoires of the Negotiations ...*, p. 115).

⁷² See the interpretative notes to the official records (*travaux préparatoires*) on article 12, paragraph 5, of the Convention (*Travaux Préparatoires of the Negotiations ...*, p. 115).

(b) Concerning the detection of capital, it is necessary for the requested authorities to facilitate, to the best of their ability, access to information regarding the movement of capital;

(c) Concerning the freezing of capital, it is essential for the request made by one State to another for the freezing of capital to remain confidential until completion of the procedure, in particular where the requested State refuses to comply, in order to avoid the disappearance of the capital concerned;

(d) Finally, concerning the confiscation of funds, it is recommended that States conclude agreements in order to facilitate cooperation in this field.

- **Identification is the task of the financial intelligence unit**, as long as a judicial procedure has not yet been initiated. (For further information on financial intelligence units, see section 1.E.5 above.)

The competent authorities shall ensure that the intervention of financial institutions and “other professions involved in financial transactions”⁷³ makes it possible to identify their customers and to report suspicious transactions, which constitutes the precondition for the effective freezing of suspicious accounts. The Counter-Terrorism Committee of the Security Council has identified these “other professions involved in financial transactions” in particular as lawyers, notaries and outside accountants.⁷⁴

- **International cooperation in the identification and detection of bank accounts**

➤ *Legal basis:*

(a) International instruments. International conventions attempt to remove the obstacles in the way of requests for mutual assistance by requiring States to give effect to them, for example, the Financing of Terrorism Convention and the Organized Crime Convention;

(b) Furthermore, some regional conventions also provide for such mutual assistance.⁷⁵

➤ *Competent authority.* In principle, the authorities competent to issue requests for mutual assistance are those which would be responsible for carrying out such investigative measures in domestic proceedings.

⁷³ See article 18, paragraph 1 (b), of the Financing of Terrorism Convention.

⁷⁴ See, for example, the supplementary reports to the Counter-Terrorism Committee of Cyprus (S/2002/689, p. 3); of France (S/2002/783, p. 3); of the United Kingdom (S/2002/787, p. 4); and of Mexico (S/2002/877, p. 8).

⁷⁵ For example, the European Convention on Mutual Assistance in Criminal Matters; the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime concluded at Strasbourg on 8 November 1990 (United Nations, *Treaty Series*, vol. 1862, No. 31704); directive 2001/97/EC of the European Parliament and of the Council of the European Union of 4 December 2001 amending Council directive 91/308/EEC on prevention of the use of the financial system for the purpose of money-laundering (*Official Journal of the European Communities*, L 344, 28 December 2001); and the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (*Official Journal of the European Communities*, C 326, 21 November 2001).

- *Confidentiality of the request.* In all requests for mutual assistance, it is possible to ask the requested State to ensure the confidentiality of the request. Certain States only ensure confidentiality if they are specifically asked to.

2.C.6 (a) *Request for the identification of bank accounts and production of account statements*

- **Before submitting a request.** Before making a request for mutual assistance in order to obtain the identification of bank accounts and the production of bank statements, it may be advisable to send a request to the branch of the foreign bank in the requesting State that manages the account, as that branch may possibly answer the identification request without the need to resort to a request for mutual assistance.
- **Members of the Financial Action Task Force on Money Laundering.**⁷⁶ Such a request does not generally create any difficulties, at least between members of the Financial Action Task Force on Money Laundering.⁷⁷

The following may not be used as grounds for refusal:

(a) *Incompatibility of the measure with domestic law.* Certain States refuse to execute a request on the grounds that their domestic legislation does not require its banking institutions to identify the owners of bank transactions or to keep the relevant records. Such grounds for refusal would not be used by a State member of the Task Force. In fact, of its Forty Recommendations on Money-Laundering and Nine Special Recommendations on Terrorist Financing,⁷⁸ recommendation 5 and special recommendation 7, on terrorist financing, call on member States to provide for a provision requiring financial institutions to conduct bank transactions only for persons whose identity is known to be based on reliable, independent source documents. Recommendation 10 provides that records shall be maintained for five years in order to re-establish individual transactions; this provision is also included in the Financing of Terrorism Convention;

(b) *Dual criminality.* Certain States only follow up on requests for mutual assistance if the offences they concern are punishable by domestic law, with or without a requirement for a minimum penalty. It should be noted that this ground for refusal is not acceptable under paragraph 2 (f) of Security Council resolution 1373 (2001).

- **Drafting the request.** It is possible to refer to a convention: if it includes any explicit provision concerning this type of request, it is recommended to refer to it or to the recommendations of the Financial Action Task Force.

Requests for information concerning bank accounts have a better chance of being accepted if they are precise and complete, giving, for example, the complete account number, the company name of the banking establishment, the address of the branch and the period of time in question. They should also include a copy of the holder's signature; the identity of proxy holders and copies of their signatures; a

⁷⁶ The recommendations of the Task Force are neither self-executing nor legally binding.

⁷⁷ For a list of members of the Task Force, see http://www.fatf-gafi.org/pages/0,2966,en_32250379_32236869_1_1_1_1_1,00.html#FATF_Members.

⁷⁸ For the recommendations of the Task Force, see http://www.fatf-gafi.org/document/28/0,3343,en_32250379_32236930_33658140_1_1_1_1,00.html.

copy of bank statements for the period concerned; and double-sided copies of cheques, with the numbers indicated.

As with any request for mutual assistance, the reasons why the information requested is relevant for the purpose of the requesting authority's procedure should be made clear. These reasons must also comply with particular conditions to which, where appropriate, the requested State subjects its execution of the request for mutual assistance: compatibility with domestic law and dual criminality.

2.C.6 (b) *Request for the detection of bank accounts*

- **Reason for the request.** As the execution of a request for mutual assistance for the detection of bank accounts most often requires more important investigative means than the identification of accounts, the grounds for such a request should be well founded, justifying, in particular, the indispensable nature of the detection for the investigation; and the reasons for which it is plausible that banks located in the territory of the requested State have in their possession accounts that are of interest to the investigation.
- In addition, it is advisable to **target the search**, for example geographically, in order to facilitate the task of requested States that do not have a centralized database.

2.C.6 (c) *Monitoring accounts*

In certain investigations, it may be useful to monitor the banking operations carried out on a particular bank account. Such a request may always be issued on the basis of Security Council resolution 1373 (2001), on the grounds of "the greatest measure of" mutual assistance.

- **Specific character of and need for the request.** The account to be monitored must be identified in the most specific manner possible and the indispensable nature of the monitoring for the investigation must be demonstrated.

2.C.7 **Sharing the proceeds of crime**

- **Disposal of assets confiscated in the framework of an investigation or prosecution: fair distribution.** In transnational cases, it is important for the confiscated assets to be shared fairly in order to encourage cooperation in future **investigations** and proceedings. The sharing of confiscated assets and their fair distribution is now incorporated into international texts.⁷⁹ Thus,

⁷⁹ The principle of sharing of property is included in article 14, paragraph 3 (b), of the Organized Crime Convention:

"When acting on the request made by another State Party in accordance with articles 12 and 13 of this Convention, a State Party may give special consideration to concluding agreements or arrangements on:

"...

"(b) Sharing with other States Parties, on a regular or case-by-case basis, such proceeds of crime or property, or funds derived from the sale of such proceeds of crime or property, in accordance with its domestic law or administrative procedures."

The Senior Expert Group on Transnational Organized Crime of the Political Group of Eight has also recently looked into the issue. The Group prepared a model agreement on the sharing of property that States should refer to if they plan to conclude an agreement in this area (see the

when confiscation is effected in a State and another State has contributed to the action, some of the confiscated assets should be shared with the other State in recognition of the joint nature of the effort.

• **In practice, the notion of the sharing of assets is based on several implementation mechanisms:**

- *Basis: an agreement.* The sharing is generally done on the basis of an agreement, which can range from a general treaty to an exchange of notes concerning a specific case.
- *Evaluation of the State holding the confiscated assets.* The decision to share and the decision concerning the amount to share depend on the evaluation of the State in which the confiscated assets are located.
- *Implementation.* Several approaches are possible in such matters:
 - (a) Certain States hand over the assets in question to the other State so that it is the latter that has to obtain the confiscation order, with the understanding that some of the assets shall be returned to the first State;
 - (b) Other States carry out the confiscation according to their domestic law and then share the confiscated assets with the State having assisted in that action.
- *Allocating the assets.* Taking into account that assets are being shared between sovereign States, each State decides how they shall be distributed within it. Although certain States decide to allocate the confiscated property or funds to a programme for the fight against criminality, the decision is the responsibility of each State, which acts according to its domestic law and its own policies. No condition should be set regarding this issue at the time of the sharing.

It should be noted that article 8, paragraph 4, of the Financing of Terrorism Convention encourages States to establish mechanisms whereby the funds derived from the active forfeiture of assets are utilized to compensate the victims of terrorist offences or their families.

report of the Secretary-General on the establishment of an intergovernmental expert group to prepare a draft model bilateral agreement on disposal of confiscated proceeds of crime covered by the Organized Crime Convention and the 1988 Convention (E/CN.15/2005/7)).

The sharing of confiscated assets is also provided for in the 1988 Convention, article 5, subparagraph (b), which states:

“When acting on the request of another Party in accordance with this article, a Party may give special consideration to concluding agreements on:

“... ”

“(ii) Sharing with other Parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.”

The sharing of property is touched upon in a note regarding the Optional Protocol to the Model Treaty on Mutual Assistance in Criminal Matters concerning the proceeds of crime, adopted by the General Assembly in its resolution 45/117 (see A/45/49, footnote 125).

- **Examples**

- During a Meeting of Commonwealth Law Ministers, held in Port of Spain in 1999, the participants examined the issue of sharing property. The ministers adopted an amendment to the Harare Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth for the purpose of incorporating a discretionary provision concerning the sharing of property. The modified article 28 provides:

“1. The law of the requested country shall apply to determine the disposal of any property

(a) forfeited; or

(b) obtained as a result of the enforcement of a pecuniary penalty order as a result of a request under this Scheme

“... ”

“3. The law of the requested country may provide that the proceeds of an order of the type referred to in subparagraphs 27 (2)(b) and (c), or the value thereof, may be:

“(i) returned to the requesting country; or

“(ii) shared with the requesting country in such proportion as the requested country in its discretion deems appropriate in all the circumstances.”

- For certain States, sharing of property is already a part of their international cooperation. The United States, for example, frequently shares confiscated property with States that have cooperated in a given case. This is done either on a case-by-case basis or according to a general agreement concluded with the other State.⁸⁰

2.D. Request for mutual legal assistance

2.D.1. Content

The content of a request for mutual legal assistance is often determined by multilateral, regional or bilateral treaties or by national law.⁸¹

It is essential for the request to be formulated clearly and concisely. Since requests are sometimes addressed to officials who work in an entirely different legal system and tradition, it is advisable to avoid overly specialized legal terminology

⁸⁰ See, for example, the Agreement between the Government of Canada and the Government of the United States of America regarding the Sharing of Forfeited Assets and Equivalent Funds (United Nations, *Treaty Series*, vol. 2028, No. 34997) (see http://untreaty.un.org/unts/144078_158780/9/8/282.pdf).

⁸¹ See article 18, paragraph 15, of the Organized Crime Convention and article 7 of the 1988 Convention.

and, instead, to describe objectively the goal or objective sought rather than the methodology used to obtain it.⁸²

2.D.1 (a) *One or several requests/letters rogatory/other types of requests*

2.D.1 (a)(i) *One or several requests*

- **The advantage of formulating a single request.** Even though the subject of requests can vary greatly, it is sometimes advisable to send a single document, the advantage being that the magistrate who will make the final decision – against which an appeal is often possible – shall be able to give a positive response concerning the entire request. Furthermore, the requesting authority is free to specify that only one section of the request is urgent and that the other measures could be taken at a later time. In addition, the requested authority may itself decide on the partial execution of the request.
- **The advantage of formulating separate requests.** On the other hand, separate requests can have the advantage, where one has a chance of being rejected by the requested authority, of only jeopardizing part of the requesting authority's request for mutual assistance. It is useful to make reference to the first request when a second request is transmitted, indicating, if necessary, that it is a supplementary request.

In any event, it is recommended that requests for mutual assistance be made as simple as possible. It is always possible to make additional requests at a later date.

2.D.1 (a)(ii) *Letters rogatory*

A letter rogatory is a formal request from a court in one country to the appropriate judicial authorities in another country requesting taking of testimony or documentary or other evidence or service of process. Although statutory authority generally refers to the document as a "letter rogatory", the terms "letter rogatory" and "letter of request" have come to be virtually synonymous in actual practice.

- **A traditional method of access to mutual legal assistance.** In order to obtain mutual legal assistance, a requesting party can use traditional letters rogatory, transmitted by the judicial authorities of one country to the judicial authorities of another through diplomatic channels.
- **Difficulties: using letters rogatory when criminal investigations are not judicial proceedings.** One of the essential problems for common law States concerning letters rogatory is that they must be issued by the judicial authority. This is because, in common law countries, the judicial authority is responsible for judging, but it is the police and the authorities responsible for the criminal prosecution who carry out the criminal investigation and institute prosecution. Common law investigating authorities can use letters rogatory before a formal judicial charge has been made only if they find a way to create some type of judicial proceeding upon which to base the letters rogatory. Even if some judicial proceeding is available, which is not always the case, that preliminary proceeding may prematurely disclose information, causing the inquiry to be

⁸² In this regard, it is useful to contact the authorities in the requested State beforehand to know its guidelines.

obstructed, resulting in extensive delay or otherwise being detrimental to the inquiry. The International Convention for the Suppression of Terrorist Bombings introduced language that solved the problem that earlier conventions only referred to mutual assistance in “criminal proceedings”. The new language has become standard in subsequent conventions by providing for mutual assistance “in connection with investigations or criminal or extradition proceedings”.⁸³

• **Information to be included in the request for mutual legal assistance:**

- (a) The authority issuing the request (its address and telephone and facsimile numbers, and language(s) for contact);
- (b) The recipient authority (in practice this is generally the judicial authorities of the requested State);
- (c) A description of the circumstances in question;
- (d) The purpose of and grounds for the request (specifying the objectives and details of the measures and documents requested);
- (e) Applicable criminal statute (definition of the offences that are the subject of the request);
- (f) The identity and nationality of the suspect (if known).

Common law countries are advised to supply systematically, in addition to the above, in order to obviate the need for requests for further details from the requested State, the following information:⁸⁴

- (a) A description of the nature of the investigation or proceeding;
- (b) A description of the reason for which mutual assistance is being requested (in particular, the reasons for believing that evidence relevant to the prosecution of the offence(s) are present in the designated place or in the possession of the designated person);

⁸³ See article 10 of the International Convention for the Suppression of Terrorist Bombings.

⁸⁴ As regards the United States, these particular requirements are derived from the Fourth Amendment of the Constitution. For identical grounds but obviously on a different legal basis, such requirements also have to be satisfied where the request is delivered to another country with a common law legal system.

The Fourth Amendment makes a search warrant issued by the locally competent judicial authority a prerequisite for any breach of a person’s rights and the issuance of such a warrant may only be done upon “probable cause”, that is, with the existence of sufficient presumption. It is consequently necessary to set forth clearly and in detail the grounds that lead the requesting judicial authority to consider that there are elements in the territory of the requested State useful for discovering the truth within the framework of its case.

In a case of search and seizure, it is necessary to describe – in as much detail as possible – the items sought, specifying how they are to be used as evidence in the procedure. If a hearing or an interrogation is requested, it is advisable to provide the detailed questions to be asked.

It is also important to specify the situation of the persons being heard in relation to the procedure. In effect, the Fifth Amendment of the United States Constitution guarantees that no person shall be held to make any incriminating declaration against themselves, which is equivalent to a right to silence.

(c) A description of the evidentiary elements sought and of any other types of mutual assistance requested (if necessary, a list of questions if hearing of a witness or questioning of a suspect is requested);

(d) The text of the applicable criminal statute;

(e) Any useful details concerning specific types of procedure that the requesting State wishes to be followed in the execution of the measures of mutual assistance.

- **Texts that criminalize and punish.** Even when not obligatory, the provision of texts that criminalize and punish the offences for which mutual assistance is requested constitute, for the requested authority, a means of verifying that the condition of dual criminality, when it exists, is fulfilled. Consequently, such texts should be included systematically in any request.
- **Translation, legalization, certification and apostille:**
 - *Translation: see section 2.D.3 (b) below.*
 - *Legalization, certification and apostille: see section 2.D.3 (d) below.*
- **Model of a letter rogatory**

Letter rogatory/letter of request
Requested authority: _____
Your reference: _____
1. Requesting authority: _____
Request for mutual legal assistance present by: _____
Function, place of origin, contact information of the person concerned: _____
Telephone number: _____
Facsimile number: _____
Electronic (e-mail) address: _____
Our reference. Case No. _____ against _____ _____ (name, date of birth)
2. Urgency (only if necessary): _____
This request is urgent for the following reasons: mention dates, legal time limits, statute of limitations, articles of legislation and so on _____
3. Legal basis:
Acting in execution of _____
<input type="checkbox"/> Multilateral/bilateral convention <input type="checkbox"/> National legislation <input type="checkbox"/> Arrangement

Reciprocity/comity

4. **Statement of the circumstances** (succinct and complete) _____

5. **Legal definition of the offences** (with copy of applicable legal texts if necessary):

6. **Measures requested**

- Hearing (including, if necessary, a list of questions or themes the hearing should cover; if necessary, the reasons why a hearing via videoconference is being requested)
- Search
- Seizure
- Hearing via telephone conference
- Hearing via videoconference
- Interception of telecommunications
- Recording a statement before a court
- Other (specify): _____

(a) **Details of measures requested** (name, date of birth and address of persons to be heard, if they are to be heard as suspects, witnesses or victims, address where a search has to be carried out, etc.): _____

(b) **Link between the offences and the requested measures** (if coercive measures are requested, explain why they are necessary): _____

(c) **The measures requested are to be executed as follows** (execution coordinated at different stages, presence of a lawyer, presence of a third party in the event of a confrontation, transfer of detained persons, whether or not an oath is to be administered, notifications and/or communications to be made, etc.): _____

(d) **Partial transmission** (if partial transmission of the execution documents is requested, indicate the time limit or sequence of the execution): _____

7. **The following persons are to be present:** _____

8. **The request is confidential for the following reasons** (only if necessary):

<p>9. Judicial authorities and police agencies concerned (for example, an INTERPOL liaison officer or liaison magistrate):</p> <p>_____</p>
<p>Annexes: cover note, legislation, others.</p> <p>For the requesting authority: _____</p> <p>(Signed) _____ at _____ on _____</p>

2.D.1 (b) *Contents of the request for mutual legal assistance*

If it is drafted correctly, the request for mutual legal assistance shall include all the **information deemed necessary** for it to be executed, namely:

- | |
|--|
| <p>List of necessary information</p> <ul style="list-style-type: none">• Name of the authority presenting the request• Contact information of the requesting authority• Objective and nature of the investigation, prosecution or judicial proceeding• Name(s) and function(s) of the authorities in charge of the investigation, prosecution or judicial proceeding• Legal basis• Grounds for the request: details of the investigations, measures and documents requested• Confidentiality• Information concerning the person being prosecuted• Legal definition of the offence(s)• Description of the essential facts• Purpose for which the measures are requested• Time limit for execution of the request• Signature of the issuing authority, date and official seal |
|--|

- **Designation of the authority presenting the request.** As a general rule, requests are presented by the judicial authorities. In some countries, in particular countries of common law tradition, that are not familiar with the function of an examining magistrate, either the police or prosecutors, or the two authorities together, present the request for mutual legal assistance.

If the authority issuing the request wishes to assist in the execution of its request or that investigators be present, it is advisable to request authorization to assist in the execution and to mention the identity of persons who are the subject of the request and, if necessary, their precise status. If the authority issuing the request

wishes to receive, or its representative to receive, the results of the execution of the request without delay, this shall be stated accordingly.

- **Contact information of the requesting authority:**
 - *Surname(s)*
 - *Name(s)*
 - *Mailing address*
 - *Telephone and facsimile numbers*
 - *Electronic mail (e-mail) address*
 - *Language(s) for contact*
 - *Importance of the contact information.* If the authority of the requested State needs additional information in order to direct the request to the competent executing authority, it will not be able to execute the request before having obtained it. Without the requesting authority's telephone number and e-mail address, it will have to make its request through official channels, which is often a slow process. Similarly, if the requested authority realizes that additional measures are necessary for the execution of the request, it may wish to suggest them to the requesting authority; without precise contact information, it will once again have to use official channels, instead of obtaining a quick response, if necessary during the execution of the request.
- **Objective and nature** of the foreign investigation, prosecution or legal proceeding to which the request is related.
- **Names and functions** of the authorities in charge of the foreign investigation, prosecution or legal proceeding to which the request is related. (See section 2.D.2 below concerning contact information on the recipient authority.)
- **Legal grounds** on which the request is based. It is essential to specify which international convention or conventions the request for mutual assistance is being based on. Identification of the relevant instrument enables the requested authority to determine the scope of its legal obligations and, if necessary, the only grounds that may be invoked for a complete or partial refusal to execute. If no bilateral or multilateral convention on mutual legal assistance is applicable in the relations between the requesting State and the requested State or if there are no relevant conventions in the specific case, it is then necessary to present the request on grounds of reciprocity.
- **Grounds for the request: details of the investigations, measures and documents requested**
 - *Description of the assistance required and the official measures requested and of any particular procedure the requesting State wishes to see followed*
 - (a) For example, a request requiring the witness(es) to be under oath, the preparation of a verbatim transcript of the questions and answers instead of simply minutes, how a photograph should be taken or

an analysis verified and certified or the certification of the procedure to secure the items requested and transfer them to the requesting State;

(b) For example, in the event of a request for hearing or questioning, a list of questions should be drawn up, including, if necessary, possible follow-up to the answers given by the person to be heard or questioned. The request should provide all the relevant elements for the purpose of identifying or locating the person to be heard;

(c) In the event of a request for search and seizure, it is advisable to describe accurately the articles of evidence sought and the place where the investigation has to be carried out: “search at such a place” or “seizure of such item(s) or proceeds that may be discovered” (see section 2.B.3 above);

(d) Furthermore, if a bank account is to be requisitioned, it is advisable to identify the account as precisely as possible; in a request for telephone tapping, it is advisable to specify, if possible, the number of the telephone line.

The phrase “carry out any other measures useful in discovering the truth (or in the suppression of the offences concerned by the present request)” can be beneficial and enable the requested authority in charge of the prosecution to carry out the investigations necessary to reach the objectives of the request. The “mandate” entrusted to the foreign authority should also be defined very precisely by using the following wording “carry out any other measures useful in the execution of the measures requested”. Thus, the requested authority will only be able to carry out minor investigations not expressly set forth in the request, but necessary for its execution, such as verification of an address or identity.

When it is possible to request the application of a procedural rule in compliance with the legislation of the requesting authority, it is advisable to supply all the relevant details concerning the particular procedural rule the requesting authority wishes to see applied in execution of its request and to explain it in detail: right to counsel, swearing in, notification of the charges and so on (see section 2.D.4 below). In addition, it is recommended that the texts to be applied be included with the request.

- **Confidentiality.** It is often necessary to include details regarding the confidentiality of the request (see section 2.D.3 (c) below).
- **Information concerning the person being prosecuted.** This should include, if possible, the identity, address and nationality of any person mentioned in the request.
- **Legal definition of the acts** in the requesting State, with the transmission of a **copy of the relevant criminal statutes**. In fact, although it is not obligatory, the provision of texts that criminalize and punish the offences in relation to which the request is made assist the authority receiving the request in ensuring that: (a) its public order is not endangered by the request; and (b) the condition of dual criminality, when it exists, is fulfilled.
- **Description of the essential facts** (place, date and circumstances of the offence)

- The purpose of including an *account of the facts* in the request for mutual assistance is to show the need for the investigation and for the measures requested, as well as their compliance with the applicable provisions of the universal instruments and with the law of the requested State. The description of the facts may be succinct, but must be sufficiently detailed to indicate how the measures requested are related to the prosecution being carried out by the requesting authority. This description of the grounds for the request will obviously be shorter if the measures requested are not coercive and do not require extensive resources. On the other hand, it will need to be carefully prepared if the measures requested require considerable resources and are of a coercive nature.
- A *carefully prepared explanation of grounds* can be structured in the following manner:
 - (a) A summary of the results of the investigation;
 - (b) A description of the measures deemed necessary in order to discover the truth;
 - (c) If coercive measures are requested, it is also advisable – and necessary when the request is sent to a common law country:
 - (i) To demonstrate the need for the coercive measure (application of the principle of necessity for requested States that practise non-coercive measures such as “injunctions to produce”) and in proportion to the gravity of the offence in question (*in abstracto*, length of the sentence incurred; *in concreto*, demonstration of disturbance of public order, of prejudice suffered by the victim(s), etc.);
 - (ii) To indicate why it is reasonable to believe that the items of evidence are to be found in the designated place or in the possession of the designated person (demonstration of the existence of probable cause, which assures the requested State that the request will not resemble a “fishing expedition” prohibited by its law (see below on what the request may not contain)).

The requesting authority is not required to provide proof of the accuracy of the account described; it is required to present probable cause.

Account of the facts and supplementary request. If a request for mutual legal assistance is issued for the same case several weeks or months after an initial request for mutual legal assistance, it is advisable to re-use the account of the facts and summarize the results of the first request. A simple reminder of the facts, such as “further to my international letter rogatory or my request for mutual assistance of ... in this case, and in addition to the investigations already carried out, I have the honour to request you to ...”, is thus advised against. The new request may in fact not be assigned to the same authority as was the first request and the second sub-delegated authority may not yet be familiar with the facts of the case.

- **Purpose** for which the testimony, information or other measures are requested.
- **Time limit for the execution of the request.** It is advisable to specify the time limit within which the request should be executed and the reasons for such

time constraints, in particular if urgent action is required (grounds for deadline). It should be noted that, in matters of terrorism, a request is in principle very urgent.

- **Signature of the issuing authority, date and official seal.**
- Naturally, the **standard complimentary close**, at the end of a request for mutual assistance, is strongly recommended. It may read as follows: “The magistrate is grateful to the competent high authorities for their help and assures them of his/her reciprocity and consideration.” It should be noted that the assurance of reciprocity is recommended, even if the request is based on a mutual assistance convention.

Additional information, such as a case reference number, can be included **for the administrative convenience** of the requesting State.

- **What the request may not contain.** The requesting authority cannot be required to indicate precisely what the request is supposed to help discover. The unfocused seeking of evidence (“fishing expedition”) is unacceptable, however. Evidence-gathering cannot be requested haphazardly, without specific clues (e.g. freezing all the assets in a State and providing records, in the absence of more precise details concerning the place where such assets are to be found).
- **Sample request for mutual legal assistance⁸⁵**

The elements below should be included in a request for mutual legal assistance:

Requesting authority	<ul style="list-style-type: none"> • Official designation of the requesting authority • Name of the representative(s) • Function(s) (title) • Reference of texts giving jurisdiction and powers to the requesting authority • Case reference number • Mailing address • Telephone number • Facsimile number • E-mail address • Contact information of the person(s) to be contacted • Language(s) for contact
Names and functions of the authorities responsible for the foreign investigation, prosecution or legal	<ul style="list-style-type: none"> • Name • Function (title)

⁸⁵ This is not an official model for a request.

<p>proceeding to which the request is related</p>	<ul style="list-style-type: none"> • Mailing address • Direct telephone number • Direct facsimile number • E-mail address of the person(s) to be contacted
<p>Legal grounds on which the request is based</p>	<ul style="list-style-type: none"> • Multilateral convention • Bilateral treaty • Arrangement • Reciprocity
<p>Objective and nature of the foreign investigation, prosecution or legal proceeding to which the request is related</p>	<ul style="list-style-type: none"> • Objective • Nature
<p>Reason for the request</p>	<ul style="list-style-type: none"> • Description of the assistance requested, of the official measures requested and of any specific procedure that the requesting party would like to have followed
<p>Personal details of the person to be heard or prosecuted</p>	<ul style="list-style-type: none"> • Surname • Name • Maiden name (if applicable) • Alias (if applicable) • Sex • Nationality • Date of birth • Place of birth • Residence or known address • If known, the language or languages that the wanted person understands • Distinguishing features of the wanted person (if necessary) • Photographs and fingerprints of the wanted person (if necessary)
<p>and/or if the request is related to seizure and delivery of items</p>	<ul style="list-style-type: none"> • Description of the items • Place where the items are to be found

Legal definitions of the offence(s) in the requesting State	<ul style="list-style-type: none"> • Offences • “The present request is connected to [number] offences.” • Nature and legal definition of the offence(s) • Applicable legal provisions
Description of the offence(s) committed	<ul style="list-style-type: none"> • Description and circumstances in which the offence(s) were committed • Date and time of commission • Place of commission • Other relevant circumstances (optional information)
Purpose for which the measures are requested	
Time limit for execution of the request	<ul style="list-style-type: none"> • Reasons for time constraint, in particular if urgent action is required
Complimentary close	<ul style="list-style-type: none"> • “The magistrate is grateful to the competent high authorities for their help and assures them of his/her reciprocity and consideration.”
Signature of the issuing authority	<ul style="list-style-type: none"> • Name • Function (title) • Place • Date • Signature and/or official seal

2.D.2. Recipient authority

- **Where there is an instrument of cooperation:**
 - (a) The channel agreed upon between parties should be preferred;
 - (b) Transmission by a central authority, such as that designated by the instrument of cooperation, may be preferred by certain States or in certain cases where it is necessary to follow the request for mutual assistance with particular care or where a requesting magistrate is required to travel.
- **In the absence of a convention**, diplomatic channels may be used and offer a high level of security. Such channels are used when States cooperating with one another have not previously established common legal relations or where one party prefers to use them. However, the obligation for the requesting authority to transmit the original through these channels does not exclude the possibility of transmitting a copy by other means, for example, by facsimile

transmission or the informal and unofficial transmission of a copy to the requested authority, when known.

- Certain mutual assistance conventions provide for the possibility of transmitting a **copy of the request directly to the requested authorities**, the original being transmitted through the usual channels, from central authority to central authority.
- **In case of urgency**, for example, if the witness or offender is liable to leave the territory, a direct transmission from judicial authority to judicial authority may be advisable.

To ensure credibility, urgency may only be invoked when a suspect is being detained in the framework of the case or if there is a risk of the loss of items of evidence being sought. It is advisable to indicate the grounds for urgency in a prominent part of the request.

- **In all cases** it is advisable to indicate the recipient authority in the request:
 - Generally, the request for mutual assistance is addressed “To the competent authorities of the Republic of ... Kingdom of ...”, using the official name adopted by the recipient State in international relations.
 - However, when one is sure of the identity of the competent person who will execute the request (for example, in the event of a supplementary request) and where direct transmission is authorized, it is possible to refer to him or her by name, but still adding, as a precaution, “... or any other competent authority”.
- **The form**
 - The form can be sent as a facsimile or e-mail (for verbal transmission, see section 2.D.3 (a) below).
 - In addition, it is possible to use INTERPOL channels, which are secure.

The recipient authority may transmit an acknowledgment of receipt.

2.D.2 (a) *Diplomatic channels*

This traditional channel of transmission of requests for mutual legal assistance requires several steps: it requires not only the involvement of embassy services,⁸⁶ but also that of the departments of justice and foreign offices of the concerned countries, and inevitably leads to delays. It is for this reason that other entities are often called upon in order to accelerate the procedure. It nevertheless often remains the only channel available (see above). It should be noted that embassies and consulates (to which liaison magistrates are often attached, see section 2.D.2 (d) below) play an important role in offering counsel regarding the content of and procedure for requests for mutual legal assistance.

⁸⁶ As already mentioned, the Vienna Convention on Consular Relations states in article 5: “Consular functions consist in ... transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State.”

2.D.2 (b) *Central authorities*

- **Body for the coordination and follow-up of requests**

- The designation of a central authority for the purpose of mutual legal assistance entails the establishment of a body that will centralize all requests for mutual legal assistance. This body shall ensure the coordination and follow-up of requests received and transmitted. The designation of a central authority responsible for the execution and transmission of requests for mutual legal assistance is a common element included in a number of treaties and arrangements in this field.⁸⁷
- There can certainly be several competent authorities within a State (for example, police authorities or other governmental body). This may be the case in particular in federal or composite States or in States that conduct the foreign affairs of independent territories. It is advisable to send the request to the central authority responsible for mutual assistance in terrorist matters.⁸⁸

A list of national central authorities competent in matters of fighting terrorism is given in annex XVI.

2.D.2 (c) *Role of INTERPOL*

- It should be noted that, in many cases, the national police department acts as the national central bureau for INTERPOL. It also acts as the central authority in the framework of the treaties related to terrorism. (For a list of the national central bureaux designated central authority by their country, refer to the General Secretariat of INTERPOL.)
- Moreover, many conventions provide explicitly that INTERPOL can play a role in the transmission of requests for mutual legal assistance (see annex XVII). It is highly recommended to experts who will use the services of INTERPOL that in this context they specify the applicable convention and refer to the relevant provision authorizing this mode of transmission.
- Lastly, when the services of INTERPOL are used pursuant to these conventions, it is possible, for reasons of confidentiality, rapidity and simplicity of use, for the transmission of the request for mutual legal assistance to be sent electronically through the INTERPOL global police communications system, I-24/7, through the national central bureau or directly by the central authority itself, if right of access has been granted to it by its national central bureau.

⁸⁷ Thus, article 3 of the Model Treaty on Mutual Assistance in Criminal Matters (modified by General Assembly resolution 53/112) provides for the establishment or designation of a national central authority or authorities responsible for processing requests for mutual assistance.

⁸⁸ It should be noted that article 18, paragraph 13, of the Organized Crime Convention provides that each State party shall designate a central authority that shall have the responsibility and power to transmit requests to the competent authorities for execution.

2.D.2 (d) *Liaison magistrates: counsel and expertise in requests for mutual legal assistance*

- **Knowledge of the legal system of the requested and requesting parties.** Thanks to their knowledge of the law and procedure of both their own country and their host country, liaison magistrates are able to remove the principal obstacle that national authorities are likely to encounter when they draft a cooperation request: the misunderstandings created by real or imagined differences between legal systems. Thus, for example, a national authority that wishes to hear a witness who is in another country or to collect items of evidence (bank records, DNA samples, etc.) may well hesitate, owing to lack of knowledge of the domestic law of the requested State, to send an international letter rogatory, when its execution is uncertain.
- **Counselling role.** If a judge can request assistance from a colleague posted in the country concerned by the request for mutual legal assistance, he or she is then able to formulate his or her request taking into account the requirements peculiar to the procedure applied in that country. Thus, in the field of bilateral cooperation in criminal law, liaison magistrates or officers can act as facilitators. Accordingly, an increasing number of magistrates now send to the liaison magistrate via facsimile or e-mail drafts of the letters rogatory they wish to send to the authorities of the other country. Their colleague in the foreign post will then clarify certain points, such as in what capacity a person is to be heard as a witness (simply as a witness or as a suspect), identify the types of evidence required for a search warrant or provide useful telephone numbers. This advisory or even substantive work carried out prior to the transmission of the request for mutual legal assistance can pre-empt the need for the foreign authorities to make a request for further information, which would otherwise delay the execution of the letters rogatory.
- **Follow-up to the request.** If the case is urgent, the proximity of the liaison magistrate to his or her colleagues in the host country enables him or her to draw their attention to the need to respond to the request for mutual legal assistance as quickly as possible. The competent authority that made the request for assistance may, with the help of the colleague posted to the receiving State, follow the execution of its request. Moreover, should difficulties arise in the execution of the request, it can swiftly be informed of the reasons for the problem. Such information is particularly useful if one or more of the persons being prosecuted are in pretrial detention.

2.D.3. Form of the request for mutual assistance

2.D.3 (a) *Verbal requests (subject to written confirmation) or written requests*

- **In theory, requests are made in writing.** Requests for mutual legal assistance shall be sent in writing or by any other means that produces a written record.
- **In case of urgency, a verbal request may be made, followed by written confirmation.**⁸⁹ In practice, when the requesting authority knows its

⁸⁹ The provisions complementary to the Model Treaty on Mutual Assistance in Criminal Matters added the following footnote to the end of article 5, paragraph 2: "Countries may wish to provide that the request may be made by modern means of communication, including, in particularly urgent cases, verbal requests that are confirmed in writing forthwith."

counterpart in the requested State or States, in particular in the case of neighbouring States or States between which requests are regularly exchanged, the request is first made orally and then followed by written confirmation.

2.D.3 (b) Language of the request

- **Principle.** In the absence of a convention and provisions on this issue, a translation in the language of the requested State is often necessary or required. If there is a convention, the translation in the language of the requested State is not always required: some States accept requests in a language other than their official language, as stated in the applicable text.
- **A language acceptable to the requested State.** In the absence of a provision, it is essential to communicate with the authorities of the requested party called upon to act, often urgently, in a language that they know. Thus, the national language of the requested party is the most acceptable, but it is often necessary, for practical reasons, to offer a wider selection to the requesting parties.

Problems may arise when translations into the language of the requested State are made by someone who is not a legal expert and thus likely to make inaccurate translations or misinterpretations, which can complicate the execution of the request.⁹⁰ For this reason, it is advisable to pay particular attention to the legal terms used in the translation.

If the language used in the request is not acceptable to the requested party, translation expenses will be added to the cost of the mutual assistance.

Remarks

- The request drafted in the language of the requested State should be attached to the translated request for mutual assistance and a copy of the translated request should also be kept throughout the proceedings of the requesting State.
- If the request for mutual assistance has to be certified/legalized, then it should be accompanied by a certified copy of the document, as well as a translation of it.

- **Avoiding legal expressions characteristic of national law and Latin expressions.** Legal expressions characteristic of national law should be avoided in the drafting of requests, including when they are translated. Thus, it is advisable to write, for example: “formally accuse a person by legal process” instead of “indict”; “detain a person at the police station for the purpose of the

⁹⁰ For example, a French-speaking requesting authority formulating a request to a Spanish-speaking requested authority may ask a letter rogatory to *entendre* a specific person, which means to question or hear the person; the Spanish translator may use the verb *oir*, which does mean “to hear”, but only according to the literal sense of the word, that is, to hear a noise or a sound. *Entendre* should be translated as *interrogar* (for an indicted person) or as *tomar declaración de* (for a witness). The French-speaking authority may also request that a person be *interpellé* to be *entendu*. If the translator translate literally, he or she will use the verb *interpellar*, which in Spanish means “to ask questions”, whereas the correct translation is *detener*.

investigation” instead of “place in police custody”; or “obtain his or her explanations of those elements” instead of “interpellate on the facts”.

2.D.3 (c) Confidentiality

- **Request for confidentiality.** It may be useful to make a formal request, when necessary, that the request for mutual assistance and its execution be carried out confidentially.
- **Confidentiality may be provided for in the instruments.** Thus, article 12, paragraph 3, of the Financing of Terrorism Convention states:

“The requesting Party shall not transmit or use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.”

- **Request for secrecy concerning the request and the contents of the mutual assistance.** The requesting party may require that the requested party keep the request and its contents confidential, except for measures necessary for its execution. If the requested party cannot satisfy this request, it so informs the requesting party as soon as possible. For example, if some of the proceedings followed in the requested party are public and breach the confidentiality of the request beyond what is necessary, the requesting party, after having been informed by the requested party, shall determine whether the request should be executed as it was initially presented or in a new form.

2.D.3 (d) Legalization/certification of copies and apostille

Legalization/certification and the apostille are formalities that may be provided for in certain conventions. In practice, **legalization and certification**, which can be considered equivalent, concern States that are not linked by any mutual criminal assistance convention. The operation consists of affixing, by the competent services of the foreign office and/or the official representative of the requesting State in the requested State, of seals formally establishing that the documents transmitted have been issued by a competent authority.

- **Example of certification**⁹¹

The elements below should be included in a certification document:

State of origin	
Competent authority delivering the certificate	<ul style="list-style-type: none"> • Name • Address • Telephone/facsimile/e-mail
Authority certifying the authenticity (a) Authority responsible for establishment of the authentic document (if applicable)	<ul style="list-style-type: none"> • Name and designation of the authority • Location of the authority

⁹¹ This is not an official model for certification.

(b) Authority that recorded the authentic document (if applicable)	<ul style="list-style-type: none"> • Name and designation of the authority • Location of the authority
Authentic document	<ul style="list-style-type: none"> • Description of the document • Date: <ul style="list-style-type: none"> (a) On which the document was established (b) On which the document was recorded, if different • Reference number • The parties concerned
Reference text (if applicable)	
Signature of the certifying authority	<ul style="list-style-type: none"> • Place • Date • Signature and/or official seal

- An apostille is appended in application of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents, done at The Hague on 5 October 1961, which abolished the requirement of authentication of foreign public documents⁹² for States parties,⁹³ or the bilateral conventions that provide for an apostille. The main purpose of the so-called Apostille Convention is to facilitate the circulation of public documents issued by a State party to the Convention that need to be produced in another State party.

➤ *Documents covered.* The Apostille Convention applies only to public documents,⁹⁴ that is, documents emanating from an authority or an official of a jurisdiction of the State (including from an administrative or constitutional jurisdiction, from the office of the public prosecutor, from a clerk of a court or process server (*huissier de justice*)); administrative documents; notarial acts; and official declarations, such as official

⁹² United Nations, *Treaty Series*, vol. 527, No. 7625 (see http://www.hcch.net/index_en.php?act=conventions.text&cid=41 for the text of the Convention, the list of States parties and a list and contact information of competent authorities).

⁹³ For an up-to-date list of States parties to the Apostille Convention, see the Hague Conference on Private International Law website at www.hcch.net.

⁹⁴ The main examples of public documents for which apostilles are delivered include birth, wedding or death certificates; excerpts from trade registers or other registers; patents; decisions handed down by a court; notarial acts (including certifications of signatures); and school or university diplomas awarded by a public institution. (As regards diplomas awarded by a private institution, the apostille can only be delivered for the purpose of certifying the signature and the capacity of the notary once the diploma has been authenticated by a notary or of certifying the signature and the capacity of the signatory of a certified true copy.)

certificates recording the registration of a document or the fact that it was in existence on a certain date, and official and notarial authentications of signatures.

- *Documents not covered.* The Convention does not apply to documents executed by diplomatic or consular agents, nor to administrative documents dealing directly with commercial or customs operations (e.g. certificates of origin or importing or exporting licences), as such documents are for the most part exempt from legalization.
- *The appending of an apostille by a competent authority and the requirement to keep a register.* The apostille is appended by the competent authority⁹⁵ on the public document itself or on an “allonge”. Each competent authority designated shall keep a register or index card on which it shall record the certificates issued. This register or index card may be consulted by any interested person who wishes to verify whether the particulars in the apostille correspond to those in the register. Given technological advances, the register can now be kept in electronic form.
- *Effects of an apostille.* The only effect of an apostille is to certify the authenticity of the signature, the capacity in which the person signing the document acted and, where appropriate, the identity of the seal or stamp that it bears. An apostille is not concerned with the actual content of the attached public document.

• **Model for an apostille⁹⁶**

Apostille	
1. Country: _____	
This public document	
2. has been signed by _____	
3. acting in the capacity of _____	
4. bears the seal/stamp of _____	
Certified	
5. at _____	6. the _____
7. by _____	
8. Number _____	
9. Seal/stamp: _____	10. Signature: _____
_____	_____

⁹⁵ Each State party to the Convention is required to designate the authorities in its country, ex officio, which are entitled to issue apostilles.

⁹⁶ Based on the UNODC Mutual Legal Assistance Request Writer Tool.

- **Model for approval and certification of the authenticity of legal documents⁹⁷**

<p style="text-align: center;">Approval and certification of the authenticity of legal documents</p> <p>I, [...], judge/magistrate/judicial officer of the court, acting in the name of the State [...], certify that:</p> <ol style="list-style-type: none">1. The attached testimony:<ol style="list-style-type: none">(a) Is an exact transcription of that which has been directly reported to me;(b) Has been obtained in conformity with the procedures recognized by the courts as conferring validity to the testimony;2. Each item attached to the present testimony corresponds to the item designated in it. <p>Read and approved:</p> <p>Place: _____</p> <p>Date: _____</p> <p>By: _____</p> <p>Number: _____</p> <p>Seal/stamp:^a _____</p> <p>Signature: _____</p> <p>^aAn official seal of the State, court of the State or competent international court or public authority or administration responsible for legal affairs.</p>
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- **Model for certification of authenticity of legal documents⁹⁷**

<p style="text-align: center;">Certificate of authenticity of legal documents</p> <p>I, [...], declare that I exercise the function of [...] in the name of the Government of [...] and in that capacity am authorized in accordance with the laws of this Government to declare that the documents listed below:</p> <ol style="list-style-type: none">1. Are pre-certified copies of the original documents that may be registered in a public establishment.2. Correspond according to the laws of [...] to the documents that shall be registered and indexed. <p>Description of the attached documents</p> <p>List of documents: _____</p>
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- **Certain conventions exclude the need for such formalities.** For example, for member States of the Council of Europe and in the framework of the European

⁹⁷ As shown in the annex to the Apostille Convention. The certificate shall be square, with sides of at least 9 cm.

Convention on Mutual Assistance in Criminal Matters (article 17), neither legalization, certification nor apostille are required.

2.D.4. Applicable law: execution of the request in accordance with the law of the requesting State or the requested State

- **Principle of compliance with the law of the requested Party.** The law applicable in the execution of the request for mutual assistance is that of the State in which the request is executed, which is to say that it is executed in compliance with the domestic law of the requested party. However, for execution to be acceptable, procedures specified by the requesting party may be followed:
 - The purpose of a request for mutual legal assistance is to facilitate the investigation, prosecution or legal proceedings in the territory of the requesting party. The mutual assistance provided will only be relevant if it is in a form usable by the requesting State.
 - Accordingly, whenever possible, it is advisable to follow the procedures specified in the request by the requesting party (so that, for example, the items of evidence obtained for criminal proceedings in the territory of the requesting party are acceptable under the rules of evidence applied by the courts of that party).
 - In doing so, parties may be following procedures that differ from those they would normally follow for purely domestic cases, providing they do not violate their national law. This can be done on the grounds of reciprocity or international courtesy.
 - Where it seems difficult to satisfy a request, it is advisable for the requesting and requested authorities to stay in contact in order to try to find a satisfactory course to follow.
- **Example of the application of the procedural rules of the requesting State**

Subparagraph 2 of article 694-3 of the French Code of Criminal Procedure enables the instructing magistrate or the prosecuting attorney to implement foreign procedural rules under certain conditions, namely, if the request for legal assistance specifies this, it is executed in accordance with the procedural rules indicated by the competent authorities of the requesting State. This provision follows article 4 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, which requires the requested State to respect the formalities and procedures expressly indicated by the requesting member State. It is no longer a matter of finding the domestic procedure most appropriate to the applicable rule through an obligation of means, but rather to implement, under certain conditions, the applicable rule through an obligation of results. Similar provisions can also be found in mutual assistance conventions linking Australia to France and Canada and the United States.⁹⁸

⁹⁸ The Treaty between the Government of the French Republic and the Government of Canada on mutual assistance in penal matters, signed at Paris on 15 December 1989 (United Nations, *Treaty Series*, vol. 1644, No. 28260), applicable since 1991, stipulates that, if the legislation of the requested State does not exclude it, a mutual assistance request may be executed in the

- **Flexibility at the operational level.** The need for flexibility is not limited to the authorities called upon to execute a request for assistance. Requesting authorities must also try to submit materials that will meet the requirements of the requested State and will be workable and useful to authorities in a State with a different legal tradition. Submitting a request that meets all the requirements of the domestic law of the requesting State but none in the requested State does little to facilitate the provision of assistance. It is thus useful, if at all possible, for the requesting State to supply the information required by the law of the requested State.

2.D.5. Follow-up to the request

2.D.5 (a) *Deadline for the execution of the request*

- **As quickly as possible and with urgency if necessary.** The requested party executes the request for mutual legal assistance as quickly as possible and where possible takes into consideration any deadline suggested by the requesting State that is justified in the request. The requested party also answers any reasonable requests from the requesting party concerning progress in the execution of the request. When specified in the request, it is advisable to proceed with urgency, especially considering that the fight against terrorism is in itself urgent.
- **Postponement of execution or conditional execution.** If the offences relating to which the request was made are being prosecuted in the requested State, the latter is not authorized to refuse to execute the request, but it may postpone it or defer transmittal of the requested documents or place any condition on its execution of the request that it deems necessary.
- **End of the mutual assistance process.** When the mutual assistance is no longer necessary, the requesting State party shall inform the requested State party to that effect without delay.

2.D.5 (b) *Complementary information*

The requested authority may ask for **additional information** it considers necessary for the execution of the request in compliance with its legislation or where it can facilitate the execution of the request. For example, a search may require, under the domestic legislation of the requested party, that a warrant be issued by a judge and the procedure governing this type of mutual assistance may require specific information not included in the initial request.

In addition, circumstances may change. Thus, a request for identification or location of items may be difficult to execute as a result of an event subsequent to the request, for example, if persons suspected of being in possession of the items

manner specified by the requesting State. Applicable since 1994, the Treaty between the Government of Australia and the Government of the French Republic on mutual legal assistance in criminal matters (United Nations, *Treaty Series*, vol. 1819, No. 31154) signed at Paris on 14 January 1993, stipulates that if the requesting party expressly requests that an activity be carried out in a specific manner, the requested party shall execute such a request as long as it is compatible with its legislation. Finally, article 9 of the Treaty on Mutual Legal Assistance in Criminal Matters between France and the United States of America, done at Paris on 10 December 1998, in force since 1 December 2001, also contains such a provision.

have left the territory. In such a case, the requested authority may need additional, or more detailed, information concerning how best it can provide its assistance.

2.D.5 (c) *Communication and use of information provided*

- **Rule of limited use.** The requesting party may not, without the consent of the requested party, use or transmit information or evidence provided by the requested party for investigations or legal proceedings other than those stated in the request. The same principle applies to the transmission of the information or items of evidence to a third party. However, they may be used as evidence for acquittal in other proceedings, on condition that the requested party is informed of it beforehand or, in an emergency, without delay after its use.
- **Justification.** The party that issues the request must include information concerning the objective and the nature of the investigation or the information on which the request is based. For example, it can indicate that the request requires the recording of a specific statement relating to the prosecution that is about to be instituted against a suspect designated by name before a criminal court of the requesting party. In such a case, the police authorities of the requested party cannot, when the request is presented to them, predict how the situation will evolve. The trial that is about to begin may eventually involve other defendants or other charges. Any rule that could unduly limit the use of the information obtained as a result of the request would restrict the effectiveness of the mutual legal assistance system.

On the other hand, the requested party also has legitimate interests that need to be protected. For example, it may be that a party has a rule that rigorously protects bank secrecy, which it had to depart from in a case involving terrorism, as required by article 12, paragraph 2, of the Financing of Terrorism Convention. The fact that it has disclosed bank statements that can be used as evidence in a trial in a case involving terrorism does not signify that the party has abandoned its general rule and that it will consequently allow those same statements to be used in a subsequent trial for another offence.

2.D.5 (d) *The final destination of transmitted documents and items transmitted*

It may be decided that the original items, files or documents provided to the requesting State should be returned to the requested State as soon as possible or, on the contrary, the requesting State may withdraw the request before its execution.⁹⁹

2.D.5 (e) *Possibility of postponing mutual assistance*

- **Obstructing an investigation.** Mutual legal assistance may be postponed by the requested State party on the ground that it would hinder an ongoing investigation, prosecution or a legal proceeding.
- **Solution: mutual assistance subject to conditions.** Before postponing execution, the requested State and the requesting State should examine whether

⁹⁹ As an example, article 7 of the Model Treaty on Mutual Assistance in Criminal Matters deals with the issue of the final destination of the documents and items transmitted to the requesting State.

mutual assistance can be granted subject to conditions they may deem necessary (which could be to wait until the difficulties eventually cease to exist or lose some of their importance). If the requesting State party accepts the mutual assistance on those conditions, then it will have to comply with them.

Information exchanges between the parties often enable the competent authorities of the interested States to act in a complementary fashion and thus to ensure that the measures adopted by one State do not interfere with ongoing activities of the other. It should be noted that the fact that the offences that have led to the request are being prosecuted in the requested State does not authorize it to refuse to execute the request, but it does give it the right to postpone it, including transmission, or to make execution subject to conditions it deems necessary.¹⁰⁰

2.D.5 (f) *Denial or lack of an answer*

Reminder

- Bar on denying mutual assistance on political or fiscal grounds.¹⁰¹
- Acts of terrorism are not political offences.

In practice, refusals to execute a request are most often the result of a lack of understanding concerning the request for mutual assistance rather than an unwillingness to assist. The requested authority should not hesitate to contact the requesting authority in order to obtain any clarification necessary.

- **Bar on denial on grounds of the political or fiscal nature of the offence.** No denial of assistance may be based on the ground that the offence set forth by the resolutions or the universal instruments is of a political or fiscal nature, nor that it is inspired by political motives (see sections 1.C.4 and 2.C.3 above).

None of the offences set forth in the universal instruments related to terrorism shall be regarded for the purposes of mutual legal assistance as a political offence or as an offence related to a political offence or as an offence inspired by political motives. Accordingly, a request for mutual legal assistance based on such an offence may not be denied on the sole ground that it concerns a political offence or an offence related to a political offence or an offence inspired by political motives.¹⁰²

None of the offences related to the financing of terrorism shall be regarded, for the purposes of mutual legal assistance, as a fiscal offence.¹⁰³

¹⁰⁰ Such are, for example, the provisions of article 7, of the mutual legal assistance treaty between France and the United States (see footnote 98 above).

¹⁰¹ Claims of political motivation shall not be recognized as grounds for denying requests for mutual assistance concerning alleged terrorists. This obligation is included in the Financing of Terrorism Convention and the International Convention for the Suppression of Terrorist Bombings. The International Convention for the Suppression of Acts of Nuclear Terrorism and the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol of 1988 for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf contain a similar bar.

¹⁰² See, for example, the Financing of Terrorism Convention, article 14.

¹⁰³ *Ibid.*, article 13.

This results in the exclusion of certain justifications for denial that may be present in different mutual legal assistance treaties and arrangements.

- **Acceptance on certain conditions.** Before denying a request for assistance, the requested State shall consult with the requesting State to examine whether assistance can be granted subject to such conditions as the requested State deems to be necessary. If the requesting State accepts the mutual assistance on these conditions, it will then have to comply with them.
- **Justification and causes for denial**¹⁰⁴
 - *Justification.* Any denial of mutual legal assistance must be justified. This is in the interest of good relations and the proper functioning of mutual legal assistance arrangements.
 - *Refusal: limitation of causes for denial*

For the needs of the fight against terrorism, it is advisable to interpret the traditional justifications for refusal to provide mutual assistance very strictly. Accordingly, mutual assistance may be granted on condition that a guarantee is given to respect the public order or other essential interests of the requested State.

- Mutual legal assistance may be refused if the requested State party considers that the execution of the request may undermine its sovereignty, security, public order or other essential interests. It could be denied, for example, where there are substantial reasons for believing that the assistance requested would facilitate proceedings taken against a person because of his or her race, religion, nationality or political views (“non-discrimination clauses”), or also if the person could be exposed to cruel, inhuman or degrading punishment in the requesting State. However, the concerned States may agree to international cooperation in criminal matters, provided that the requesting State gives the necessary guarantees that it will not use such types of punishment.
- **Other traditional justifications for denial that are not relevant in the fight against terrorism**
 - *Absence of dual criminality.* The absence of dual criminality should not be used as a ground for refusing a request for mutual legal assistance. The authorities of the requested State are not bound by the legal definition of the requesting State: they must verify that the offences mentioned in the request for mutual assistance constitute a criminal offence under their own law.
 - *Formal/material irregularity.* An irregularity in the transmission of the incoming request for mutual assistance should not cause the measures taken in execution of the request to be nullified.¹⁰⁵ This rule is justified

¹⁰⁴ These are cited in article 4 of the Model Treaty on Mutual Assistance in Criminal Matters. See, for a commentary, the *Revised Manuals on the Model Treaty ...*, pp. 86 ff.

¹⁰⁵ For example, the French Court of Cassation judged that the Examining Chamber was not competent to evaluate the modes of transmission of incoming requests for mutual assistance, stating that an examining chamber shall not without exceeding its powers evaluate the modes of the issuing or transmission of such a request (unofficial translation) (Crim. 4 November 1997, *Bulletin des arrêts de la Chambre criminelle*, n° 365).

by the fact that the national authorities of the requested State would not be in a position to condemn the violation of rules that should be respected by the competent authorities in the requesting State, other than by simply refusing to execute the request. As regards material irregularity, the scope of application of conventions concerning mutual assistance in criminal matters depends on the compliance of the requests for mutual assistance with substantive conditions, the non-respect of which could lead the requested State to refuse execution of the request. However, the scope of application of the conventions is often defined very broadly as regards what measures can be requested. Thus, Security Council resolution 1373 (2001) and the universal instruments in the fight against terrorism require the “greatest measure of mutual legal assistance possible”. This provision provides a basis for a request for investigation, even if it is not provided for explicitly in the applicable convention. The judicial authorities may decide – as regards what measures are requested – that what is not expressly excluded from the convention is therefore included.¹⁰⁶

2.D.5 (g) Immunities

- **Immunity of the witnesses, experts or other persons assisting.** A witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that State by reason of any acts, omissions or convictions that preceded his or her departure from the territory of the requested State.

End of immunity. Such immunity shall cease when the witness, expert or other person having, for a period of 15 consecutive days or for any period agreed upon by the parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, been free to leave, has nevertheless remained voluntarily in the territory of the requesting State or, having left it, has returned of his or her own free will.¹⁰⁷

- **Diplomatic immunity.**¹⁰⁸ Diplomatic agents shall enjoy immunity from the criminal jurisdiction of the receiving State. The immunity of a diplomatic

¹⁰⁶ For example, the French Court of Cassation judged, in a case in which the applicable convention did not include such an introductory condition, but only an article stating, among other provisions, that “the requested State executes the mutual assistance in criminal matters of the requesting State in a manner provided for by its law”. The Court of Cassation also held that the fact that the measure requested was not expressly provided for should not be interpreted as prohibiting its request or execution. The party appealing criticized the Examining Chamber of the Second Degree for having confirmed the ruling of the French investigating magistrate, in violation of article 23 of the Franco-Senegalese mutual assistance convention, which only authorized, according to the claimant, the issuing of international letters rogatory for the purpose of hearing witnesses. The criminal court considered that article 23 of that convention had been interpreted correctly, as its general wording did not exclude the notification of the charges (Crim. 30 March 1999, *Bulletin des arrêts de la Chambre criminelle*, n° 60).

¹⁰⁷ Such are the provisions of the Organized Crime Convention (article 18, paragraph 27) and of the 1988 Convention (article 7, paragraph 18).

¹⁰⁸ Vienna Convention on Diplomatic Relations of 1961 (United Nations, *Treaty Series*, vol. 500,

agent from the jurisdiction of the State does not exempt him from the jurisdiction of the sending State. The immunity from jurisdiction of diplomatic agents may be waived by the sending State. Such a waiver must always be express.

2.D.6. Cost of mutual legal assistance

- **Ordinary expenses: borne by the requested State.** Ordinary expenses incurred in the execution of a request are borne by the requested State party, unless otherwise agreed upon by the States parties concerned. The purpose of this rule is to simplify procedures, based on the hypothesis that a balance will eventually be reached, as States will at some point be both requested and requesting. However, in practice this balance does not always exist and requests are often one-sided. Accordingly, parties may decide to make an exception to the general rule, including for ordinary expenses.
- **Extraordinary expenses: agreement between the parties.** If expenses of a substantial or extraordinary nature are or will be required in order to execute the request, the parties shall consult in advance to determine the terms and conditions on which the request shall be executed as well as the manner in which the costs shall be borne.¹⁰⁹ This can happen, for example, where assistance is requested for the purpose of finding and producing commercial records, a process that can require in-depth analysis of bulky financial statements by specialized investigators and thus incur substantial costs.

In practice: agreements between parties. Nevertheless, it is often difficult to distinguish between ordinary and extraordinary expenses and the amounts of money involved may vary considerably for States having reached different levels of economic development. In practice, consultations concerning who is responsible for the cost of the mutual assistance should be left open so as to facilitate the assistance and, in particular, if the requesting State has more extensive resources at its disposal than the requested State, then the former should accept to bear the cost.

- **Specificity of freezing and confiscation.** The development of assistance involving freezing and confiscation of the proceeds of crime adds another dimension to the issue of mutual assistance costs. The freezing of assets can in fact engage the liability of States, in particular if the item frozen is damaged or if the freezing causes its value to diminish. This type of risk also affects domestic investigations and prosecutions where measures of freezing and confiscation are requested, but the problem is particularly delicate where the freezing or seizure procedure is based on a request for mutual assistance. As mentioned above, mutual legal assistance treaties generally provide that the requested State will bear the expenses for ordinary measures of execution (often including specific exceptions for travel expenses and expert fees), but that extraordinary expenses and substantial costs shall be discussed between the parties. These provisions of a general nature nevertheless do not settle the issue of liability or compensation in the framework of requests for freezing and confiscation of proceeds of crime. At present, mutual legal assistance treaties

No. 7310).

¹⁰⁹ See article 19 of the Model Treaty on Mutual Assistance in Criminal Matters.

do not provide for this and leave the parties to settle the question on a case-by-case basis.

- **Example**

The *Guidelines on the Apportionment of Costs Incurred in Providing Mutual Assistance in Criminal Matters* drawn up in the framework of the Harare Scheme (see section 1.B.5 above) and adopted by Commonwealth Ministers of Justice in Port of Spain in May 1999 are an example of progress in this area.¹¹⁰ These *Guidelines* are a result of the concern of the smaller countries of the Commonwealth at the costs of mutual assistance in general and the particular risks resulting from measures of freezing and confiscation. They state in particular that mutual legal assistance cases should be entrusted to attorneys in the private sector and also mention the possibility of obtaining compensation in cases of freezing. In addition to the general problem of resources and costs for smaller countries, these same countries are often in the position of the requested State and much more rarely in that of the requesting State. This imbalance of reciprocity is one of the issues that were considered in the development of the *Guidelines*.

2.D.7. Provision and use of foreign execution material

The items of evidence obtained in a case following the execution of a request for mutual assistance can: (a) enable the requesting authority to expedite, in its own territory, the proceedings that led to the mutual assistance request; (b) prove useful in uncovering the truth in other proceedings, whether or not concerning the same person, whether or not conducted within the same jurisdiction, and thus lead to the transfer of the execution material to other criminal proceedings; and (c) be communicated to or requested by other administrations for use in their own proceedings.

2.D.7 (a) *Provision of material for use in the proceeding for which the request was made*

Use of material depends on how it was provided, whereby it is necessary to distinguish between the “official” mode and the “unofficial” mode.

- “Official” provision of evidence. Two conditions have to be fulfilled for the return of the execution material to be official:
 - (a) Compliance with the provisions of the applicable convention. Should direct transmission be possible, it is advisable to ask for it in the request for mutual assistance;
 - (b) The consent of the requested authority.¹¹¹

The requested authority shall indicate its consent for such direct provision by sending, or where appropriate, transmitting to the requesting authority authenticated copies of the execution material and an official report or an official letter certifying

¹¹⁰ See <http://www.thecommonwealth.org>.

¹¹¹ For example, certain conventions (in particular the Treaty on Mutual Legal Assistance in Criminal Matters between France and the United States of America) make direct return of execution material subject to an agreement between the central authorities.

that they have been sent or transmitted. Once these conditions are fulfilled, the requesting magistrate can, of course, expedite the investigations based on such material.

- “Unofficial” provision of material. In other situations – either (a) where direct transmission is provided for in the convention but the material being sent is not certified, or (b) where the material is certified but the convention does not make provision for direct transmission – even if it is possible to obtain some information from such “unofficially” provided material, the requesting magistrate will not be able to advance the investigation based on it.

2.D.7 (b) *Provision of evidence for use in another criminal proceeding*

- **Principle of the rule of speciality:** see section 1.C.7 above.
- **In practice,** however, one should distinguish between the following two types of situation:

(a) The offence prosecuted does not lie within the scope of application of the applicable convention. The use of the evidence in another criminal proceeding is then prohibited if that proceeding involves an offence for which mutual assistance was excluded;

(b) The offence prosecuted lies within the scope of application of the applicable convention. It is then advisable to distinguish between two categories of criminal proceeding:

(i) A criminal proceeding that involves either the same person who is the subject of the request for mutual assistance but other offences, or the same offences but different persons – a proceeding that could be described as “close” or related to the one for which assistance was requested;

(ii) A criminal proceeding that concerns other persons and other offences – a proceeding that could be described as “different”.

The right of the requesting magistrate to use the execution material in a “close” or “different” proceeding is governed by the *principle of speciality*, even though that principle is not stated with as much force in mutual assistance law as it is in extradition law.¹¹² The principle requires the requesting authority to ask for the authorization of the requested State in order to use the execution material in a “different” proceeding. In the case of a “close” or related proceeding, a request may be made. This request for authorization may be made without particular formalities: an official letter to the authority that sent the execution material and signed by the

¹¹² Certain conventions do mention it, in particular those relating to the suppression of the financing of terrorism (see below), to drug trafficking (the 1988 Convention, article 7, paragraph 13) and to transnational organized crime (the Organized Crime Convention, article 18, paragraph 19). As already mentioned, article 12, paragraph 3, of the Financing of Terrorism Convention states that “the requesting Party shall not transmit or use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party”.

authority that requires its use is sufficient. There is of course no need for such a request if the requested State has already given its consent for such use.

2.E. Joint investigations

- **Possibility of carrying out a joint investigation.** If investigations, **prosecutions** or judicial proceedings are initiated in one or several States, joint investigations may be carried out directly by the authorities responsible for those investigations.
- **Advantages.** This enables the competent authorities to be informed of the **state** of the proceedings and investigations in the countries carrying out the investigations together, which can prevent problems linked to concurrent jurisdiction and *ne bis in idem*.
- **Examples**
 - Certain *international conventions* provide for this type of cooperation, such as the Organized Crime Convention.¹¹³
 - The *bilateral agreement* between the Government of France and the Government of Colombia relative to cooperation in matters of internal security.¹¹⁴

¹¹³ Article 19 of the Convention reads:

“States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.”

¹¹⁴ See <http://www.senat.fr/leg/pjl03-430.html>.

Module 3

Extradition

Objectives

After defining extradition, this module of the *Manual* sets out:

- 3.A. To determine the objectives of extradition.
- 3.B. To describe the conditions of provisional arrest for the purpose of extradition.
- 3.C. To determine the details of substance and form of the request for extradition and the recipient authorities.
- 3.D. To identify the applicable law: execution of the request in compliance with the law of the requesting State or requested State.
- 3.E. To examine the outcome of the request.
- 3.F. To determine who should bear the cost of the extradition.
- 3.G. To outline the rules relative to the surrender of the wanted person.

3.A. Goals of extradition

States parties shall afford one another the greatest measure of mutual assistance for all extradition procedures¹ relative to acts of terrorism.

Definition

Extradition is the surrender by a State (the requested State) of a person present in its territory to another State (the requesting State) that seeks the person either in order to prosecute him or her or to enforce a sentence already handed down by its courts.

Reminder

The principle “extradite or prosecute” (*aut dedere aut judicare*) is clearly established in the negotiated universal instruments against terrorism and is also a binding rule, since it is embodied in Security Council resolution 1373 (2001).²

- **Extradition is different from:**

- *Expulsion*, which arises for domestic reasons (often administrative) and consists of enjoining a person to leave the territory where he or she is present without authorization;
- *Repatriation*, which is not in the criminal domain and which consists of ensuring the return of a person to his or her country or place of origin;

¹ See, for example, the rule set forth in article 12 of the International Convention for the Suppression of the Financing of Terrorism.

² See section 1.C.1 above.

- *A transfer*, which is a notion deriving from the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991;³
- *A surrender, as established by the European Union* in the framework of the European arrest warrant, which aims to abolish formal extradition procedures by adopting a principle of mutual recognition of criminal decisions;
- *A surrender, as practised by some common law countries* in the context of a warrant scheme.⁴
- **Extradition may be formulated:**
 - *For the purpose of prosecution*, that is, in order to prosecute an individual suspected of having committed an act of terrorism;
 - *For the purpose of enforcement*, that is, in order to enforce a custodial sentence following the conviction of an individual.

A request for extradition does not constitute a presumption of guilt. The obligation to prosecute if extradition is refused (*aut dedere aut judicare*) does not mean, however, that an allegation proving to have no basis must be brought to court.

3.B. Provisional arrest for the purpose of extradition

- **Request for provisional arrest.** If the circumstances warrant and/or in case of urgency, the legal authority of the requested State may order the provisional arrest of a wanted person before receipt of the formal request for extradition. A request for provisional arrest attests to the existence in the requesting State of a judicial act ordering the arrest or of a conviction. The obligatory elements that the request must contain are specified in a number of multilateral or bilateral treaties on extradition.
- **Transmission of the request for provisional arrest.** A request for provisional arrest can generally be made by any means of transmission producing a hard copy or equivalent. It is generally sent, however, through the channels described below:
 - *Diplomatic channels.* The mandating authority may transmit its request – translated into the language of the requested State – through diplomatic channels, via embassies and consular officers.
 - *INTERPOL.*⁵ The request for provisional arrest may be transmitted in two ways through INTERPOL:

³ This involves the transfer to the International Tribunal for the Former Yugoslavia of a person initially prosecuted by a national jurisdiction, according to the principle of primacy of that Tribunal over national jurisdictions for the prosecution of crimes falling under its jurisdiction.

⁴ For example, the backing of warrants scheme between Australia and New Zealand, which is administered by police forces in the two countries (see <http://www.crimeprevention.gov.au>).

⁵ Most multilateral conventions and some bilateral conventions relating to extradition recognize

(a) At the request of the competent judicial authority, circulation by the national central bureau of the requesting State of a wanted person notice directly through INTERPOL's global police communications system, I-24/7, to all or some of the national central bureaux (at the discretion of the requesting State), with instructions to transmit the request to the appropriate services in the requested State;

(b) Publication by the General Secretariat of INTERPOL, at the request of the national central bureau of the requesting State acting at the request of the competent judicial authority, of a "red notice".⁶ A red notice is a notification sent by INTERPOL on behalf of one of its members, to all of its members, of a request for provisional arrest⁷ against a specific person. A national central bureau wishing to issue a red notice completes a form that contains the elements necessary to constitute a request for provisional arrest in most States.⁸ Once the General Secretariat of INTERPOL has examined the information provided in the form, it publishes the required red notice.

The red notice must contain:

(a) Identity particulars of the wanted person (marital status, nationality, physical description, photograph, fingerprints and a DNA profile);

(b) Judicial information necessary for confirmation of the admissibility of the request by the requested authority (type, date and place of commission of the offence, arrest warrant, authority having issued the warrant and a summary of the details of the offence);

(c) Extradition convention on which the request for provisional arrest is based;

(d) An assurance that extradition will be formally requested by the requesting State in the event of provisional arrest.

The publication of the red notice entails:

(a) Its translation into the four working languages of INTERPOL (Arabic, English, French and Spanish);

(b) Its immediate distribution to all 186 members of INTERPOL through I-24/7.

The red notice is considered valid as a request for provisional arrest in many INTERPOL member countries without it being necessary for the legal authority of

INTERPOL as a channel for transmitting requests for provisional arrest. See annex XVII for details of their provisions; see also section 1.B.2 above and www.interpol.int for more information on INTERPOL.

⁶ For more information on the red notice, see <http://www.interpol.int/Public/Notices/default.asp>.

⁷ The red notice also allows for the simultaneous transmission of a request for transfer of a wanted person on the basis of the European arrest warrant.

⁸ In addition, it is possible, in order to fulfil requirements of confidentiality, rapidity and simplicity of use, for the transmission of the request for provisional arrest to be carried out electronically through I-24/7 by the competent authority itself, provided that right of access to the system has been granted by its national central bureau.

the requested State to obtain confirmation of the validity of the request from the legal authority of the requesting State. In other countries, however, the confirmation of the requesting authority is necessary, but the red notice can still instigate implementation by the requested law enforcement authorities of certain measures, such as location of the wanted person, checks and identification, questioning or placing under surveillance.⁹

In practice, the INTERPOL channel is used routinely when the wanted person has not yet been located. When the person's whereabouts are not known, but there is reason to believe that he or she is in the territory of the requested State, the judicial authority may address its request through both channels of transmission. This allows for execution of the request for arrest on the basis of transmission via INTERPOL in case the person is located before receipt through diplomatic channels of the request for provisional arrest.

- *Direct application to the competent authority.* Transmission of the request can be made directly to the foreign judicial authority wherever a convention provides for this.¹⁰ Such direct transmission is used when the precise whereabouts of the wanted person are known.
- **Transmission deadline of the request.** It is recommended, once the wanted person has been taken into custody for the purpose of extradition, that the transmission deadline for the request for extradition be strictly respected,¹¹ or else the authority that carried out the provisional arrest could set the individual free before receiving the request for extradition.

3.C. Request for extradition

3.C.1. The extradition request form

3.C.1 (a) Contents of the request

- It is essential that the request be formulated, **in writing, in a clear and concise fashion.**

A request for extradition should include the following:

1. *List of required information*

- Designation of the authority presenting the request and certification of its competence
- Contact information of the requesting authority
- Legal basis
- Identity particulars of the person to be extradited

⁹ To determine the position of each country in this respect, refer to the General Secretariat of INTERPOL.

¹⁰ For example, article 16 of the European Convention on Extradition.

¹¹ For example, the European Convention on Extradition provides in its article 16, paragraph 4, for an 18-day time limit, while in bilateral conventions the time limit is often 40 days. In the absence of a treaty, the requirements of the requested State shall be followed.

- Statement of the facts of the case
 - Applicable criminal statute
 - Description of the elements of the charge(s)
 - Arrest warrant or judgement
 - An assurance of respect of the rule of speciality
 - Signature of the issuing authority, date and official seal
 - Standard complimentary close
2. *Documents annexed to the request*
- List of the annexed documents
 - Arrest warrant or judgement
 - Text of the applicable criminal statute
 - Essential documents, if necessary

1. *List of necessary information*

- *Designation of the authority presenting the request and certification of its competence*
- *Contact information of the requesting authority, such as:*
 - Surname(s)
 - Name(s)
 - Mailing address
 - Telephone and facsimile numbers
 - Electronic mail (e-mail) address
 - Language(s) for contact
- *Legal grounds* on which the request is based. It is necessary to refer to the legal international and/or national instrument(s) on the basis of which the request for *extradition* is made. Reference to the relevant instrument(s) enables the requested authority to determine the scope of its obligations. If no bilateral or multilateral convention is applicable in the relations between the requesting State and the requested State, it may be useful to indicate that the requesting country will provide the same assistance for requests for extradition received from the requested country in the future.
- *Identity particulars of the person to be extradited*, as well as any other information that could help establish the identity and whereabouts of the person. It is recommended that as many physical identifying features of the wanted person as possible be mentioned in the file and also, if possible, a photograph and/or fingerprints.

- *A very detailed statement of the facts and the legal definition of the offence(s)* for which extradition is requested.
- *References to the laws under which the charge is made*, so that the extraditing authority may take them into account. Thus, for example, in common law countries, the extraditing judge examines the contents of the file in order to decide if the charges against the person concerned are sufficient, firstly, to detain him or her and, secondly, to authorize his or her extradition.
- *Details of the arrest warrant.*
or
- *Details of the convicting judgement.*
- *An assurance of respect of the rule of speciality.*
- *Signature* of the issuing authority, date and official seal.

2. *Documents annexed to the request*

- *List of the documents (numbered) enclosed.*
- *Arrest warrant.* If the request is for the purpose of prosecution, it shall also include:
 - A copy of the arrest warrant issued by a judge, prosecutor or any other competent authority of the requesting State;
 - Proof that the arrest and detention of the wanted person are for purpose of a trial, including the proof that the wanted person is indeed the person referred to in the arrest warrant.
- *Text of the applicable criminal statute, including the penalties incurred.*
- *Copy of the judgement.* If the request is for the purpose of execution, it shall also include:
 - A copy of the court judgement of the requesting State;
 - Proof that the wanted person is indeed the person referred to in the convicting judgement.
- *Essential documents* (copies) of the prosecution file proving the charges against the person concerned. It is advisable to attach documents in their complete form: providing extracts may result in the requested State questioning their overall context. If one document refers to another, the other document should also be attached.
- Naturally, the *standard complimentary close* is indispensable at the end of a request for extradition. It may read as follows: “The magistrate is grateful to the competent high authorities for their help and assures them of his/her reciprocity and consideration”. It should be noted that the assurance of reciprocity is recommended, even if the request is based on an extradition convention.

- Additional information, such as the reference number of the dossier, can be inserted *for the administrative convenience* of the requesting State.

Presentation of the request

- It is useful to include a list of the enclosed elements.
- It is useful to send the request in duplicate.
- It is recommended that hastily produced photocopies of judgements that summarize the facts be avoided: all ambiguity should be avoided and the foreign reader should be able to easily identify in what document a fact can be found.
- The summary of offences should not be confused with the arrest warrant.

- **Model of a request for extradition:**

Letter of request

Excellency,

Subject. Request for extradition of [name of the wanted person]

I, the undersigned [name and position of the person who has the authority to make the request], of [name of the requesting country], have the honour to request the competent authority of [name of the requested country] in accordance with the Extradition Treaty between [name of the requesting country] and [name of the requested country], which entered into force on [date of the entry into force of the Treaty] or, in the absence of an extradition treaty, the legal basis on which a request is made: Security Council resolution, multilateral treaty, arrangement or reciprocity for the extradition of [name of the wanted person and his nationality] to [name of the requesting country].

[Name of the wanted person and personal details to identify him or her (if known)] is believed to be currently residing at [address or whereabouts of the wanted person].

Paragraph 1, in the case of a request for extradition in order to prosecute:

[Name of the requested person] is suspected of [name of the offence(s)], which [is/are] punishable under the laws of the [requesting State] by the following sentence(s) [...].

[name of the court] summons him/her for such crime(s) on [date of summons].

The Competent Authority under the law of [name of the requesting country] has already issued an arrest warrant for [name of the wanted person].

Paragraph 2, in the case of a request for extradition for the purpose of enforcement of a sentence:

[Name of the wanted person] has been convicted of [name of the offence(s)], which [is/are] punishable under the laws of the [requesting State] for a period of at least [...] year(s). (A copy of the court judgement is attached.)

[Requesting country] seeks the surrender of [name of the wanted person] to serve the [remainder of the] sentence handed down.

A summary of the facts of the case and the applicable criminal statute(s) of [name of the requesting country], as well as all supporting documents, are attached for the information and consideration of [name of the requested country].

I attest that [name of the wanted person] will not be prosecuted for crimes other than that/those stated in the present request.

Please contact [name and contact details for the case officer, including telephone number, facsimile number and e-mail address] of the requesting country if you require further information.

[Please rest assured that (name of the requesting country) will provide the same assistance for extradition requests from (name of the requested country) in the future.]

Accept, Excellency, the assurances of my highest consideration.

Date:

Place:

Signature:

Seal:

3.C.1 (b) *Language of the request*

- **Principle.** In the absence of a convention and/or bilateral treaties and provisions on this issue, a translation in the language of the requested State is often required. If there is a convention, the translation in the language of the requested State is not always required: some States accept requests in a language other than their official language, as stated in the applicable text.
- **A language acceptable to the requested State.** In the absence of a provision, it is essential to communicate with the authorities of the requested party called upon to act, often urgently, in a language that they know. Thus, the official language of the requested party is the most acceptable, but it is often necessary, for practical reasons, to offer a wider selection to the requesting parties. If the language used in the request is not acceptable to the requested party, translation expenses will be added to the cost of the extradition.

3.C.1 (c) *Simplified extradition*¹²

- **The person consents to be extradited.** If the person who is the object of the request for extradition gives his or her explicit consent before the decision of the competent requested authority concerning the extradition has been made,

¹² See article 6 of the Model Treaty on Extradition of 1990. For an example at the regional level, see the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on Simplified Extradition Procedure between the Member States of the European Union (*Official Journal of the European Communities*, C 078, 30 March 1995).

the requested State may grant extradition without formal extradition proceedings.

- **Conditions.** Prior to giving such consent, the person who is the object of the request must be informed: (a) of his or her right to formal extradition proceedings; and (b) of the rights and protections he or her is entitled to under those proceedings, as well as the legal consequences of his or her consent.

3.C.2. Recipient authority

The addressee may be either (a) diplomatic channels; (b) central authorities; or (c) liaison magistrates.

It is advisable to continue to communicate throughout the extradition procedure, that is, to maintain contact between the requesting authorities and the requested authorities. Thus, the requesting authority may ensure that its request complies with the requirements of the requested party and confirm its availability to provide, if necessary, any additional information or evidence that may be required. Such communication can reduce the risk of delay or of interruption of the process.

3.C.2 (a) Diplomatic channels

- **Extradition as an inter-State diplomatic act.** Extradition is a form of cooperation between States. Thus, any request for extradition, as well as the response to it, are inter-State diplomatic acts. An extradition act is the act of an executive authority and not of the judicial authority.
 - In principle, therefore, all requests for extradition should be presented through diplomatic channels.
 - It is only after receipt of the request for extradition by the Government of the requested State that the latter transmits it to its competent national jurisdictions in order for them to establish the validity of the request.
 - There may be three types of extradition procedure in the requested State:
 - (a) A purely administrative procedure;
 - (b) A purely judicial procedure;
 - (c) A procedure that is both judicial and administrative (the most common).
 - According to legislation relating to extradition, there are two types of inquiry:
 - (a) A formal inquiry based on the documents attached to the request for extradition, the purpose of which is to certify that the formal conditions for extradition are fulfilled (system of civil law countries);
 - (b) A material inquiry based on the merits of the case, which examines the evidence in order to determine that the case for prosecution is well-founded (common law system).

- The traditional diplomatic channel of transmission of requests for extradition requires several steps: it requires not only the involvement of embassy services, but also that of departments of justice and foreign offices.

In order to accelerate the procedure:

- Other entities, such as central authorities, are increasingly called upon;
- Modern means of communication are increasingly used so that the request may advance quickly.¹³

3.C.2 (b) *Central authorities*

- **The designation of a central authority** for the purpose of extradition entails the establishment of a body that will centralize all requests for extradition. It is this entity that will ensure coordination and follow-up of requests received and transmitted.
- **Entity to process requests for extradition.** The designation of a central authority to process requests for extradition is provided for in several treaties and arrangements in this field or is strongly recommended.¹⁴

A list of the national central authorities with competence in matters of fighting terrorism is given in annex XVI.

3.C.2 (c) *Liaison magistrates*

- **Counsel and expertise**
 - The magistrate's role of facilitator in matters of international criminal cooperation also encompasses extradition procedures. Indeed, there are significant differences between countries concerning the processing of such procedures, for example, in whether they give precedence to a request for provisional arrest or to a request for extradition.
 - The establishment of the file must also take into account the avenues of appeal available in the country in question: for example, opening an extradition file in the United Kingdom is directly dependent on habeas corpus and judicial review.

¹³ Article 5 of the Model Treaty on Extradition, as amended by the General Assembly in its resolution 52/88, includes a footnote reading as follows: "Countries may wish to consider including the most advanced techniques for the communication of requests and means which could establish the authenticity of the documents as emanating from the requesting State" (see http://www.unodc.org/pdf/model_treaty_extradition.pdf).

¹⁴ Thus, in its resolution 52/88, the General Assembly invited Member States to establish and designate a national central authority to process requests for extradition; also invited Member States to consider, where applicable and within the framework of national legal systems, the following measure in the context of the use and application of extradition treaties or other arrangements: establishing and designating a national central authority to process requests for extradition; reiterated its invitation to Member States to provide the Secretary-General updated information on central authorities designated to deal with requests; and requested the Secretary-General to promote regular communication and exchanges of information between central authorities of Member States dealing with requests for extradition and to promote meetings of such authorities on a regional basis for Member States wishing to attend.

- **Follow-up to the request.** In case of urgency, the proximity of the liaison magistrate to his or her colleagues in the host country enables him or her to draw their attention to the need to respond to the request for extradition as quickly as possible. The magistrate who has made the request for extradition may, with the help of his or her colleague posted in the receiving State, follow the execution of the request. Moreover, should difficulties arise in the execution of the request, the judge can be swiftly informed of the reasons for the problem.

3.D. Applicable law: execution of the request in accordance with the law of the requested or requesting State

- **Principle: compliance with the legislation of the requested party.** Extradition is subject to the domestic law of the requested party and to the obligations set forth in the bilateral or multilateral extradition agreements, as well as to international law, in particular, human rights, refugee and humanitarian law.

3.E. Outcome of the request

3.E.1. Rule of speciality

Principle. In accordance with the principle of speciality, the extradition granted is valid only in relation to the facts mentioned in the request for extradition and for which extradition was granted.

- **Consequences**
 - As long as the requested State does not give its consent to a new prosecution on the basis of an additional request, the extradited person may not be prosecuted, detained or surrendered to a third State for another offence committed prior to his extradition.
 - If the person was extradited by virtue of a conviction, only the sentence handed down in relation to the case for which the extradition was granted may be enforced.
 - If the requesting State determines that, subsequent to the extradition, offences committed before that date should be prosecuted, it may request permission from the requested State to prosecute based on the new facts (request for extension of extradition).
- **Outcomes**
 - *Consent of the requested State.* The requested State may consent to a new prosecution based on an additional request.
 - *Waiver of application of the rule by the person being prosecuted.* If the national legislation so provides, the person being prosecuted may waive the application of the principle of speciality.

3.E.2. Re-extradition

This section examines whether it is possible for a requesting State to re-extradite a wanted person to a third State.

- **Prior offences**

- The rule of speciality limits the rights of the requesting State that made the original request for extradition to re-extradite the person to another State (third State) without first obtaining the permission of the original requested State. Consequently, the same principles and procedures of speciality also apply to the possibility of re-extradition.
- Possible solutions where the requesting authority receives a request for re-extradition or surrender to a third State for offence(s) committed prior to the surrender and other than the offence(s) on which the extradition was based:
 - If the decision to extradite includes the express condition that the person concerned shall not be extradited to a third State, the requesting State is bound by this.
 - If the extradition is granted on the express condition that the requesting State shall re-extradite the person concerned to a third State (for example, where there is a plurality of extradition requests), the requesting State shall comply.
 - If the decision to extradite contains no mention of the possibility of re-extradition, the conventions sometimes provide for the possibility of re-extraditing with the permission of the requested State.¹⁵

- **Subsequent offences.** Where re-extradition is based on offence(s) emerging subsequent to the surrender of the wanted person, it is advisable to reason in plain and simple terms for extradition. Consequently, the State that was formerly the requesting State, but which has now become the requested State, examines the request of the third party, which is now the requesting State.

3.E.3. Conflicting requests for extradition

- **Concurrent requests for extradition.** There may be concurrent requests emanating from concurrent jurisdictions.
- **Outcomes.** It is advisable to refer to the provisions of the treaty/legal basis on which the request for extradition was issued.
 - *If the instrument allows the freedom to choose,¹⁶ no order of priority exists:* the requested State is completely free to choose between the different requests.
 - *If the instrument contains no mention of conflicting requests the requested party considers the requests in relation to the circumstances:* preference may be given to the requesting party where the offence was

¹⁵ For example, article 15 of the European Convention on Extradition.

¹⁶ This is the case, for example, of the Model Treaty on Extradition (article 16). For an exhaustive explanation of the article see the *Revised Manuals on the Model Treaty ...*, pp. 60 ff.

committed, to the State of which the victim is a national, or of which the offender is a national, according to the chronological order of the requests or according to the severity of the penalty incurred.

- *The instrument may recommend an examination according to the interests that are specified.* For example:

(a) Article 11, paragraph 5, of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation states that a requested State party shall pay due regard to the interests and responsibilities of the State party whose flag the ship was flying at the time of the commission of the offence;

(b) Article 13, paragraph 1, of the Organization of African Unity Convention on the Prevention and Combating of Terrorism¹⁷ states:

“Where a State Party receives several extradition requests from different States Parties in respect of the same suspect and for the same or different terrorist acts, it shall decide on these requests having regard to all the prevailing circumstances, particularly the possibility of subsequent extradition, the respective dates of receipt of the requests, and the degree of seriousness of the crime.”

- *The instrument may provide for an order of priority.* For example, the Inter-American Convention on Extradition of 1981¹⁸ sets forth in article 15:

“When the extradition is requested by more than one State for the same offence, the requested State shall give preference to the request of the State in which the offence was committed. If the requests are for different offences, preference shall be given to the State seeking the individual for the offence punishable by the most severe penalty, in accordance with the laws of the requested State. If the requests involve different offences that the requested State considers to be of equal gravity, preference shall be determined by the order in which the requests are received.”

3.E.4. Transit of extradited persons

- **Authorization of a third State.** The execution of the extradition measure may require the transit of the extradited person through a third State, in which case it is necessary to request authorization and to obtain an agreement concerning the guard of the individual during transit through that State. Lack of authorization can have consequences for the prosecution of the individual and may delay the proceeding, for example, if the extradited person is a national of the third State, or if he or she requests asylum or refugee status.¹⁹

¹⁷ United Nations, *Treaty Series*, vol. 2219, No. 39464.

¹⁸ United Nations, *Treaty Series*, vol. 1752, No. 30597.

¹⁹ Authorization from a third State to allow the transfer of an extradited person through its territory cannot nullify the non-refoulement obligation, nor can it justify denial of access to asylum procedures.

- **Conditions**

- Transit through a third State is granted based on a request transmitted to that State.
- Transit of a national of the country of transit may be refused.
- If air transport is used, the following rules apply:
 - Where no landing is scheduled, no authorization is required.
 - In the event of an unscheduled landing, it is possible to request authorization with a request for an immediate response.
 - Where landing is scheduled, the requesting party makes a normal transit request.
- A State may require, in order to grant the transit of a person, that all or some of the conditions of extradition be satisfied, in which case, the rule of reciprocity may be applied.
- The transit of the extradited person shall not be carried out through a territory in which there is reason to believe that his or her life or liberty could be put in danger owing to his or her race, religion, nationality, membership of a particular social group or political views.

3.E.5. Refusal or lack of response

If the response to the request for extradition is negative, the requested State must declare jurisdiction and submit the case against the individual concerned for prosecution, under the *aut dedere aut judicare* principle (see section 1.C.1. above).

3.E.5 (a) Exception for political offences

- **Bars on refusal for political offences or political motives.** No refusal may be based on the ground that the offence set forth by the universal instruments is of a political nature or is related to a political offence or is a terrorist act inspired by political motives. (For further discussion of this issue, see section 1.C.4 above.)
 - This rule emanates from Security Council resolution 1373 (2001).²⁰
 - As well as from the negotiated universal instruments.²¹

²⁰ See paragraph 3 (g) of resolution 1373 (2001). Furthermore, in resolution 1566 (2004), the Council recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, 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, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

²¹ See article 15 of the International Convention for the Suppression of Acts of Nuclear Terrorism; and article 14 of the Financing of Terrorism Convention. Furthermore, the Protocol of 2005 to

Example. Judgement of the Court of Appeal of Milan, Italy, of 24 February 2000.²² The case concerned a request for extradition from France to Italy in order to obtain the surrender of an alleged terrorist belonging to the Algerian terrorist group, Armed Islamic Group (GIA). The Court rejected the exception for political offences for terrorist crimes.

3.E.5 (b) *Exception for fiscal offences*

- **Offences related to the financing of terrorist activities** may not be regarded as fiscal offences for the purposes of extradition.²³
- **No refusal of extradition for the suppression of the financing of terrorism** may be justified on the ground that the offence set forth by the universal instruments is of a fiscal nature.

3.E.5 (c) *Refusal*

- **Non-discrimination clause.** The requested State has no obligation to execute a request for extradition where its competent authorities have substantial reason to believe that the request would facilitate the prosecution or punishment of a person on account of his or her race, gender, religion, nationality or political views, or would cause prejudice for any of those reasons to the person concerned by the request.²⁴
- **Bars to extradition under international human rights and refugee law.** The requested State is bound to examine the consequences of extradition for the individual concerned. It must refuse to extradite if this would be in breach of its non-refoulement obligations under relevant international treaties and customary international law. The obligation to respect the principle of non-refoulement as provided for under international refugee and human rights law takes precedence over any duty to extradite on the basis of a bilateral or multilateral extradition agreement or extradition-related provisions in other international treaties.²⁵
 - *Respect for human rights.* International human rights law establishes a mandatory bar on extradition under certain circumstances:
 - Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment expressly provides that “no State Party shall expel, return (refouler) or extradite a

the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf both contain a similar exclusion.

²² Available upon request from the Terrorism Prevention Branch of UNODC.

²³ See article 13 of the Financing of Terrorism Convention and concerning this topic see section 2.C.3 above.

²⁴ See article 15 of the Financing of Terrorism Convention, article 12 of the International Convention for the Suppression of Terrorist Bombings and article 9 of the International Convention against the Taking of Hostages.

²⁵ Article 103 in conjunction with Articles 55 (c) and 56 of the Charter of the United Nations. The primacy of obligations under the Charter, including human rights obligations, is discussed in section 1.A above.

person to another State where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture”.

- The prohibition of arbitrary deprivation of life and of torture and other cruel, inhuman or degrading treatment or punishment under the International Covenant on Civil and Political Rights, as interpreted by the Human Rights Committee, also covers a bar on refoulement to a risk of such treatment.²⁶ Regional human rights treaties provide for similar obligations.²⁷

Extradition may also be denied if the requested State is concerned that the wanted person would be subjected to serious violations of fair trial guarantees in the requesting State.

➤ *Principle of non-refoulement of refugees*

Article 33, paragraph 1, of the Convention relating to the Status of Refugees of 1951 establishes a mandatory bar on extradition of a refugee to the country of origin or any other country where he or she may be at risk of persecution. Asylum-seekers are also protected under article 33, paragraph 1, of the 1951 Convention while their claim is being examined, including on appeal (see section 1.C.5 (b) above). A refugee may be extradited to a country where he or she would be in danger of persecution only in the circumstances expressly provided for under

²⁶ As noted by the Human Rights Committee, the prohibition of refoulement where there are substantial grounds for believing that there is a real risk of irreparable harm, such as violations of the right to life or the right to be free from torture or cruel, inhuman or degrading treatment or punishment under articles 6 and 7, respectively, of the International Covenant on Civil and Political Rights, extends to all persons who may be within a State’s territory or subject to its jurisdiction, including refugees and asylum-seekers, and applies with regard to the country to which removal is effected or any other country to which the person may subsequently be removed. This is non-derogable and not subject to exceptions. See Human Rights Committee, General Comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant (A/59/40, vol. I, annex III, paragraphs 10 and 12).

²⁷ In the Americas, see, for example, article 22, paragraph 8, of the American Convention on Human Rights (United Nations, *Treaty Series*, vol. 1144, No. 17955): “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.” Similarly, article 13, paragraph 4, of the Inter-American Convention to Prevent and Punish Torture states: “Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State.” The European Court of Human Rights has held in consistent jurisprudence that non-refoulement is an inherent obligation under article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment. See, for example, *Soering v. United Kingdom*, Application No. 14038/88, of 7 July 1989, and subsequent cases, including *Cruz Varas and Others v. Sweden*, Application No. 15567/89 of 20 March 1991; *Vilvarajah and Others v. United Kingdom*, Application Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87 of 30 October 1991; *Chahal v. United Kingdom*, Application No. 22414/93 of 15 November 1996; *Ahmed v. Austria*, Application No. 25964/94, of 17 December 1996; and *TI v. United Kingdom*, Third Section Decision as to the Admissibility of Application No. 43844/98 of 7 March 2000.

article 33, paragraph 2, of the 1951 Convention. This provision is applicable only if return to the country of origin is a last resort and the only means whereby the host State may eliminate the danger posed by the refugee. Moreover, the implementation of an exception provided for in article 33, paragraph 2, requires a decision by a competent authority in a procedure providing for adequate procedural safeguards. The application of article 33, paragraph 2, does not affect the requested State's non-refoulement obligations under international human rights law, which permit no exceptions (see section 1.C.5 (b) above).

- **Outcomes**

- *Agreement on the condition of mutual trust (based on diplomatic assurances).*²⁸ States may agree on a positive outcome to the extradition request, on condition that the requesting State commits itself to respect the rights in question.

- **Example.** France granted extradition of a United States citizen to his home country on condition that the prosecuting authorities of the federal state guaranteed not to impose the death penalty, since that goes against French public order (Council of States, 17 October 1993).

- It is for the executive body of the requested State to judge whether the assurances given by the requesting State are satisfactory.²⁹

- Nevertheless, States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.³⁰

- **Example.** Judgement *Suresh v. Canada*, 2002.³¹

“124. It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on

²⁸ Certain extradition treaties envisage grounds for refusal, such as capital punishment. It is indicated that capital punishment will be replaced by the same punishment as foreseen in the requested State. See, for example, the Convention on Extradition between the Kingdom of Spain and the Kingdom of Morocco (United Nations, *Treaty Series*, vol. 2074, No. 35942).

²⁹ Such is the position adopted by the Examining Chamber of the Second Degree of the Court of Appeal of Aix-en-Provence, France, which, in its judgement of 3 July 1991 concerning the *Davis-Aylor* case, ruled in favour of extradition on the express condition that the French Government obtain from the United States the assurance that Joy Davis-Aylor not be executed if the death penalty were to be pronounced. By rejecting the appeal against this judgement, the Court of Cassation validated this position (Court of Cassation, Criminal Chamber, public hearing of 15 October 1991, Appeal No. 91-84464).

³⁰ See the note by the Secretary-General transmitting to the General Assembly the interim report of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment (A/60/316, paragraph 51); see also the cases referred to in paragraphs 40-50 of the report.

³¹ See section 1.C.5 (b) (iv) above.

its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.

“125. In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government’s record in complying with its assurances, and the capacity of the government to fulfil the assurances, particularly where there is doubt about the government’s ability to control its security forces. In addition, it must be remembered that before becoming a Convention refugee, the individual involved must establish a well-founded fear of persecution (although not necessarily torture) if deported.”

- In addition, where the request for extradition concerns a refugee, the United Nations High Commissioner for Refugees is of the view that diplomatic assurances submitted by the country of origin should not be given any weight. Where the assurances concern an asylum-seeker (who would be protected under article 33, paragraph 1, of the 1951 Convention against return to the country of origin for the entire duration of the asylum procedure), such assurances would form part of the elements to be considered when determining whether or not the individual concerned is eligible for refugee status. It should be noted, however, that diplomatic assurances in such cases could be considered suitable only if they effectively eliminate all possible manifestations of persecution in the individual case and if they may be considered reliable.³²

If the refusal is based on the fact that the requested person is a refugee, the person’s status should be kept confidential.

- **Specific issues**

- *Trial in absentia.* Where a request for extradition is issued for execution of an arrest warrant based on a judgement in absentia, it is advisable for the requesting party to offer the guarantee that the person shall be retried with the full benefit of the rights of defence, so as to avoid denial of the extradition request.
- *Statute of limitations.* By virtue of the principle of dual criminality, according to which the extraditable offence is required to be punishable in the requesting State and would be punishable in the requested State, were it committed in its territory, when the statute of limitations has expired in the requested State, extradition may be refused. However, it should be noted that this principle is in decline.

³² See the UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006.

3.F. Cost of extradition

- **Principle.** Traditionally, each State meets the costs incurred in its territory by the extradition, such as the costs connected with the arrest, detention, guarding and food, the transfer of the person and the seizure and transportation of assets.
- The costs incurred by the transit through the territory of the requested State are traditionally met by the requesting party.
- **Special arrangements** relating to extradition costs may be provided for between the States concerned. In practice, consultations concerning who is responsible for the cost of the extradition should be left open so as to facilitate the assistance and, in particular, if the requesting State has more extensive resources at its disposal than the requested State, then the former should accept to bear the cost.

3.G. Surrender of the person to be extradited

- **After examining the request**, the requested party informs the requesting party of its decision regarding the extradition. Any complete or partial refusal shall include justification.
- If the response is positive, it is advisable to proceed with the surrender of the wanted individual.
 - *Surrender of the individual after the request has been accepted:*
 - (a) The requesting party is informed of the place and date of surrender, as well as the length of time for which the wanted person was detained with a view to extradition;
 - (b) If circumstances beyond its control prevent the surrender or reception of the person to be extradited, the interested party shall inform the other party. The two parties shall take a joint decision on a new date for surrender.
 - *Postponed or conditional surrender:*
 - (a) *Postponed surrender.* The requested State may, after taking its decision concerning the request for extradition, postpone the surrender of a person sought in order to prosecute that person or, if that person has already been convicted, in order to enforce a sentence imposed for an offence other than that for which extradition is sought;
 - (b) *Conditional surrender.* Instead of postponing the surrender, the requested State may temporarily surrender the person sought to the requesting State on conditions to be agreed between the parties.

Module 4

Other types of cooperation

Objectives

To describe other types of international cooperation, such as:

- 4.A. Other types of surrender.
- 4.B. The transfer of criminal proceedings.
- 4.C. The transfer of convicted persons.

4.A. Other types of surrender

4.A.1. Administrative surrender

- States may also use other types of surrender, such as expulsion or deportation, when the surrender is not based on criminal activity by the person to be surrendered. This is the case, for example, where immigration laws are not respected: a State may refuse to accept in its territory a person who has not satisfied the conditions required for entry.
- In expulsion or deportation proceedings, international refugee law should be respected, so the requested State will need to ensure that its international non-refoulement obligations are respected.
- If they plan to request surrender of an individual for the purpose of prosecution or enforcement, it is advisable for the competent authorities in matters of extradition to make inquiries concerning the existence of an expulsion or deportation procedure. They will then be able to coordinate with the competent agencies responsible for such measures.
- **Example.**

Case: *Mohamed v President of the Republic of South Africa*¹

“Khalfan Khamis Mohamed, a Tanzanian national, lived in South Africa from August 1998 to October 1999. He had entered South Africa on the basis of a forged passport in the name of Zahran Nassor Maulid. Under this name, he applied for refugee status. The deception was discovered by an agent of the Federal Bureau of Investigation who recognised him as a suspect in bomb attacks on United States embassies in Nairobi and Dar es Salaam. During October 1999 South African immigration officials and FBI agents arrested him in Cape Town and interrogated him. He admitted that he had taken part in the bombing in Dar es Salaam. Mohamed said that he had obtained a visitor’s visa from the South African High Commission in Dar es Salaam the day before the bombings and left Tanzania by road the day after. Travelling via Mozambique

¹ A. Katz, “Terrorism and its effect on refugee and extradition law”, *Africa and Terrorism: Joining the Global Campaign*, Jakkie Cilliers and Kathryn Sturman, eds., Institute for Security Studies Monograph No. 74 (Pretoria, 2002), chap. IV (available at <http://www.iss.org.za>) and in 2001 (3) South African Law Reports 893 (Constitutional Court).

he entered South Africa as an asylum-seeker under his assumed name, and, on spurious grounds, lived and worked quietly in Cape Town.

“In the meantime, he had been indicted in the Federal District Court for the Southern District of New York. The grand jury had been sitting in New York since the mid-nineties investigating the activities of Al-Qaeda, founded, led and financed by Osama bin Laden. The grand jury concluded that the attacks were the work of Al-Qaeda in its international campaign of terror against the United States and its allies. It indicted fifteen men, including Mohamed.

“Mohamed allegedly expressed the wish to be removed to the United States, instead of Tanzania to where, in the ordinary course as a prohibited person [illegal alien], he would have been deported. He was subsequently, and very rapidly, taken from South Africa directly to New York to face a criminal trial for the Dar es Salaam bombing. Because he was surrendered to the United States without a condition that he should not be subject to the death penalty, the United States Federal Court accepted that he was ‘death eligible’.² While in New York and now facing the capital charges, Mohamed launched an application in the South African Courts seeking an order declaring his deportation to be unlawful in that it was in fact a disguised extradition and that it was in any event unlawful because the South African authorities had not stipulated that as a condition of his removal the United States authorities would not seek or carry out the death penalty. This was so because the death penalty was unlawful in South Africa and effectively meant that South Africa indirectly had a hand in him facing that penalty. The South African Constitutional Court ruled in favour of Mohamed against the South African Government. Its judgment considered authorities worldwide in deciding that Mohamed had been unlawfully removed from South Africa.

“In particular, it rejected the government’s claims to have deported and not to have extradited him as irrelevant. Reference was made to the Torture Convention as well as to the European Convention on Human Rights. It concluded that the South African Constitution requires South Africa to avoid being a party to the imposition of cruel, inhuman or degrading punishment, including the death penalty, whether directly or indirectly. For South Africa to have deported Mohamed to face the death penalty was a violation of Mohamed’s right to life and his right not to be subject to cruel or unusual punishment.

“Mohamed asked the South African Court to order the South African Government to request the United States to refrain from executing him. The Court declined to so order the South African Government but instead ordered that a copy of the judgment be transmitted to the New York Court. After conviction as a result inter alia of his confession, the United States jury sentenced Mohamed to life imprisonment.

² Salim, a co-accused of Mohamed, was extradited to the United States from Germany subject to an assurance that the death penalty would not be imposed on him. The death sentence was not sought against him, unlike Mohamed.

“One of the precedents relied upon in the judgment is that of *Hilal v. United Kingdom*, a case dealing with the deportation of a Tanzanian citizen from the United Kingdom to Tanzania. The European Court of Human Rights held that Hilal’s deportation to Tanzania violated his rights because he would face a serious risk of being subject to torture or inhuman or degrading treatment in Tanzania.”

4.A.2. Arrest warrant

- At the regional level, Europe has introduced the **European arrest warrant**, which can, in most cases in that region, replace the extradition procedure.³

4.B. Transfer of criminal proceedings: official request for the purpose of prosecution

- **The transfer of criminal proceedings** has the following principal functions:
 - (a) To compensate for the non-extradition of nationals;
 - (b) To centralize proceedings where several jurisdictions are concerned (for example, where several States have established jurisdiction regarding several offences committed by the same person or the same offence committed by several persons);
 - (c) To transfer the proceedings to the State in which most of the evidence is concentrated and thus to entrust the prosecution and judgement of the case to the jurisdictions of the State that is in the best position to assume that responsibility (“positive conflict”);
 - (d) To prevent possible impunity (“negative conflict”).
- Transmission is carried out by an **official request for the purpose of prosecution**, which is the act by which a State that has jurisdiction to judge an offence asks another State to carry out the prosecution. In other words, it is an

³ The European arrest warrant is a judicial decision issued by a competent judicial authority of a European Union member State, called the “issuing member State”, for the apprehension and surrender by decision of the judicial authority of another member State, called the “executing Member State”, of a wanted person to be prosecuted or to execute a sentence or a detention. The basic principles that govern this procedure are:

- (a) It is a purely judicial procedure;
- (b) The procedure requires that decisions be made as quickly as possible. Thus, the maximum time limit for making the final decision authorizing or refusing the surrender of the wanted person is three months following his or her arrest, except in special circumstances;
- (c) It is no longer permitted, for the 32 categories of offence listed (acts of terrorism are included in this list), to control the dual criminality of the acts of which the wanted person is accused in order to execute a European arrest warrant;
- (d) Contrary to current extradition law, the nationality of the person concerned no longer constitutes systematic grounds for refusal;
- (e) Statutes of limitation are no longer grounds for refusal of the surrender, unless the person concerned can be prosecuted and judged in the requested State. (See Council of the European Union framework decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member States (*Official Journal of the European Communities*, L 190, 18 July 2002) at <http://europa.eu/scadplus/leg/en/lvb/l33167.htm>.)

act by which, instead of asking the requested State to aid in the prosecution of the facts, the requesting State voluntarily transmits the task of prosecuting them.

- **Advisability of an official request to prosecute.** An official request to prosecute is timely when the jurisdictions of the other State prove to be in a position to more readily or effectively carry out the prosecution than would the jurisdictions of the requesting State, in particular for the following reasons:
 - (a) The accused is a national of the requested State;
 - (b) The accused is already serving a sentence in the requested State;
 - (c) The most important items of evidence are in the requested State;
 - (d) The presence of the accused for the hearing or the enforcement of the potential sentence in the requesting State, even if it resorts to extradition, cannot be guaranteed.
- **Scope.** The scope of a transfer is limited, concerning only certain offenders and certain offences. Transfer can be implemented at any point in the procedure: from the commission of the offences to the final judgement, as long as, concerning the latter, the interested party cannot invoke the principle of *ne bis in idem* to the requested State.
- **Consequences of an official request to prosecute**
 - *Consequence for the issuing authority.* Resorting to the transmission of prosecution does not remove the case from the jurisdiction initially responsible; it remains possible, until the statute of limitation has expired, to resume prosecution, whether or not the receiving State has given effect to the transmission of the procedure (within the limits of the respect of the principle of *ne bis in idem* where effect has been given) and at least until the surrender of the accused person to the foreign court, or, at most, until commencement of enforcement of the sentence if there is a conviction.
 - *Consequence for the recipient authority:*
 - (a) The authorities of the requested State verify that they are competent to prosecute and judge the offences in question and their perpetrators;
 - (b) They inform the issuing authority of their agreement to prosecute;
 - (c) They may then initiate action according to their own substantive and procedural law;
 - (d) The requested authority has to inform the requesting authority that it accepts the proceedings.
- **Difference from the transmission of documents.** In its effect, an official request to prosecute differs from the transmission of evidence, whether that transmission is done in response to a request for mutual assistance or in a spontaneous manner. Even if both the request to prosecute and the transmission of evidence convey items of evidence useful for conviction, only a request to

prosecute requests prosecution for offences over which the requesting jurisdiction has competence. This is not the case with the transmission of evidence, which is not intended to resolve a conflict of competence, but has the sole purpose of transmitting information or evidence to foreign authorities.

4.C. Transfer of detained persons already convicted⁴

- The transfer of detained persons reflects the international character of terrorist offences, which has led to imprisonment in foreign countries of nationals of a number of States.
- In that context, the transfer of detained persons who have already been convicted has one principal function, to further the social rehabilitation of convicted foreigners, by allowing them to serve their sentence in their home country. The policy is also rooted in humanitarian considerations: difficulties in communication because of language barriers, alienation from local culture and customs, and the absence of contact with relatives may have detrimental effects on the foreign prisoner.⁵ This is why the State to which the detained person is transferred is usually the State of which he or she is a national or his or her place of origin.⁶

Such transfer also serves to provide an effective alternative if other means of cooperation do not work. For example, a national of State A convicted in State B leaves the latter before serving his or her sentence in order to avoid justice in the former. State A does not grant extradition because he or she is a national, but cannot judge due to the *ne bis in idem* principle. The person remains unpunished unless the States reach an agreement on the transfer of the enforcement of the sentence.

- **Legal basis.** This type of cooperation is provided for in certain international conventions⁷ and regional agreements.⁸ Such a transfer shall, nonetheless, result mainly from agreements between individual States.
- **Condition.** The transfer is subject to the consent of the person concerned.⁹

⁴ This type of cooperation is provided for in certain international conventions: see article 17 of the Organized Crime Convention and article 45 of the Convention against Corruption. There exists a Model Agreement on the Transfer of Foreign Prisoners (*Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. D.1, annex I) created within the framework of the United Nations.

⁵ Council of Europe, *Explanatory Report on the Convention on the Transfer of Sentenced Persons* (Strasbourg, Council of Europe, 1983), p. 7.

⁶ The Commonwealth Scheme for the Rendition of Fugitive Offenders (modified in 1990) mentions in this respect the close ties that may be recognized by the State to which the prisoner may be transferred.

⁷ See article 21 of the Organized Crime Convention and article 47 of the Convention against Corruption.

⁸ See the Commonwealth Scheme for the Rendition of Fugitive Offenders and the Convention on the Transfer of Sentenced Persons (United Nations, *Treaty Series*, vol. 1496, No. 25703).

⁹ See the Model Agreement on the Transfer of Foreign Prisoners and recommendations on the treatment of foreign prisoners (see footnote 4 above).

Annex I

The United Nations Global Counter-Terrorism Strategy*

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and reaffirming its role under the Charter, including on questions related to international peace and security,

Reiterating its strong condemnation of terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security,

Reaffirming the Declaration on Measures to Eliminate International Terrorism, contained in the annex to General Assembly resolution 49/60 of 9 December 1994, the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, contained in the annex to General Assembly resolution 51/210 of 17 December 1996, and the 2005 World Summit Outcome,^a in particular its section on terrorism,

Recalling all General Assembly resolutions on measures to eliminate international terrorism, including resolution 46/51 of 9 December 1991, and Security Council resolutions on threats to international peace and security caused by terrorist acts, as well as relevant resolutions of the General Assembly on the protection of human rights and fundamental freedoms while countering terrorism,

Recalling also that, in the 2005 World Summit Outcome, world leaders rededicated themselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, to uphold the resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination or foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion, international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and the fulfilment in good faith of the obligations assumed in accordance with the Charter,

Recalling further the mandate contained in the 2005 World Summit Outcome that the General Assembly should develop without delay the elements identified by the Secretary-General for a counter-terrorism strategy, with a view to adopting and implementing a strategy to promote comprehensive, coordinated and consistent responses, at the national, regional and international levels, to counter terrorism, which also takes into account the conditions conducive to the spread of terrorism,

* General Assembly resolution 60/288. (See also <http://www.un.org/terrorism/strategy-counter-terrorism.shtml>.)

^a See resolution 60/1.

Reaffirming that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism,

Reaffirming also that terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group,

Reaffirming further Member States' determination to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism, including by resolving the outstanding issues related to the legal definition and scope of the acts covered by the convention, so that it can serve as an effective instrument to counter terrorism,

Continuing to acknowledge that the question of convening a high-level conference under the auspices of the United Nations to formulate an international response to terrorism in all its forms and manifestations could be considered,

Recognizing that development, peace and security, and human rights are interlinked and mutually reinforcing,

Bearing in mind the need to address the conditions conducive to the spread of terrorism,

Affirming Member States' determination to continue to do all they can to resolve conflict, end foreign occupation, confront oppression, eradicate poverty, promote sustained economic growth, sustainable development, global prosperity, good governance, human rights for all and rule of law, improve intercultural understanding and ensure respect for all religions, religious values, beliefs or cultures,

1. *Expresses its appreciation* for the report entitled "Uniting against terrorism: recommendations for a global counter-terrorism strategy" submitted by the Secretary-General to the General Assembly;^b

2. *Adopts* the present resolution and its annex as the United Nations Global Counter-Terrorism Strategy ("the Strategy");

3. *Decides*, without prejudice to the continuation of the discussion in its relevant committees of all their agenda items related to terrorism and counter-terrorism, to undertake the following steps for the effective follow-up of the Strategy:

(a) To launch the Strategy at a high-level segment of its sixty-first session;

(b) To examine in two years progress made in the implementation of the Strategy, and to consider updating it to respond to changes, recognizing that many of the measures contained in the Strategy can be achieved immediately, some will require sustained work through the coming few years and some should be treated as long-term objectives;

^b A/60/825.

(c) To invite the Secretary-General to contribute to the future deliberations of the General Assembly on the review of the implementation and updating of the Strategy;

(d) To encourage Member States, the United Nations and other appropriate international, regional and subregional organizations to support the implementation of the Strategy, including through mobilizing resources and expertise;

(e) To further encourage non-governmental organizations and civil society to engage, as appropriate, on how to enhance efforts to implement the Strategy;

4. *Decides* to include in the provisional agenda of its sixty-second session an item entitled “The United Nations Global Counter-Terrorism Strategy”.

Annex

Plan of action

We, the States Members of the United Nations, resolve:

1. To consistently, unequivocally and strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security;

2. To take urgent action to prevent and combat terrorism in all its forms and manifestations and, in particular:

(a) To consider becoming parties without delay to the existing international conventions and protocols against terrorism, and implementing them, and to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism;

(b) To implement all General Assembly resolutions on measures to eliminate international terrorism and relevant General Assembly resolutions on the protection of human rights and fundamental freedoms while countering terrorism;

(c) To implement all Security Council resolutions related to international terrorism and to cooperate fully with the counter-terrorism subsidiary bodies of the Security Council in the fulfilment of their tasks, recognizing that many States continue to require assistance in implementing these resolutions;

3. To recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law.

I. Measures to address the conditions conducive to the spread of terrorism

We resolve to undertake the following measures aimed at addressing the conditions conducive to the spread of terrorism, including but not limited to prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of the rule of law and violations of human rights,

ethnic, national and religious discrimination, political exclusion, socio-economic marginalization and lack of good governance, while recognizing that none of these conditions can excuse or justify acts of terrorism:

1. To continue to strengthen and make best possible use of the capacities of the United Nations in areas such as conflict prevention, negotiation, mediation, conciliation, judicial settlement, rule of law, peacekeeping and peacebuilding, in order to contribute to the successful prevention and peaceful resolution of prolonged unresolved conflicts. We recognize that the peaceful resolution of such conflicts would contribute to strengthening the global fight against terrorism;

2. To continue to arrange under the auspices of the United Nations initiatives and programmes to promote dialogue, tolerance and understanding among civilizations, cultures, peoples and religions, and to promote mutual respect for and prevent the defamation of religions, religious values, beliefs and cultures. In this regard, we welcome the launching by the Secretary-General of the initiative on the Alliance of Civilizations. We also welcome similar initiatives that have been taken in other parts of the world;

3. To promote a culture of peace, justice and human development, ethnic, national and religious tolerance and respect for all religions, religious values, beliefs or cultures by establishing and encouraging, as appropriate, education and public awareness programmes involving all sectors of society. In this regard, we encourage the United Nations Educational, Scientific and Cultural Organization to play a key role, including through inter-faith and intra-faith dialogue and dialogue among civilizations;

4. To continue to work to adopt such measures as may be necessary and appropriate and in accordance with our respective obligations under international law to prohibit by law incitement to commit a terrorist act or acts and prevent such conduct;

5. To reiterate our determination to ensure the timely and full realization of the development goals and objectives agreed at the major United Nations conferences and summits, including the Millennium Development Goals. We reaffirm our commitment to eradicate poverty and promote sustained economic growth, sustainable development and global prosperity for all;

6. To pursue and reinforce development and social inclusion agendas at every level as goals in themselves, recognizing that success in this area, especially on youth unemployment, could reduce marginalization and the subsequent sense of victimization that propels extremism and the recruitment of terrorists;

7. To encourage the United Nations system as a whole to scale up the cooperation and assistance it is already conducting in the fields of rule of law, human rights and good governance to support sustained economic and social development;

8. To consider putting in place, on a voluntary basis, national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives. In this regard, we encourage States to request the relevant United Nations entities to help them to develop such national systems. We will also strive to promote international solidarity in support of victims and foster the involvement of civil society in a global campaign against terrorism

and for its condemnation. This could include exploring at the General Assembly the possibility of developing practical mechanisms to provide assistance to victims.

II. Measures to prevent and combat terrorism

We resolve to undertake the following measures to prevent and combat terrorism, in particular by denying terrorists access to the means to carry out their attacks, to their targets and to the desired impact of their attacks:

1. To refrain from organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities and to take appropriate practical measures to ensure that our respective territories are not used for terrorist installations or training camps, or for the preparation or organization of terrorist acts intended to be committed against other States or their citizens;

2. To cooperate fully in the fight against terrorism, in accordance with our obligations under international law, in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates, participates or attempts to participate in the financing, planning, preparation or perpetration of terrorist acts or provides safe havens;

3. To ensure the apprehension and prosecution or extradition of perpetrators of terrorist acts, in accordance with the relevant provisions of national and international law, in particular human rights law, refugee law and international humanitarian law. We will endeavour to conclude and implement to that effect mutual judicial assistance and extradition agreements and to strengthen cooperation between law enforcement agencies;

4. To intensify cooperation, as appropriate, in exchanging timely and accurate information concerning the prevention and combating of terrorism;

5. To strengthen coordination and cooperation among States in combating crimes that might be connected with terrorism, including drug trafficking in all its aspects, illicit arms trade, in particular of small arms and light weapons, including man-portable air defence systems, money-laundering and smuggling of nuclear, chemical, biological, radiological and other potentially deadly materials;

6. To consider becoming parties without delay to the United Nations Convention against Transnational Organized Crime^c and to the three protocols supplementing it,^d and implementing them;

7. To take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum-seeker has not engaged in terrorist activities and, after granting asylum, for the purpose of ensuring that the refugee status is not used in a manner contrary to the provisions set out in section II, paragraph 1, above;

8. To encourage relevant regional and subregional organizations to create or strengthen counter-terrorism mechanisms or centres. Should they require cooperation and assistance to this end, we encourage the Counter-Terrorism Committee and its Executive Directorate and, where consistent with their existing

^c Resolution 55/25, annex I.

^d Resolution 55/25, annexes II and III; and resolution 55/255, annex.

mandates, the United Nations Office on Drugs and Crime and the International Criminal Police Organization, to facilitate its provision;

9. To acknowledge that the question of creating an international centre to fight terrorism could be considered, as part of international efforts to enhance the fight against terrorism;

10. To encourage States to implement the comprehensive international standards embodied in the Forty Recommendations on Money-Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force, recognizing that States may require assistance in implementing them;

11. To invite the United Nations system to develop, together with Member States, a single comprehensive database on biological incidents, ensuring that it is complementary to the biocrimes database contemplated by the International Criminal Police Organization. We also encourage the Secretary-General to update the roster of experts and laboratories, as well as the technical guidelines and procedures, available to him for the timely and efficient investigation of alleged use. In addition, we note the importance of the proposal of the Secretary-General to bring together, within the framework of the United Nations, the major biotechnology stakeholders, including industry, the scientific community, civil society and Governments, into a common programme aimed at ensuring that biotechnology advances are not used for terrorist or other criminal purposes but for the public good, with due respect for the basic international norms on intellectual property rights;

12. To work with the United Nations with due regard to confidentiality, respecting human rights and in compliance with other obligations under international law, to explore ways and means to:

(a) Coordinate efforts at the international and regional levels to counter terrorism in all its forms and manifestations on the Internet;

(b) Use the Internet as a tool for countering the spread of terrorism, while recognizing that States may require assistance in this regard;

13. To step up national efforts and bilateral, subregional, regional and international cooperation, as appropriate, to improve border and customs controls in order to prevent and detect the movement of terrorists and prevent and detect the illicit traffic in, inter alia, small arms and light weapons, conventional ammunition and explosives, and nuclear, chemical, biological or radiological weapons and materials, while recognizing that States may require assistance to that effect;

14. To encourage the Counter-Terrorism Committee and its Executive Directorate to continue to work with States, at their request, to facilitate the adoption of legislation and administrative measures to implement the terrorist travel-related obligations and to identify best practices in this area, drawing whenever possible on those developed by technical international organizations, such as the International Civil Aviation Organization, the World Customs Organization and the International Criminal Police Organization;

15. To encourage the Committee established pursuant to Security Council resolution 1267 (1999) to continue to work to strengthen the effectiveness of the travel ban under the United Nations sanctions regime against Al Qaida and the

Taliban and associated individuals and entities, as well as to ensure, as a matter of priority, that fair and transparent procedures exist for placing individuals and entities on its lists, for removing them and for granting humanitarian exceptions. In this regard, we encourage States to share information, including by widely distributing the International Criminal Police Organization/United Nations special notices concerning people subject to this sanctions regime;

16. To step up efforts and cooperation at every level, as appropriate, to improve the security of manufacturing and issuing identity and travel documents and to prevent and detect their alteration or fraudulent use, while recognizing that States may require assistance in doing so. In this regard, we invite the International Criminal Police Organization to enhance its database on stolen and lost travel documents, and we will endeavour to make full use of this tool, as appropriate, in particular by sharing relevant information;

17. To invite the United Nations to improve coordination in planning a response to a terrorist attack using nuclear, chemical, biological or radiological weapons or materials, in particular by reviewing and improving the effectiveness of the existing inter-agency coordination mechanisms for assistance delivery, relief operations and victim support, so that all States can receive adequate assistance. In this regard, we invite the General Assembly and the Security Council to develop guidelines for the necessary cooperation and assistance in the event of a terrorist attack using weapons of mass destruction;

18. To step up all efforts to improve the security and protection of particularly vulnerable targets, such as infrastructure and public places, as well as the response to terrorist attacks and other disasters, in particular in the area of civil protection, while recognizing that States may require assistance to this effect.

III. Measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard

We recognize that capacity-building in all States is a core element of the global counter-terrorism effort, and resolve to undertake the following measures to develop State capacity to prevent and combat terrorism and enhance coordination and coherence within the United Nations system in promoting international cooperation in countering terrorism:

1. To encourage Member States to consider making voluntary contributions to United Nations counter-terrorism cooperation and technical assistance projects, and to explore additional sources of funding in this regard. We also encourage the United Nations to consider reaching out to the private sector for contributions to capacity-building programmes, in particular in the areas of port, maritime and civil aviation security;

2. To take advantage of the framework provided by relevant international, regional and subregional organizations to share best practices in counter-terrorism capacity-building, and to facilitate their contributions to the international community's efforts in this area;

3. To consider establishing appropriate mechanisms to rationalize States' reporting requirements in the field of counter-terrorism and eliminate duplication of reporting requests, taking into account and respecting the different mandates of the

General Assembly, the Security Council and its subsidiary bodies that deal with counter-terrorism;

4. To encourage measures, including regular informal meetings, to enhance, as appropriate, more frequent exchanges of information on cooperation and technical assistance among Member States, United Nations bodies dealing with counter-terrorism, relevant specialized agencies, relevant international, regional and subregional organizations and the donor community, to develop States' capacities to implement relevant United Nations resolutions;

5. To welcome the intention of the Secretary-General to institutionalize, within existing resources, the Counter-Terrorism Implementation Task Force within the Secretariat in order to ensure overall coordination and coherence in the counter-terrorism efforts of the United Nations system;

6. To encourage the Counter-Terrorism Committee and its Executive Directorate to continue to improve the coherence and efficiency of technical assistance delivery in the field of counter-terrorism, in particular by strengthening its dialogue with States and relevant international, regional and subregional organizations and working closely, including by sharing information, with all bilateral and multilateral technical assistance providers;

7. To encourage the United Nations Office on Drugs and Crime, including its Terrorism Prevention Branch, to enhance, in close consultation with the Counter-Terrorism Committee and its Executive Directorate, its provision of technical assistance to States, upon request, to facilitate the implementation of the international conventions and protocols related to the prevention and suppression of terrorism and relevant United Nations resolutions;

8. To encourage the International Monetary Fund, the World Bank, the United Nations Office on Drugs and Crime and the International Criminal Police Organization to enhance cooperation with States to help them to comply fully with international norms and obligations to combat money-laundering and the financing of terrorism;

9. To encourage the International Atomic Energy Agency and the Organization for the Prohibition of Chemical Weapons to continue their efforts, within their respective mandates, in helping States to build capacity to prevent terrorists from accessing nuclear, chemical or radiological materials, to ensure security at related facilities and to respond effectively in the event of an attack using such materials;

10. To encourage the World Health Organization to step up its technical assistance to help States to improve their public health systems to prevent and prepare for biological attacks by terrorists;

11. To continue to work within the United Nations system to support the reform and modernization of border management systems, facilities and institutions at the national, regional and international levels;

12. To encourage the International Maritime Organization, the World Customs Organization and the International Civil Aviation Organization to strengthen their cooperation, work with States to identify any national shortfalls in areas of transport security and provide assistance, upon request, to address them;

13. To encourage the United Nations to work with Member States and relevant international, regional and subregional organizations to identify and share best practices to prevent terrorist attacks on particularly vulnerable targets. We invite the International Criminal Police Organization to work with the Secretary-General so that he can submit proposals to this effect. We also recognize the importance of developing public-private partnerships in this area.

IV. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism

We resolve to undertake the following measures, reaffirming that the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy, recognizing that effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing, and stressing the need to promote and protect the rights of victims of terrorism:

1. To reaffirm that General Assembly resolution 60/158 of 16 December 2005 provides the fundamental framework for the “Protection of human rights and fundamental freedoms while countering terrorism”;

2. To reaffirm that States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law;

3. To consider becoming parties without delay to the core international instruments on human rights law, refugee law and international humanitarian law, and implementing them, as well as to consider accepting the competence of international and relevant regional human rights monitoring bodies;

4. To make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with our obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations. We recognize that States may require assistance in developing and maintaining such effective and rule of law-based criminal justice systems, and we encourage them to resort to the technical assistance delivered, inter alia, by the United Nations Office on Drugs and Crime;

5. To reaffirm the important role of the United Nations system in strengthening the international legal architecture by promoting the rule of law, respect for human rights and effective criminal justice systems, which constitute the fundamental basis of our common fight against terrorism;

6. To support the Human Rights Council and to contribute, as it takes shape, to its work on the question of the promotion and protection of human rights for all in the fight against terrorism;

7. To support the strengthening of the operational capacity of the Office of the United Nations High Commissioner for Human Rights, with a particular emphasis on increasing field operations and presences. The Office should continue

to play a lead role in examining the question of protecting human rights while countering terrorism, by making general recommendations on the human rights obligations of States and providing them with assistance and advice, in particular in the area of raising awareness of international human rights law among national law-enforcement agencies, at the request of States;

8. To support the role of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The Special Rapporteur should continue to support the efforts of States and offer concrete advice by corresponding with Governments, making country visits, liaising with the United Nations and regional organizations and reporting on these issues.

Annex II

Cooperation as regards exchange of information: relevant provisions of the universal instruments

1. Certain conventions embody the principle of a strong commitment to cooperate between States parties.

“States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings ...”.

[International Convention for the Suppression of Terrorist Bombings, article 10, paragraph 1^a]

[International Convention for the Suppression of the Financing of Terrorism, article 12, paragraph 1^b]

2. Certain conventions invite States parties to establish mechanisms to make such cooperation possible.

“Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence ...”.

[International Convention for the Suppression of the Financing of Terrorism, article 12, paragraph 4]

“States Parties shall further cooperate ... by ... establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information.”

[International Convention for the Suppression of the Financing of Terrorism, article 18, paragraph 3 (a)]

“States Parties shall cooperate by ... (b) coordinating administrative and other measures taken as appropriate to detect, prevent, suppress and investigate ...”.

[International Convention for the Suppression of Acts of Nuclear Terrorism, article 7^c]

3. Certain conventions even embody the principle of an obligation to exchange information.

“States Parties shall cooperate by ... exchanging accurate and verified information.”

[International Convention for the Suppression of Terrorist Bombings, article 15]

[International Convention for the Suppression of Acts of Nuclear Terrorism, article 7]

^a United Nations, *Treaty Series*, vol. 2149, No. 37517.

^b *Ibid.*, vol. 2178, No. 38349.

^c General Assembly resolution 59/290, annex.

4. A number of conventions expressly name the International Criminal Police Organization (INTERPOL) as a possible channel for the transmission of information, for example:

“States Parties may exchange information through the International Criminal Police Organization (INTERPOL).”

[International Convention for the Suppression of the Financing of Terrorism, article 18, paragraph 4]

Annex XVII contains an extensive list of instruments that mention INTERPOL as a possible means of transmission.

Annex III

Offences defined by the universal instruments^a

I. Offences linked to the financing of terrorism

1. The following acts are qualified as offences, when committed unlawfully and wilfully:^b

(a) Directly or indirectly providing or collecting funds^c with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out the following acts:

(i) An act that constitutes an offence within the scope of and as defined in one of the nine treaties preceding the International Convention for the Suppression of the Financing of Terrorism of 1999 that define terrorist acts;

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

(b) Attempting to commit such an offence;

(c) Participating as an accomplice, organizing or directing others to commit such an offence;

(d) Intentionally contributing to the commission of such an offence by a group of persons acting with a common purpose.

In addition, States must criminalize the wilful provision by their nationals or in their territories of funds to be used in order to carry out terrorist acts.^d

II. Offences based on the status of victims

2. The following acts are qualified as offences, when committed unlawfully and wilfully:^e

^a The universal instruments may be consulted on the database of the Terrorism Prevention Branch, United Nations Office on Drugs and Crime, at http://www.unodc.org/tldb/universal_instruments.html.

^b International Convention for the Suppression of the Financing of Terrorism, article 2.

^c The expression “funds” means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

^d Security Council resolution 1373 (2001), paragraph 1.

^e International Convention against the Taking of Hostages, article 1, and Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, article 2.

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

(b) Intentionally committing a murder, kidnapping or other attack upon the person or liberty of an internationally protected person or a threat to commit any such attack;

(c) Committing a violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his or her person or liberty or a threat to commit any such attack;

(d) Acting as an accomplice of any person who commits or attempts to commit any of the aforementioned offences;

(e) Attempting to commit the aforementioned offences.

III. Offences linked to civil aviation

3. The following acts are qualified as offences, when committed unlawfully and wilfully:^f

(a) Seizing, or exercising control, by force or threat thereof, or by any other form of intimidation, of an aircraft in flight;

(b) 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;

(c) Destroying an aircraft in service or causing damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight;

(d) Placing or causing to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight;

(e) 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;

(f) Communicating information which he or she knows to be false, thereby endangering the safety of an aircraft in flight;

(g) Performing, using any device, substance or weapon, 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;

(h) Destroying or seriously damaging the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupting the

^f Convention for the Suppression of Unlawful Seizure of Aircraft, article 1; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, article 1; and article 1 bis. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

services of the airport, if such an act endangers or is likely to endanger safety at that airport;

(i) Acting as an accomplice of any person who commits or attempts to commit any of the aforementioned offences.

IV. Offences concerning ships and fixed platforms

4. The following acts are qualified as offences, when committed unlawfully and wilfully:^g

(a) Seizing or exercising control over a ship or a fixed platform by force or threat thereof or any other form of intimidation;

(b) Performing an act of violence against a person on board a ship or a fixed platform if that act is likely to endanger the safety of that ship or the safety of that fixed platform;

(c) Destroying a ship or a fixed platform or causing damage to a ship or to its cargo or to a fixed platform which is likely to endanger the safe navigation of that ship or the safety of that fixed platform;

(d) Placing or causing to be placed on a ship or a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo or to a fixed platform which endangers or is likely to endanger the safe navigation of that ship or the safety of that fixed platform;

(e) 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;

(f) Communicating information which he or she knows to be false, thereby endangering the safe navigation of a ship;

(g) Injuring or killing any person, in connection with the commission or the attempted commission of any of the aforementioned offences;

(h) Committing an act when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act: (i) use against or on a ship or fixed platform or discharges from a ship or a fixed platform any explosive, radioactive material or biological, chemical or nuclear weapon in a manner that causes or is likely to cause death or serious injury or damage; or (ii) discharge, from a ship or a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance not set forth in subparagraph (i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage;

^g Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, article 3; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms on the Continental Shelf, article 2; Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, articles 4 and 5.

(i) Transport on board a ship: (i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a Government or an international organization to do or to abstain from doing any act; or (ii) any biological, chemical or nuclear weapon, knowing it to be a biological, chemical or nuclear weapon as defined in article 1 of the Protocol; or (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an International Atomic Energy Agency comprehensive safeguards agreement; or (iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a biological, chemical or nuclear weapon, with the intention that it will be used for such purpose;

(j) Transporting another person on board a ship knowing that the person has committed an act that constitutes an offence set forth above, and intending to assist that person to evade criminal prosecution;

(k) The following acts are also offences:

(i) Abetting the commission of any of the aforementioned offences;

(ii) Acting as an accomplice of the person who commits any such offence;

(iii) Threatening to commit any of the aforementioned offences, with or without a condition, aimed at compelling a physical or juridical person to do or refrain from doing any act, if that threat is likely to endanger the safe navigation of the ship or the safety of the fixed platform.

V. Offences linked to dangerous material

5. The following acts are qualified as offences, when committed unlawfully and wilfully:

(a) The intentional commission of:^h

(i) The receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material which causes or is likely to cause death or serious injury to any person or substantial damage to property or to the environment;

(ii) A theft or robbery of nuclear material;

(iii) An embezzlement or fraudulent obtaining of nuclear material;

(iv) Carrying, sending or moving nuclear material into or out of a State without lawful authority;

(v) An act directed against a nuclear facility, or an act interfering with the operation of a nuclear facility, where the offender intentionally causes, or

^h Convention on the Physical Protection of Nuclear Material, article 7, amended by article 9, paragraph 1, of the 2005 Protocol.

where he or she knows that the act is likely to cause, death or serious injury to any person or substantial damage to property or to the environment by exposure to radiation or release of radioactive substances, unless that act is carried out in accordance with the domestic law of the State party in the territory of which the nuclear facility is located;

(vi) An act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;

(b) A threat:

(i) To use nuclear material to cause death or serious injury to any person or substantial property damage or to the environment or to commit the aforementioned offences;

(ii) To commit the aforementioned acts in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;

(c) The act of unlawfully and intentionally:ⁱ

(i) 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 intent to cause death or serious bodily injury or to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss;

(ii) Contributing in any other way to the commission of one or more of these offences by a group of persons acting with a common purpose, such contribution being intentional and either being made with the aim of furthering the general criminal activity or purpose of the group or being made in the knowledge of the intention of the group to commit the offence or offences concerned;

(iii) Participating as an accomplice, organizing, or directing others to commit any of the aforementioned offences.

6. The following acts are qualified as offences:^j

(a) Possessing radioactive material or making or possessing a device with the intent to cause death or serious bodily injury or with the intent to cause substantial damage to property or to the environment;

(b) Using in any way radioactive material or a device, or using or damaging 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;

ⁱ International Convention for the Suppression of Terrorist Bombings, article 2.

^j International Convention for the Suppression of Acts of Nuclear Terrorism, article 2, and Convention on the Physical Protection of Nuclear Material, article 7, amended by article 9, paragraph 1, of the 2005 Protocol.

- (c) Threatening, under circumstances which indicate the credibility of the threat, to commit any of the aforementioned offences;
- (d) Demanding unlawfully and intentionally radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force;
- (e) Attempting to commit any of the aforementioned offences;
- (f) Participating as an accomplice to any of the aforementioned offences;
- (g) Organizing or directing others to commit any of the aforementioned offences;
- (h) In any other way contributing to the commission of one or more offences set forth by a group of persons acting with a common purpose if such contribution is intentional and is either made with the aim of furthering the general criminal activity or purpose of the group or is made in the knowledge of the intention of the group to commit the offence or offences concerned;
- (i) Participating in any of the offences described above.

Annex IV

Indicative list of regional instruments relating to the prevention of terrorism and the suppression of the financing of terrorism^a

I. Africa

1. Central African Economic and Monetary Community

(a) Regulation No. 01/03 CEMAC-UMAC concerning prevention and suppression of the laundering of capital and financing of terrorism in Central Africa (adopted at Yaoundé on 4 April 2003)^b

(b) Regulation No. 08/05 UEAC-057-CM-13 concerning the adoption of the Convention Relative to the Fight against Terrorism in Central Africa (adopted at Libreville on 7 February 2005)^c

2. Central African Monetary Union

Regulation No.14/2002/CM/UEMOA relative to the freezing of funds and other financial resources within the framework of the fight against the financing of terrorism (adopted at Ouagadougou on 1 September 2002)^d

3. Organization of African Union

(a) Convention on the Prevention and Combating of Terrorism (adopted at Algiers on 14 July 1999)

(b) Additional Protocol to the OAU Convention on the Prevention and Combating of Terrorism (adopted at Addis Ababa on 2 July 2004)^e

II. The Americas

Organization of American States

(a) Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (concluded at Washington, D.C., on 2 February 1971)^f

(b) Inter-American Convention against Terrorism (concluded at Bridgetown on 3 June 2002)^g

^a The regional instruments may be consulted on the database of the Terrorism Prevention Branch, United Nations Office on Drugs and Crime, at <https://www.unodc.org/tldb>.

^b See <http://www.beac.int/projets/rprbft.pdf>.

^c See

http://www.izf.net/izf/Documentation/JournalOfficiel/AfriqueCentrale/2005/REG8_2005.htm.

^d See

http://www.izf.net/izf/Documentation/JournalOfficiel/AfriqueOuest/2002/REG14_2002.htm.

^e See <http://untreaty.un.org/English/Terrorism.asp>.

^f See <http://untreaty.un.org/English/Terrorism.asp> or <http://www.oas.org>.

III. Arab States

1. Cooperation Council for the Arab States of the Gulf

Convention of the Cooperation Council for the Arab States of the Gulf on the Fight against Terrorism (adopted at Kuwait on 4 May 2004)^h

2. League of Arab Nations

Arab Convention for the Suppression of Terrorism (signed at Cairo on 22 April 1998)^e

3. Organization of the Islamic Conference

Convention of the Organization of the Islamic Conference on Combating International Terrorism (adopted at Ouagadougou on 1 July 1999)^e

IV. Asia and the Pacific

1. Commonwealth of Independent States

Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism (concluded at Minsk on 4 June 1999)^e

2. Shanghai Cooperation Organization

Shanghai Convention on Combating Terrorism, Separatism and Extremism (concluded at Shanghai, China, on 15 June 2001)^h

3. South Asian Association for Regional Cooperation

(a) Regional Convention on the Suppression of Terrorism (signed at Kathmandu on 4 November 1987)^e

(b) Additional Protocol to the Regional Convention on the Suppression of Terrorism (concluded at Islamabad on 6 January 2004)ⁱ

V. Europe

1. Black Sea Economic Cooperation

Project: additional protocol on combating terrorism to the agreement among the Governments of the Black Sea Economic Cooperation participating States on cooperation in combating crime, in particular in its organized forms (2003)^h

2. Council of Europe

(a) European Convention on the Suppression of Terrorism, as amended by its Protocol (concluded at Strasbourg, France, on 27 January 1977)^j

^e See <http://www.oas.org>.

^h See https://www.unodc.org/tldb/en/regional_instruments.html.

ⁱ See <http://www.saarc-sec.org/main.php?id=11&t=3.2>.

(b) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism (concluded at Strasbourg, France, on 8 November 1990)^k

(c) Protocol amending the European Convention on the Suppression of Terrorism (concluded at Strasbourg, France, on 15 May 2003)^l

(d) Council of Europe Convention on the Prevention of Terrorism (concluded at Warsaw on 16 May 2005)^m

3. European Union

(a) Council Framework Decision of 13 June 2002 on combating terrorismⁿ

(b) Other instruments on terrorism: lists and texts^o

^j See <http://www.legal.coe.int>.

^k See <http://conventions.coe.int/treaty/>.

^l See <http://conventions.coe.int/Treaty/EN/Treaties/Html/190.htm>.

^m See <http://untreaty.un.org/English/Terrorism.asp> or <http://www.legal.coe.int>.

ⁿ See <http://conventions.coe.int/Default.asp>.

^o For lists and complete texts, see http://ec.europa.eu/justice_home/doc_centre/criminal/terrorism/doc_criminal_terrorism_en.htm.

Annex V

Mutual legal assistance: relevant provisions of the universal instruments

1. In the universal instruments related to the fight against terrorism, the rule according to which States parties are required to give one another assistance for purposes of criminal proceedings first appeared in the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (the Hague Convention).^a It is repeated in all subsequent criminal conventions (except the Convention on the Marking of Plastic Explosives for the Purpose of Detection of 1991).^b

2. The conventions relative to air security state that any contracting State in the territory of which the perpetrator of the offence of unlawful seizure of aircraft is present shall immediately make a preliminary enquiry into the facts and “promptly report its findings” to the State of registration of the aircraft and the State of which the offender is a national.^c The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention) of 1971^d even specifies that any State “having reason to believe that one of the offences ... will be committed” must provide any relevant information in its possession.^e Since that Convention, all conventions require States to adopt measures for the prevention of offences committed against other States parties.

3. This obligation was broadened in the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973^f and includes the duty to exchange information and to coordinate administrative measures and other preventive measures. All subsequent instruments also impose this requirement, except the 1988 Protocol on airport security supplementary to the Montreal Convention.^g

4. In the International Convention against the Taking of Hostages of 1979^h and subsequent conventions, this assistance is expressly defined as including the transmission of all available evidentiary elements that the States parties have at their disposal.

5. The Convention on the Physical Protection of Nuclear Material of 1979ⁱ specifies that States should cooperate concerning the design, maintenance and improvement of systems of physical protection of nuclear material in international transport (article 5, paragraph 3). The International Convention for the Suppression

^a United Nations, *Treaty Series*, vol. 860, No. 12325.

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

^c Hague Convention, article 6; Montreal Convention, article 6.

^d United Nations, *Treaty Series*, vol. 974, No. 14118.

^e Montreal Convention, article 12.

^f General Assembly resolution 3166 (XXVIII), annex.

^g United Nations, *Treaty Series*, vol. 1589, No. 14118.

^h General Assembly resolution 34/146, annex.

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

of Terrorist Bombings of 1997^j advocates common standards for explosives, which implies cooperation in research matters.

6. The International Convention for the Suppression of the Financing of Terrorism of 1999^k invites States parties to give consideration to establishing mechanisms to share with other States parties information or evidence needed to establish criminal, civil or administrative liability (article 12, paragraph 4). In fact, the text recommends the use of the most efficient channels of communication as possible. An information exchange is provided for when a State has good reason to believe that an offence will be committed; it is then required to warn the States concerned and provide relevant information to them.

^j Ibid., vol. 2149, No. 37517.

^k Ibid., vol. 2178, No. 38349.

Annex VI

Indicative list of multilateral conventions relating to mutual legal assistance and extradition

I. Mutual Legal Assistance

A. Africa

1. Central African Economic and Monetary Community

Mutual Legal Assistance Agreement between Member States of the Community^a

2. Economic Community of West African States

Convention relative to Mutual Legal Assistance in Criminal Matters

B. The Americas

Organization of American States

(a) Inter-American Convention on Letters Rogatory (1975)^b

(b) Inter-American Convention on the Taking of Evidence Abroad (1975)^c

(c) Inter-American Convention on Proof of and Information on Foreign Law (1977)^d

(d) Additional Protocol to the Inter-American Convention on Letters Rogatory (1979)^e

(e) Inter-American Convention on Execution of Preventive Measures (1979)^f

(f) Inter-American Convention on the Extraterritorial Validity of Foreign Judgements and Arbitral Awards (1979)^g

(g) Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad (1984)^h

(h) Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgements (1984)ⁱ

^a See

http://www.izf.net/izf/Documentation/JournalOfficiel/AfriqueCentrale/2004/Accord_Coop_Judiciaire.pdf.

^b See <http://www.oas.org/juridico/english/Treaties/b-36.html>.

^c See <http://www.oas.org/juridico/english/treaties/b-37.htm>.

^d See <http://www.oas.org/juridico/english/treaties/b-43.htm>.

^e See <http://www.oas.org/juridico/english/Treaties/b-46.html>.

^f See <http://www.oas.org/juridico/english/Treaties/b-42.html>.

^g See <http://www.oas.org/juridico/english/treaties/b-41.htm>.

^h See <http://www.oas.org/juridico/english/treaties/b-51.htm>.

ⁱ See <http://www.oas.org/juridico/english/treaties/b-50.htm>.

(i) Inter-American Convention on Mutual Legal Assistance in Criminal Matters (1992)^j

(j) Additional Protocol to the Inter-American Convention on Mutual Legal Assistance in Criminal Matters (1993)^k

(k) Inter-American Convention on Serving Criminal Sentences Abroad (1993)^l

C. Arab States

League of Arab States

Convention on Mutual Assistance in Criminal Matters (1983)

D. Asia

South Asian Association for Regional Cooperation

Additional protocol to the South Asian Association for Regional Cooperation Regional Convention on the Suppression of Terrorism (2004)^m

E. Europe

1. European conventions

(a) European Convention on Mutual Assistance in Criminal Matters (1959)ⁿ

(b) European Convention on the International Validity of Criminal Judgements (1970)^o

(c) European Convention on the Transfer of Proceedings in Criminal Matters (1972)^p

(d) European Agreement on the Transmission of Applications for Legal Aid (1977)^q

(e) Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (1978)^r

(f) European Convention on the Transfer of Sentenced Persons (1983)^s

^j Organization of American States, Treaty Series, No. 75 (http://www.oas.org/juridico/mla/en/traites/en_traites-mla-interam.html).

^k See <http://www.oas.org/juridico/english/treaties/A-59.htm>.

^l See <http://www.oas.org/juridico/english/treaties/A-57.htm>.

^m See <http://www.saarc-sec.org/main.php?id=11&t=3.2>.

ⁿ Council of Europe, *European Treaty Series*, No. 30 (<http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>).

^o See <http://conventions.coe.int/treaty/en/Treaties/Html/070.htm>.

^p See <http://conventions.coe.int/treaty/en/Treaties/Html/073.htm>.

^q See <http://conventions.coe.int/Treaty/en/Treaties/Html/092.htm>.

^r Council of Europe, *European Treaty Series*, No. 99 (<http://conventions.coe.int/Treaty/EN/Treaties/Html/099.htm>).

(g) Additional protocol to the European Convention on the Transfer of Sentenced Persons (1997)^t

(h) Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000)^u

(i) Additional Protocol to the European Agreement on the Transmission of Applications for Legal Aid (2001)^v

(j) Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2001)^w

(k) Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (2001)^x

(l) Council Decision on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP (2003/48/JAI, 19 December 2002)^y

2. Schengen Convention

Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (2000)^z

F. Commonwealth of Independent States

Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism (1999)^{aa}

II. Extradition

A. Conventions where the central theme is extradition

1. European Convention on Extradition (1957)^{bb}

^s See <http://conventions.coe.int/treaty/en/Treaties/Html/112.htm>.

^t See <http://conventions.coe.int/Treaty/en/Treaties/Word/167.doc>.

^u *Official Journal of the European Communities*, No. C 197, 12 July 2000 (<http://europa.eu.int/eur-lex/lex/JOIndex.do?>).

^v See <http://conventions.coe.int/treaty/en/Treaties/Html/179.htm>.

^w *Official Journal of the European Communities*, No. C 326, 21 November 2001 (<http://europa.eu.int/eur-lex/lex/JOIndex.do?>).

^x Council of Europe, *European Treaty Series*, No. 182 (<http://conventions.coe.int/Treaty/en/treaties/Html/182.htm>).

^y *Official Journal of the European Communities*, No. L 016 of 22 January 2003, pp. 68-70 (http://europa.eu.int/eur-lex/pri/fr/oj/dat/2003/l_016/l_01620030122fr00680070.pdf).

^z *Ibid.*, No. L 239, 22 September, 2000 (<http://europa.eu.int/eur-lex/lex/JOIndex.do?ihmlang=fr>).

^{aa} See http://untreaty.un.org/English/Terrorism/csi_e.pdf.

^{bb} Council of Europe, *European Treaty Series*, No. 24 (<http://conventions.coe.int/Treaty/EN/Treaties/Html/024.htm>).

2. Commonwealth Scheme for the Rendition of Fugitive Offenders (1966)^{cc}
3. Second Additional Protocol to the European Convention on Extradition (1978)^{dd}
4. Inter-American Convention on Extradition (1981)^{ee}
5. League of Arab States Convention on Mutual Assistance (1983)
6. Inter-American Convention on Extradition (1984)^{ff}
7. Economic Community of West African States Convention on Extradition (1994)^{gg}
8. Convention drawn up on the basis of article K.3 of the Treaty on European Union, on Simplified Extradition Procedures between the Member States of the European Union (1995)^{hh}
9. Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States of the European Unionⁱⁱ

B. Conventions in which extradition is mentioned but not central

1. Arab Convention on the Suppression of Terrorism (1998, article 6)
2. Convention of the Organization of the Islamic Conference on Combating International Terrorism (1999, article 6)
3. Convention of the Organization of African Unity on the Prevention and Combating of Terrorism (1999, article 8)
4. Extradition Agreement between Member States of the Economic Community of Central African States

III. Exchange of information

Treaties establishing:

- (a) Association of Southeast Asian Nations Chiefs of Police^{jj}
- (b) Comité des Chefs de police d'Afrique centrale^{kk}

^{cc} See http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B717FA6D4-0DDF-4D10-853E-D250F3AE65D0%7D_London_Amendments.pdf.

^{dd} See <http://conventions.coe.int/treaty/en/Treaties/Html/098.htm>.

^{ee} Organization of American States, *Treaty Series*, No. 60 ([http://www.oas.org/juridico/english/treaties/b-47\(1\).html](http://www.oas.org/juridico/english/treaties/b-47(1).html)).

^{ff} See [http://www.oas.org/juridico/english/treaties/b-47\(1\).html](http://www.oas.org/juridico/english/treaties/b-47(1).html) and <http://www.oas.org/juridico/spanish/tratados/b-47.html>.

^{gg} See http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/4ConExtradition.pdf.

^{hh} *Official Journal of the European Communities*, C 078, 30 March 1995

([http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=FR&numdoc=41995A0330\(01\)&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=FR&numdoc=41995A0330(01)&model=guichett)).

ⁱⁱ Decision 2002/584/JAI.

^{jj} See <http://www.aseansec.org/>.

- (c) Comité des Chefs de police d'Afrique de l'Ouest^{kk}
- (d) Eastern Africa Police Chiefs Cooperation Organization^{kk}
- (e) European Police Office^{ll}
- (f) Southern African Regional Police Chiefs Cooperation Organization^{kk}

^{kk} See <http://www.interpol.int/public/region/africa/Committees/ccpac.asp>.

^{ll} See <http://www.europol.europa.eu/>.

Annex VII

Model declaration on cooperation in matters of extradition

When a State party to one of the universal instruments, which makes extradition conditional on the existence of a treaty, receives a request for extradition from another State party with which it has no extradition treaty, the requested State party may consider the relevant instrument the legal basis for extradition with respect to the offences to which it applies.

Model declaration for cooperation in matters of extradition

(to be signed by the Head of State, the Head of Government or Foreign Secretary)

Declaration

We [*name and title of Head of State, Head of Government or Foreign Secretary*] attest by the present declaration that the Government of [*name of State*] deems [*title and date of adoption of the convention, treaty or agreement*], in accordance with article [*number*], the legal basis for extradition in order to cooperate with other States parties, on the condition of reciprocity, for the offences for which the aforementioned [*convention, treaty or agreement*] applies.

In witness whereof,
At [*place*], the [*date*],

Signature
Official seal

Annex VIII

The right to information and communication from the time of arrest: relevant provisions of the universal instruments

1. For proceedings linked to offences linked to the financing of terrorism

1. In its article 9, paragraph 3, the International Convention for the Suppression of the Financing of Terrorism,^a in accordance with the classic provisions in the matter, states that anyone who is the subject of prosecution is entitled to communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides; to be visited by a representative of that State; to be informed of his or her rights; and (article 9, paragraph 5) to communicate with the International Committee of the Red Cross, who can visit him.

2. For proceedings relative to offences based on the victim's status

2. In its article 6, paragraph 2, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,^b states:

“Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled:

“(a) To communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to protect his rights or, if he is a stateless person, which he requests and which is willing to protect his rights; and

“(b) To be visited by a representative of that State.”

3. Article 6, paragraph 3, of the International Convention against the Taking of Hostages^c provides:

“Any person regarding whom the measures referred to in paragraph 1 of this article are being taken shall be entitled ... to communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence.”

In addition, according to the terms of article 6, paragraph 5, these provisions “shall be without prejudice to the right of any State Party having claim to jurisdiction ..., to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.”

^a United Nations, *Treaty Series*, vol. 2178, No. 38349.

^b General Assembly resolution 3166 (XXVIII), annex.

^c General Assembly resolution 34/146, annex.

3. For offences relative to offences linked to civil aviation

4. According to article 13, paragraph 3, of the Convention on Offences and Certain Other Acts Committed on Board Aircraft:^d

“Any person in custody ... shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.”

5. This is also the case in article 6 of the Convention for the Suppression of Unlawful Seizure of Aircraft.^e

6. Article 6, paragraph 3, of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation^f is drafted in identical terms.

4. For proceedings concerning ships and fixed platforms

7. According to article 7, paragraph 3, of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation:^g

“Any person regarding whom the measures referred to in paragraph 1 are being taken shall be entitled to:

“(a) Communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;

“(b) Be visited by a representative of that State.”

5. For proceedings relative to offences linked to dangerous material

8. Article 12 of the Convention on the Physical Protection of Nuclear Material^h states: “Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 7 shall be guaranteed fair treatment at all stages of the proceedings”, which implies the right to information and communication.

9. Article 7, paragraphs 3 and 5, of the International Convention for the Suppression of Terrorist Bombingsⁱ provides that any person regarding whom proceedings are being carried out is entitled to communicate without delay with the appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person’s rights or, if that person is a stateless person, the State in the territory of which that person habitually resides; to be visited by a representative of that State; and to be informed of that person’s right to communicate with the International Committee of the Red Cross.

^d United Nations, *Treaty Series*, vol. 704, No. 10106.

^e *Ibid.*, vol. 860, No. 12325.

^f *Ibid.*, vol. 974, No. 14118.

^g *Ibid.*, vol. 1678, No. 29004.

^h *Ibid.*, vol. 1456, No. 24631.

ⁱ *Ibid.*, vol. 2149, No. 37517.

10. Under article 10, paragraph 3, of the International Convention for the Suppression of Acts of Nuclear Terrorism:^j

“Any person regarding whom the measures referred to in paragraph 2 of the present article are being taken shall be entitled:

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

“(b) To be visited by a representative of that State;

“(c) To be informed of that person’s rights.”

Furthermore, paragraph 5 of article 10 states that those provisions “shall be without prejudice to the right of any State Party having a claim to jurisdiction ..., to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.”

^j General Assembly resolution 59/290, annex.

Annex IX

Notification of the arrest or detention of an alleged offender to all States and/or authorities concerned: relevant provisions of the universal instruments

1. For proceedings relative to offences linked to the financing of terrorism

1. Article 9, paragraph 6, of the International Convention for the Suppression of the Financing of Terrorism^a states:

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

2. For proceedings relative to offences linked to the victim’s status

2. Article 6, paragraph 1, of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,^b provides:

“Upon being satisfied that the circumstances so warrant, the State Party in whose territory the alleged offender is present shall take the appropriate measures under its internal law so as to ensure his presence for the purpose of prosecution or extradition. Such measures shall be notified without delay directly or through the Secretary-General of the United Nations to:

“(a) The State where the crime was committed;

“(b) The State or States of which the alleged offender is a national or, if he is a stateless person, in whose territory he permanently resides;

“(c) The State or States of which the internationally protected person concerned is a national or on whose behalf he was exercising his functions;

“(d) All other States concerned; and

“(e) The international organization of which the internationally protected person concerned is an official or an agent.”

3. Article 11 of the Convention states:

“The State Party where an alleged offender is prosecuted shall communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.”

^a United Nations, *Treaty Series*, vol. 2178, No. 38349.

^b General Assembly resolution 3166 (XXVIII), annex.

4. Similar provisions appear in article 6, paragraph 2, of the International Convention against the Taking of Hostages:^c

“The custody or other measures referred to in paragraph 1 of this article shall be notified without delay directly or through the Secretary-General of the United Nations to:

“(a) The State where the offence was committed;

“(b) The State against which compulsion has been directed or attempted;

“(c) The State of which the natural or juridical person against whom compulsion has been directed or attempted is a national;

“(d) The State of which the hostage is a national or in the territory of which he has his habitual residence;

“(e) The State of which the alleged offender is a national or, if he is a stateless person, the territory of which he has his habitual residence;

“(f) The international intergovernmental organization against which compulsion has been directed or attempted;

“(g) All other States concerned.”

5. In addition, under the terms of article 7:

“The State Party where the alleged offender is prosecuted shall in accordance with its laws communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States concerned and the international intergovernmental organizations concerned.”

3. For proceedings relative to offences linked to civil aviation

6. Under article 13, paragraph 5, of the Convention on Offences and Certain Other Acts Committed on Board Aircraft:^d

“When a State ... has taken a person into custody, it shall immediately notify the State of registration of the aircraft and the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such a person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry ... shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.”

7. This is also the case under article 6 of the Convention for the Suppression of Unlawful Seizure of Aircraft.^e In addition, article 11 provides:

“Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

^c General Assembly resolution 34/146, annex.

^d United Nations, *Treaty Series*, vol. 704, No. 10106.

^e *Ibid.*, vol. 860, No. 12325.

“(a) The circumstances of the offence;

“(b) The action taken ...;

“(c) The measures taken in relation to the offender or the alleged offender, and, in particular, the results of any extradition proceedings or other legal proceedings.”

8. Under article 6, paragraph 4, of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation:^f

“When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States in which the offence was committed, of registration of the aircraft against or aboard which the offence was committed, in which the aircraft landed when the alleged offender is on board, the State of permanent residence or principal place of business of the lessee who leased the aircraft without a crew, “the State of nationality of the detained person, and if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry ... shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.”

In addition, article 13 of the Convention contains identical wording to that quoted in paragraph 7 above.

“Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning:

“(a) The circumstances of the offence;

“(b) The action taken ...;

“(c) The measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings.”

4. For proceedings concerning ships and fixed platforms

9. Under article 7, paragraph 5, of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation:^g

“When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with article 6, paragraph 1 and, if it considers it advisable, any other interested States, of the fact that such a person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.”

10. Furthermore, article 15 provides:

^f Ibid., vol. 974, No. 14118.

^g Ibid., vol. 1678, No. 29004.

“Each State Party shall, in accordance with its national law, provide the Secretary-General, as promptly as possible, any relevant information in its possession concerning:

“(a) The circumstances of the offence;

“(b) The action taken pursuant to article 13, paragraph 2;

“(c) The measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings.

“The State Party where the alleged offender is prosecuted shall, in accordance with its national law, communicate the final outcome of the proceedings to the Secretary-General.

“The information transmitted ... shall be communicated by the Secretary-General to all States Parties, to Members of the International Maritime Organization ..., to the other States concerned, and to the appropriate international intergovernmental organizations.”

5. For proceedings relative to offences linked to dangerous material

11. Article 14 of the Convention on the Physical Protection of Nuclear Material^h states:

“The State Party where an alleged offender is prosecuted shall, wherever practicable, first communicate the final outcome of the proceedings to the States directly concerned. The State Party shall also communicate the final outcome to the depositary who shall inform all States.”

12. Article 7, paragraph 6, of the International Convention for the Suppression of Terrorist Bombingsⁱ states:

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

13. Article 16 of the Convention specifies:

“The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.”

14. Under Article 10, paragraph 6, of the International Convention for the Suppression of Acts of Nuclear Terrorism:^j

^h Ibid., vol. 1456, No. 24631.

ⁱ Ibid., vol. 2149, No. 37517.

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

15. Article 19 of the Convention states:

“The State Party where the alleged offender is prosecuted shall, in accordance with its national law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.”

ⁱ General Assembly resolution 59/290, annex.

Annex X

List of national financial intelligence units*

State/territory	Financial intelligence unit
Albania	Drejtoria e Pergjithshme per Parandalimine Pastrimit te Parave (General Directorate for the Prevention of Money-Laundering)
Andorra	Unitat de Prevenció del Blaqueig (Money-Laundering Prevention Unit)
Anguilla	Money-Laundering Reporting Authority
Antigua and Barbuda	Office of National Drug and Money-Laundering Control Policy (ONDCP)
Argentina	Unidad de Información Financiera
Armenia	Financial Monitoring Centre
Aruba	Meldpunt Ongebruikelijke Transacties, Ministerie van Financiën (Reporting Centre for Unusual Transactions, Ministry of Finance)
Australia	Australian Transaction Report and Analysis Centre
Austria	Bundeskriminalamt
Bahamas	Financial Intelligence Unit
Bahrain	Anti-Money-Laundering Unit
Barbados	Anti-Money-Laundering Authority
Belarus	Department of Financial Monitoring, State Control Committee of the Republic of Belarus
Belgium	Cellule de traitement des informations financières/Cel voor Financiële Informatieverwerking (Financial Information Processing Unit)
Belize	Financial Intelligence Unit
Bermuda	Financial Investigation Unit, Bermuda Police Service
Bolivia	Unidad de Investigaciones Financieras
Bosnia and Herzegovina	Financijsko Obavjestajni Odjel
Brazil	Conselho de Controle de Atividades Financeira (Council for Financial Activities Control)
British Virgin Islands	Financial Services Commission
Bulgaria	Financial Intelligence Agency

* List established by the Egmont Group; *status as at 12 July 2007*.

Canada	Financial Transactions and Reports Analysis Centre of Canada/Centre d'analyse des opérations et déclarations financières du Canada
Cayman Islands	Financial Reporting Authority
Chile	Unidad de Análisis Financiero
Colombia	Unidad de Información y Análisis Financiero
Cook Islands	Cook Islands Financial Intelligence Unit
Costa Rica	Instituto Costarricense sobre Drogas, Unidad de Análisis Financiero
Croatia	Financijska Policija, Ured za Sprječavanje Pranja Novca (Anti-Money-Laundering Department)
Cyprus	Unit for Combating Money-Laundering
Czech Republic	Finanční analytický útvar (Financial Analytical Unit)
Denmark	Stadsadvokaten for Særlig Økonomisk Kriminalitet/Hvidvasksekretariatet (National Public Prosecutor for Serious Economic Crime/Money-Laundering Secretariat)
Dominica	Financial Intelligence Unit
Egypt	Egyptian Money-Laundering Combating Unit
El Salvador	Unidad de Investigación Financiera
Estonia	Rahapesu Andmebüro (Money-Laundering Information Bureau)
Finland	Keskusrikospoliisi/Rahanpesun selvittelykeskus (National Bureau of Investigation/Money-Laundering Clearing House)
France	Traitement du renseignement et action contre les circuits financiers clandestins (Processing of Information and Action against Clandestine Financial Networks)
Georgia	Saqartvelos Finansuri Monitoringis Samsaxuri (Financial Monitoring Service of Georgia)
Germany	Zentralstelle für Verdachtsanzeigen (Financial Intelligence Unit)
Gibraltar	Gibraltar Co-ordinating Centre for Criminal Intelligence and Drugs, Gibraltar Financial Intelligence Unit
Greece	Committee for Financial and Criminal Investigation
Grenada	Financial Intelligence Unit
Guatemala	Intendencia de Verificación Especial
Guernsey	Financial Intelligence Service

Honduras	Unidad de Información Financiera
Hong Kong	Joint Financial Intelligence Unit
Hungary	Pénzmosás Elleni Alosztály
Iceland	Ríkislögreglustjórinn (National Commissioner of the Icelandic Police)
Indonesia	Pusat Pelaporan dan Analisis Transaksi Keuangan (Indonesian Financial Transaction Reports and Analysis Centre)
Ireland	An Garda Síochána/Bureau of Fraud Investigation
Isle of Man	Financial Crime Unit
Israel	Israel Money-Laundering Prohibition Authority
Italy	Ufficio Italiano dei Cambi, Servizio Antiriciclaggio (Italian Foreign Exchange Office, Anti-Money-Laundering Service)
Japan	Japan Financial Intelligence Center
Jersey	Joint Police and Customs Financial Investigation Unit
Latvia	Kontroles dienests, Noziedzīgi iegūto līdzekļu legalizācijas novēršanas dienests (Control Service, Office for the Prevention of Laundering of Proceeds of Crime)
Lebanon	Special Investigation Commission Fighting Money-Laundering
Liechtenstein	Einheit für Finanzinformationen (Financial Intelligence Unit)
Lithuania	Mokesčiu policijos departamentas prie Lietuvos Respublikos Vidaus reikalų ministerijos (Financial Crime Investigation Service, Ministry of the Interior of the Republic of Lithuania)
Luxembourg	Cellule de Renseignement Financier (Financial Intelligence Unit)
Malaysia	Unit Perisikan Kewangan, Bank Negara Malaysia (Financial Intelligence Unit, Central Bank of Malaysia)
Malta	Financial Intelligence Analysis Unit
Marshall Islands	Domestic Financial Intelligence Unit
Mauritius	Financial Intelligence Unit
Mexico	Dirección General Adjunta de Investigación de Operaciones, Unidad de Inteligencia Financiera (Office of the Deputy Director-General for Investigation of Transactions, Financial Intelligence Unit)

Monaco	Service d'information et de contrôle sur les circuits financiers
Montenegro	Uprava za Sprječavanje Pranja Novca i Finansiranja Terorizma (Administration for the Prevention of the Money-Laundering and Financing of Terrorism)
Netherlands	Meldpunt Ongebruikelijke Transacties, Ministerie van Justitie (Unusual Transactions Reporting Centre, Ministry of Justice)
Netherlands Antilles	Meldpunt Ongebruikelijke Transacties, Nederlandse Antillen (Unusual Transactions Reporting Centre, Netherlands Antilles)
New Zealand	New Zealand Police Financial Intelligence Unit
Nigeria	Nigerian Financial Intelligence Unit
Niue	Niue Financial Intelligence Unit
Norway	Økokrim, Hvitvaskingsenheten (National Authority for Investigation and Prosecution of Economic and Environmental Crime, Money-Laundering Unit)
Panama	Unidad de Análisis Financiero
Paraguay	Unidad de Análisis Financiero
Peru	Unidad de Inteligencia Financiera del Perú
Philippines	Anti-Money-Laundering Council
Poland	Generalny Inspektor Informacji Finansowej (Inspector-General of Financial Information)
Portugal	Unidade de Informação Financeira
Qatar	Qatar Financial Information Unit
Republic of Korea	Korea Financial Intelligence Unit
Romania	Oficiul National de Prevenire si Combatere a Spalarii Banilor (National Office for the Prevention and Control of Money-Laundering)
Russian Federation	Federalnaja Sluzhba po Finansovomu Monitoringu (Federal Service for Financial Monitoring)
Saint Kitts and Nevis	Financial Intelligence Unit
Saint Vincent and the Grenadines	Financial Intelligence Unit
San Marino	Banca Centrale Della Repubblica di San Marino, Divisione Vigilanza, Area FIU (Central Bank of San Marino, Supervision Department, FIU Area)
Serbia	Uprava za Sprečavanje Pranja Novca (Administration for the Prevention of Money-Laundering)
Singapore	Suspicious Transaction Reporting Office

Slovakia	Odbor finančného spravodajstva, Úradu finančnej polície (Financial Intelligence Unit, Bureau of Financial Police)
Slovenia	Urad RS za Preprečevanje Pranja Denarja, Ministrstvo za Finance (Office for the Prevention of Money-Laundering, Ministry of Finance)
South Africa	Financial Intelligence Centre
Spain	Servicio Ejecutivo, Comisión de Prevención de Blanqueo de Capitales e Infracciones Monetarias (Executive Service, Commission for the Prevention of Money-Laundering and Financial Crime)
Sweden	Finanspolisen, Rikskriminalpolisen (Financial Unit, National Criminal Intelligence Service)
Switzerland	Money-Laundering Reporting Office – Switzerland
Syrian Arab Republic	Combating Money-Laundering and Terrorism Financing Commission
Taiwan Province of China	Money-Laundering Prevention Centre
Thailand	Anti-Money-Laundering Office
The former Yugoslav Republic of Macedonia	Ministerstvo za Finansii, Direkcija za Sprečevanje na Perenje Pari (Money-Laundering Prevention Directorate)
Turkey	Mali Suçlari Arastirma Kurulu (Financial Crimes Investigation Board)
Ukraine	State Committee for Financial Monitoring
United Arab Emirates	Anti-Money-Laundering and Suspicious Cases Unit
United Kingdom of Great Britain and Northern Ireland	Financial Intelligence Unit, Serious Organised Crime Agency
United States of America	Financial Crimes Enforcement Network
Vanuatu	Financial Intelligence Unit
Venezuela	Unidad Nacional de Inteligencia Financiera

Annex XI

Model of a hypothetical request to obtain written evidence*

Request for assistance by Country A to Country B

Nature of the request

The Competent National Authority of Country A presents its compliments to the Competent National Authority of Country B and has the honour to request the following assistance:

1. *Obtaining exhibits or documentary evidence (including government, private sector and personal records), from persons or entities in the requested State, who are willing to provide them to the competent authorities in the requested State voluntarily (i.e. without first being served with a formal judicial or other appropriate order compelling their production and handover).*

1.1. Provide as specific a description as possible of all documents/exhibits to be obtained and their relevance to the investigation.

1.2. Provide the factual basis for believing that such evidence is located in the requested State and, to the extent known, the specific places where it may be found.

1.3. Provide the identity and location of the person(s) having possession, power over or control of the required document(s)/exhibit(s).

1.4. Provide the factual basis for believing that the document(s)/exhibits will be willingly provided by the person(s) having possession, power over or control of them.

1.5. Indicate whether and if so why, which and in what manner the requesting State's investigatory, judicial, prosecution or other authorities wish to participate in the obtaining of the evidence.

1.6. Give an indication as to whether a copy or certified copy of the documents will suffice and, if not, the reason why the original documents are required.

1.7. If certification or authentication is required, specify the form of certification/authentication, using one of the proforma certificates at the end of this database if possible.

1.8. Indicate the extent, if any, to which the document(s)/exhibit(s) will be returned to the requested State when no longer required for the purposes of the investigations or proceedings.

* Based on the UNODC Mutual Legal Assistance Request Writer Tool (<http://www.unodc.org/mla/index.html>).

Legal basis

Non-treaty agreement/arrangement or understanding

The request is based on the principle of reciprocity.

Background to the request

Relevant offence(s)

The Director of Public Prosecutions is a duly authorized authority, under the laws of Country A, to conduct criminal proceedings relating to alleged violations of the criminal law of Country A. That authority is currently doing so in relation to the [alleged] offences of:

1. Importation of controlled substances contrary to article X of the XXX Act of 2000. The relevant provisions of article X of the XXX Act of 2000 are set out below:

Article X

...

(Legal) person(s) involved: full particulars appear in enclosure I.

Sheridan Manley Bayford, born on 9 September 1966 in City C.

Entity(ies) involved: full particulars appear in enclosure II.

Shrimp Imports Pty Ltd., incorporated at City A on 12 September 1997.

Statement of facts

Give a short summary of all the relevant facts, e.g.:

1. Leading to the arrest, charging or conviction of persons involved.
2. Leading to the making of any restraining or forfeiture order.
3. Leading to any seizure of property for evidentiary purpose.
4. Linking the criminal behaviour at issue to the assistance requested.
5. Showing clearly how execution of the request will contribute to the case outcomes.

Current status of the case

Give a short summary of the current status of the case, including, if appropriate, e.g.:

1. Investigation (commenced, continuing, concluded).
2. Relevant assets (restrained, seized, confiscated).
3. Arrests (dates, warrants, etc.).
4. Charges laid.
5. Prosecution (commenced, continuing, concluded).

6. Trial (commenced, continuing, concluded).
7. Convicted/condemned and the date.
8. Appeal(s).

Prior contact between our respective authorities in this case:

Law enforcement contacts and intelligence exchanges to date have been between the INTERPOL national central bureaux of Country A, Country B and other countries involved in these investigations and proceedings.

Urgency

This request is urgent for the following reasons:

Please execute this request before 31 January 2006. Please consult the contact person indicated on the cover note of this request if the request cannot be executed before the specified date.

Confidentiality of request

This request should be handled in strict confidentiality for the following reasons:

Public disclosure of the fact of the request at this stage may tip off others suspected of being involved in the trafficking network and heighten the risk of property liable to be confiscated being removed from jurisdictions in which it is currently found. Country A undertakes to notify Country B as soon as investigations and proceedings would no longer be prejudiced by premature disclosure. Please consult the contact person indicated on the cover note of this request prior to the execution of this request if confidentiality cannot be maintained.

Request execution requirements

Do you require Country B to follow any special procedures to ensure that the assistance will accomplish its purpose?

If you have already addressed any of the procedural requirements below in the assistance type checklist(s), please indicate.

The need for admissibility requirements for the records from the Central Bank has been specified in the description of the type of assistance being requested.

Transmission channels

This request is being sent via the diplomatic channel (from our Ministry of Foreign Affairs to your Ministry of Foreign Affairs). This request is also being copied to the following authorities/institutions in Country B: Central Authority.

Assurance as to restriction on use of assistance provided

All information, documentation or other evidence provided to Country A by the Central Authority of Country B is intended solely for use in relation to the investigation or prosecution of the alleged offence(s) described above. It should not be used for any other purpose except with prior consultation with and the consent of the appropriate authorities of Country B.

Assurance as to reciprocity

Authorities from Country A would give similar assistance to the authorities from Country B should a request for assistance be made by Country B in a similar matter.

Yours sincerely,

(Signed) Carlyle Greenidge
Attorney-General's Office
Sir Edmont Frank Building 10/25
Broad Street
City A
Country A

Dated at City A, Country A, on 30 December 2005

Enclosure I

Particulars of the suspect(s)/offender(s) involved

Manley Bayford Sheridan

Attach photograph if possible

Name: Manley Bayford

Surname: Sheridan

Alias: Joseph Lindley Newby

Mother's name: Hyacinth Ruth Cardale

Father's name: William Bayford Sheridan

Date of birth: 9 September 1966

Place of birth: City C

Gender: Male

Height: 189 cm

Weight: 91 kg

Eye colour: Brown

Hair: Black

Distinguishing marks: 3 mm (approx.) mole below his left eye at the orbital limit.

Mannerisms: Left-handed cricketer. Also writes with left hand.

Addresses at which Manley Bayford Sheridan resides or resided:

(a) 158 Victoria Street

Infatagrove

City C

Country C

Last known address: Yes

(b) Mangrove Bay 263

City A

Country A

Last known address: Yes

Citizenships that Manley Bayford Sheridan is known or thought to carry:

(a) Country C

Number of document: TTP5003708500

Date issued: 24 June 2003

Issued at: City C

Authority: Ministry of Foreign Affairs

Valid until: 23 June 2008

(b) Country D

Number of document: PPC0024066354

Date issued: 27 February 2002

Issued at: City D

Authority: Ministry of Foreign Affairs

Valid until: 26 February 2007

Languages spoken by Manley Bayford Sheridan: English, with a Country C accent, French.

Enclosure II

Particulars of the entity(ies) involved

Shrimp Imports Pty Ltd.

Entity's name: Shrimp Imports Pty Ltd.

Incorporated on: 12 September 1997

Incorporated at: City A

Directors/principals/controllers of Shrimp Imports Pty Ltd.:

Officer: Selma Langdon

Title/position: Secretary

Address: Enterprise Road 51

5626 City A

Country A

Officer: Manley Bayford Sheridan

Title/position: Managing Director

Address: Mangrove Bay 263

City A

Country A

Address at which the entity Shrimp Imports Pty Ltd. is located and/or represented:

Balton Street 45

5691 City A

Country A

Annex XII

Model of a hypothetical request to obtain testimony*

Request for assistance by Country A to Country B

Nature of the request

The Competent National Authority of Country A presents its compliments to the Competent National Authority of Country B and has the honour to request the following assistance:

1. *Obtaining oral evidence, including in statement, affidavit or other appropriate recorded form, from persons in the requested State who agree to provide it voluntarily (i.e. without first being served with a formal summons, subpoena or similar order issued by the competent authorities of the requested State).*

1.1. The identity and location of each person from whom the oral evidence is to be obtained.

1.2. The factual basis for believing that the evidence will be willingly provided by the person(s).

1.3. A description of the manner in which the evidence should be taken (e.g. whether under oath or other appropriate caution to be administered) and recorded (e.g. procès-verbal, verbatim, videotaped or via video link).

1.4. Whether and if so why, which and in what manner the requesting State's investigatory, judicial, prosecution or other authorities wish to participate in the obtaining of the evidence.

1.5. If authorities of the requesting State are not participating, a list of the topics to be covered and specific questions to be asked, including a focal point in the requesting State, should consultation by telephone become necessary during questioning.

1.6. In the case of video-link testimony, the reasons why video link is requested in preference to the physical presence of the witness in the requesting State and a focal point in the requesting State to be consulted on the procedures to be followed.

1.7. For each proposed witness, describe any facts, matters, circumstances or events that indicate a possible need for the protection of that witness in the requested State in relation to the giving of that evidence.

1.8. Indicate the extent, if any, to which the requesting State is prepared to contribute to any protection that may be needed.

* Based on the UNODC Mutual Legal Assistance Request Writer Tool (<http://www.unodc.org/mla/index.html>).

Legal basis

International conventions

(United Nations convention: please specify name and date of the convention.)

Background to the request

Relevant offence(s)

The Director of Public Prosecutions is a duly authorized authority, under the laws of Country A, to conduct criminal proceedings relating to alleged violations of the criminal law of Country A. That authority is currently doing so in relation to the [alleged] offences of:

1. Importation of controlled substances contrary to article X of the XXX Act of 2000. The relevant provisions of article X of the XXX Act of 2000 are set out below:

Article X

...

(Legal) person(s) involved: full particulars appear in enclosure I.

Sheridan Manley Bayford, born on 9 September 1966 in City C.

Entity(ies) involved: full particulars appear in enclosure II.

Shrimp Imports Pty Ltd., incorporated at City A on 12 September 1997.

Statement of facts

Give a short summary of all the relevant facts, e.g.:

1. Leading to the arrest, charging or conviction of persons involved.
2. Leading to the making of any restraining or forfeiture order.
3. Leading to any seizure of property for evidentiary purpose.
4. Linking the criminal behaviour at issue to the assistance requested.
5. Showing clearly how execution of the request will contribute to the case outcomes.

Current status of the case

Give a short summary of the current status of the case, including, if appropriate, e.g.:

1. Investigation (commenced, continuing, concluded).
2. Relevant assets (restrained, seized, confiscated).
3. Arrests (dates, warrants, etc.).
4. Charges laid.

5. Prosecution (commenced, continuing, concluded).
6. Trial (commenced, continuing, concluded).
7. Convicted/condemned and the date.
8. Appeal(s).

Prior contact between our respective authorities in this case:

Law enforcement contacts and intelligence exchanges to date have been between the INTERPOL national central bureaux of Country A, Country B and other countries involved in these investigations and proceedings.

Urgency

This request is not urgent.

Confidentiality of request

This request does not need to be treated in strict confidence.

Request execution requirements

Do you require Country B to follow any special procedures to ensure that the assistance will accomplish its purpose?

If you have already addressed any of the procedural requirements below in the assistance type checklist(s), please indicate.

The need for admissibility requirements for the records from the Central Bank has been specified in the description of the type of assistance being requested.

Transmission channels

This request is being sent via the diplomatic channel (from our Ministry of Foreign Affairs to your Ministry of Foreign Affairs). This request is also being copied to the following authorities/institutions in Country B: Central Authority.

Assurance as to restriction on use of assistance provided

All information, documentation or other evidence provided to Country A by the Central Authority of Country B is intended solely for use in relation to the investigation or prosecution of the alleged offence(s) described above. It should not be used for any other purpose except with prior consultation with and the consent of the appropriate authorities of Country B.

Assurance as to reciprocity

Authorities from Country A would give similar assistance to the authorities from Country B should a request for assistance be made by Country B in a similar matter.

Yours sincerely,

(Signed) Carlyle Greenidge
Attorney-General's Office
Sir Edmont Frank Building 10/25
Broad Street
City A
Country A

Dated at City A, Country A, on 30 December 2005

Enclosure I

Particulars of the suspect(s)/offender(s) involved

Manley Bayford Sheridan

Attach photograph if possible

Name: Manley Bayford

Surname: Sheridan

Alias: Joseph Lindley Newby

Mother's name: Hyacinth Ruth Cardale

Father's name: William Bayford Sheridan

Date of birth: 9 September 1966

Place of birth: City C

Gender: Male

Height: 189 cm

Weight: 91 kg

Eye colour: Brown

Hair: Black

Distinguishing marks: 3 mm (approx.) mole below his left eye at the orbital limit.

Mannerisms: Left-handed cricketer. Also writes with left hand.

Addresses at which Manley Bayford Sheridan resides or resided:

(a) 158 Victoria Street

Infatagrove

City C

Country C

Last known address: Yes

(b) Mangrove Bay 263

City A

Country A

Last known address: Yes

Citizenships that Manley Bayford Sheridan is known or thought to carry:

(a) Country C

Number of document: TTP5003708500

Date issued: 24 June 2003

Issued at: City C

Authority: Ministry of Foreign Affairs

Valid until: 23 June 2008

(b) Country D

Number of document: PPC0024066354

Date issued: 27 February 2002

Issued at: City D

Authority: Ministry of Foreign Affairs

Valid until: 26 February 2007

Languages spoken by Manley Bayford Sheridan: English, with a Country C accent, French.

Enclosure II

Particulars of the entity(ies) involved

Shrimp Imports Pty Ltd.

Entity's name: Shrimp Imports Pty Ltd.

Incorporated on: 12 September 1997

Incorporated at: City A

Directors/principals/controllers of Shrimp Imports Pty Ltd.:

Officer: Selma Langdon

Title/position: Secretary

Address: Enterprise Road 51

5626 City A

Country A

Officer: Manley Bayford Sheridan

Title/position: Managing Director

Address: Mangrove Bay 263

City A

Country A

Address at which the entity Shrimp Imports Pty Ltd. is located and/or represented:

Balton Street 45

5691 City A

Country A

Annex XIII

Model of a hypothetical request for seizure*

Request for assistance by Country A to Country B

Nature of the request

The Competent National Authority of Country A presents its compliments to the Competent National Authority of Country B and has the honour to request the following assistance:

1. *Recognition and enforcement in the requested State of a forfeiture/confiscation/penalty order made in the requesting State against property believed to be located in the requested State, where the property comprises proceeds or benefits derived directly or indirectly from either criminal behaviour or the commission of specific criminal offences within the jurisdiction of the requesting State.*

1.1. Provide a copy of the order in a form acceptable to the requested State, using one of the proforma certificates at the end of this database if possible.

1.2. A description of the proceedings that resulted in the seizure/restraint order(s), the names of the parties involved, the name of the Court or other competent authority that made/varied/confirmed the order(s) and the date(s) of the order(s).

1.3. If the confiscation/forfeiture/penalty order was not made in connection with the conviction of a person for a criminal offence, a statement of the legal preconditions required to be established under your domestic law before such a confiscation/forfeiture/penalty order could be lawfully made. (Examples of non-conviction-based schemes include where an offender could not be dealt with because of his or her death, or flight from justice, or where the property can be shown to be proceeds or instrumentalities of criminal activity.) Also, a statement of the notice and opportunity to be heard given to persons likely to be adversely affected.

1.4. An assurance that the confiscation/forfeiture/pecuniary penalty order(s) made in the requesting State are final and not subject to appeal or further appeal.

1.5. As specific a description as possible of all property to be confiscated/forfeited or to be realized under the pecuniary penalty order(s).

1.6. The factual basis for believing that such property is located in the requested State and, to the extent known, the specific places where such property may be found.

1.7. The factual basis for believing that the property was used in, or derived directly or indirectly from, unlawful behaviour or the commission of specific

* Based on the UNODC Mutual Legal Assistance Request Writer Tool (<http://www.unodc.org/mla/index.html>).

criminal offence(s).

1.8. If the order was made against a person because that person was (a) found to have engaged in unlawful behaviour, or (b) convicted of specific criminal offence(s), state whether or not that person appeared in the proceeding.

1.9. The factual basis for believing that the property belongs to, is subject to the effective control of, or is connected with person(s) who are: (a) suspected or accused of a specific criminal offence(s); (b) found to have engaged in unlawful behaviour; or (c) been convicted of specific criminal offence(s).

1.10. If the person did not appear, a declaration that the person was given notice of the proceedings in sufficient time to enable him/her to defend him/herself.

1.11. Any information as to the identity, whereabouts, possible involvement in the targeted conduct, bona fides or other material information on third parties who may have an interest in the property the subject of the confiscation/forfeiture/pecuniary penalty action.

1.12. An undertaking, if required by the requested State, to reimburse the requested State for any loss or damage that may be suffered if the confiscation/forfeiture/pecuniary penalty action in the Requested State is discontinued, withdrawn, set aside or otherwise rendered unsuccessful for reasons beyond its power or control.

1.13. A statement of any notice and of any opportunity to be heard given to such third parties to enable them to defend their interests in the property before the confiscation order was made.

1.14. Indicate: (a) whether the requesting State requests the confiscated/forfeited/pecuniary penalty property to be returned to it; (b) if so, for what purpose (e.g. reimbursement to victims) and via what financial transaction channels; and (c) the extent to which it may be willing to share the confiscated proceeds with the requested State.

Legal basis

Background to the request

Relevant offence(s)

The Director of Public Prosecutions is a duly authorized authority, under the laws of Country A, to conduct criminal proceedings relating to alleged violations of the criminal law of Country A. That authority is currently doing so in relation to the [alleged] offences of:

1. Importation of controlled substances contrary to article X of the XXX Act of 2000. The relevant provisions of article X of the XXX Act of 2000 are set out below:

Article X ...

(Legal) person(s) involved: full particulars appear in enclosure I.

Sheridan Manley Bayford, born on 9 September 1966 in City C.

Entity(ies) involved: full particulars appear in enclosure II.

Shrimp Imports Pty Ltd., incorporated at City A on 12 September 1997.

Statement of facts

Give a short summary of all the relevant facts, e.g.:

1. Leading to the arrest, charging or conviction of persons involved.
2. Leading to the making of any restraining or forfeiture order.
3. Leading to any seizure of property for evidentiary purpose.
4. Linking the criminal behaviour at issue to the assistance requested.
5. Showing clearly how execution of the request will contribute to the case outcomes.

Current status of the case

Give a short summary of the current status of the case, including, if appropriate, e.g.:

1. Investigation (commenced, continuing, concluded).
2. Relevant assets (restrained, seized, confiscated).
3. Arrests (dates, warrants, etc.).
4. Charges laid.
5. Prosecution (commenced, continuing, concluded).
6. Trial (commenced, continuing, concluded).
7. Convicted/condemned and the date.
8. Appeal(s).

Prior contact between our respective authorities in this case:

Law enforcement contacts and intelligence exchanges to date have been between the INTERPOL national central bureaux of Country A, Country B and other countries involved in these investigations and proceedings.

Urgency

This request is urgent for the following reasons:

Please execute this request before 31 January 2006. Please consult the contact person indicated on the cover note of this request if the request cannot be executed before the specified date.

Confidentiality of request

This request should be handled in strict confidentiality for the following

reasons:

Public disclosure of the fact of the request at this stage may tip off others suspected of being involved in the trafficking network and heighten the risk of property liable to be confiscated being removed from jurisdictions in which they are currently found. Country A undertakes to notify Country B as soon as investigations and proceedings would no longer be prejudiced by premature disclosure. Please consult the contact person indicated on the cover note of this request prior to the execution of this request if confidentiality cannot be maintained.

Request execution requirements

Do you require Country B to follow any special procedures to ensure that the assistance will accomplish its purpose?

If you have already addressed any of the procedural requirements below in the assistance type checklist(s), please indicate.

The need for admissibility requirements for the records from the Central Bank has been specified in the description of the type of assistance being requested.

Transmission channels

This request is being sent via the diplomatic channel (from our Ministry of Foreign Affairs to your Ministry of Foreign Affairs). This request is also being copied to the following authorities/institutions in Country B: Central Authority.

Assurance as to restriction on use of assistance provided

All information, documentation or other evidence provided to Country A by the Central Authority of Country B is intended solely for use in relation to the investigation or prosecution of the alleged offence(s) described above. It should not be used for any other purpose except with prior consultation with and the consent of the appropriate authorities of Country B.

Assurance as to reciprocity

Authorities from Country A would give similar assistance to the authorities from Country B should a request for assistance be made by Country B in a similar matter.

Yours sincerely,

(Signed) Carlyle Greenidge
 Attorney-General's Office
 Sir Edmont Frank Building 10/25
 Broad Street
 City A
 Country A

Dated at City A, Country A, on 30 December 2005

Enclosure I**Particulars of the suspect(s)/offender(s) involved****Manley Bayford Sheridan**

Attach photograph if possible

Name: Manley Bayford

Surname: Sheridan

Alias: Joseph Lindley Newby

Mother's name: Hyacinth Ruth Cardale

Father's name: William Bayford Sheridan

Date of birth: 9th September 1966

Place of birth: City C

Gender: Male

Height: 189 cm

Weight: 91 kg

Eye colour: Brown

Hair: Black

Distinguishing marks: 3 mm (approx.) mole below his left eye at the orbital limit.

Mannerisms: Left-handed cricketer. Also writes with left hand.

Addresses at which Manley Bayford Sheridan resides or resided:

(a) 158 Victoria Street

Infatagrove

City C

Country C

Last known address: Yes

(b) Mangrove Bay 263

City A

Country A

Last known address: Yes

Citizenships that Manley Bayford Sheridan is known or thought to carry:

(a) Country C

Number of document: TTP5003708500

Date issued: 24 June 2003

Issued at: City C

Authority: Ministry of Foreign Affairs

Valid until: 23 June 2008

(b) Country D

Number of document: PPC0024066354

Date issued: 27 February 2002

Issued at: City D

Authority: Ministry of Foreign Affairs

Valid until: 26 February 2007

Languages spoken by Manley Bayford Sheridan: English, with a Country C accent, French.

Enclosure II

Particulars of the entity(ies) involved

Shrimp Imports Pty Ltd.

Entity's name: Shrimp Imports Pty Ltd.

Incorporated on: 12 September 1997

Incorporated at: City A

Directors/principals/controllers of Shrimp Imports Pty Ltd.:

Officer: Selma Langdon

Title/position: Secretary

Address: Enterprise Road 51

5626 City A

Country

Officer: Manley Bayford Sheridan

Title/position: Managing Director

Address: Mangrove Bay 263

City A

Country A

Address at which the entity Shrimp Imports Pty Ltd. is located and/or represented:

Balton Street 45

5691 City A

Country A

Annex XIV

Model of a hypothetical request for the voluntary appearance of a person in the requesting State*

Request for assistance by Country A to Country B

Nature of the request

The Competent National Authority of Country A presents its compliments to the Competent National Authority of Country B and has the honour to request the following assistance:

1. *Obtaining oral evidence, including in statement, affidavit or other appropriate recorded form, from persons in the requested State who agree to provide it voluntarily (i.e. without first being served with a formal summons, subpoena, or similar order issued by the competent authorities of the requested State).*

1.1. Provide the identity and location of each person from whom the oral evidence is to be obtained.

1.2. Provide the factual basis for believing that the evidence will be willingly provided by the person(s).

1.3. Provide a description of the manner in which the evidence should be taken (e.g. whether under oath or other appropriate caution to be administered) and recorded (e.g. procès-verbal, verbatim, videotaped or via video link).

1.4. Indicate whether and if so why, which and in what manner the requesting State's investigatory, judicial, prosecution or other authorities wish to participate in the obtaining of the evidence.

1.5. If authorities of the requesting State are not participating, provide a list of the topics to be covered and specific questions to be asked, including a focal point in the requesting State, should consultation by telephone become necessary during questioning.

1.6. In the case of video-link testimony, indicate the reasons why video link is requested in preference to the physical presence of the witness in the requesting State and a focal point in the requesting State to be consulted on the procedures to be followed.

1.7. For each proposed witness, describe any facts, matters, circumstances or events that indicate a possible need for the protection of that witness in the requested State in relation to the giving of that evidence.

1.8. Indicate the extent, if any, to which the requesting State is prepared to contribute to any protection that may be needed.

* Based on the UNODC Mutual Legal Assistance Request Writer Tool (<http://www.unodc.org/mla/index.html>).

Legal basis

Background to the request

Relevant offence(s)

The Director of Public Prosecutions is a duly authorized authority, under the laws of Country A, to conduct criminal proceedings relating to alleged violations of the criminal law of Country A. That authority is currently doing so in relation to the [alleged] offences of:

1. Importation of controlled substances contrary to article X of the XXX Act of 2000. The relevant provisions of article X of the XXX Act of 2000 are set out below:

Article X

...

(Legal) person(s) involved: full particulars appear in enclosure I.

Sheridan Manley Bayford, born on 9 September 1966 in City C.

Entity(ies) involved: full particulars appear in enclosure II.

Shrimp Imports Pty Ltd., incorporated at City A on 12 September 1997.

Statement of facts

Give a short summary of all the relevant facts, e.g.:

1. Leading to the arrest, charging or conviction of persons involved.
2. Leading to the making of any restraining or forfeiture order.
3. Leading to any seizure of property for evidentiary purpose.
4. Linking the criminal behaviour in issue to the assistance requested.
5. Showing clearly how execution of the request will contribute to the case outcomes.

Current status of the case

Give a short summary of the current status of the case, including, if appropriate, e.g.:

1. Investigation (commenced, continuing, concluded).
2. Relevant assets (restrained, seized, confiscated).
3. Arrests (dates, warrants, etc.).
4. Charges laid.
5. Prosecution (commenced, continuing, concluded).
6. Trial (commenced, continuing, concluded).
7. Convicted/condemned and the date.
8. Appeal(s).

Prior contact between our respective authorities in this case:

(Any prior contact between your law enforcement, prosecution or judicial authorities on this case may affect the handling and execution of the request. Please provide details of any relevant prior contact between Country A and Country B concerning this case.)

Law enforcement contacts and intelligence exchanges to date have been between the INTERPOL national central bureaux of Country A, Country B and other countries involved in these investigations and proceedings.

Urgency

This request is not urgent.

Confidentiality of request

This request does not need to be treated in strict confidence.

Request execution requirements

Do you require Country B to follow any special procedures to ensure that the assistance will accomplish its purpose?

If you have already addressed any of the procedural requirements below in the assistance type checklist(s), please indicate.

The need for admissibility requirements for the records from the Central Bank has been specified in the description of the type of assistance being requested.

Transmission channels

This request is being sent via the diplomatic channel (from our Ministry of Foreign Affairs to your Ministry of Foreign Affairs). This request is also being copied to the following authorities/institutions in Country B: Central Authority.

Assurance as to restriction on use of assistance provided

All information, documentation or other evidence provided to Country A by the Central Authority of Country B is intended solely for use in relation to the investigation or prosecution of the alleged offence(s) described above. It should not be used for any other purpose except with prior consultation with and the consent of the appropriate authorities of Country B.

Assurance as to reciprocity

Authorities from Country A would give similar assistance to the authorities from Country B should a request for assistance be made by Country B in a similar matter.

Yours sincerely,

(Signed) Carlyle Greenidge
Attorney-General's Office
Sir Edmont Frank Building 10/25
Broad Street
City A
Country A

Dated at City A, Country A, on 30 December 2005

Enclosure I

Particulars of the suspect(s)/offender(s) involved

Manley Bayford Sheridan

Attach photograph if possible

Name: Manley Bayford

Surname: Sheridan

Alias: Joseph Lindley Newby

Mother's name: Hyacinth Ruth Cardale

Father's name: William Bayford Sheridan

Date of birth: 9 September 1966

Place of birth: City C

Gender: Male

Height: 189 cm

Weight: 91 kg

Eye colour: Brown

Hair: Black

Distinguishing marks: 3 mm (approx.) mole below his left eye at the orbital limit.

Mannerisms: Left-handed cricketer. Also writes with left hand.

Addresses at which Manley Bayford Sheridan resides or resided:

(a) 158 Victoria Street

Infatagrove

City C

Country C

Last known address: Yes

(b) Mangrove Bay 263

City A

Country A

Last known address: Yes

Citizenships that Manley Bayford Sheridan is known or thought to carry:

(a) Country C

Number of document: TTP5003708500

Date issued: 24 June 2003

Issued at: City C

Authority: Ministry of Foreign Affairs

Valid until: 23 June 2008

(b) Country D

Number of document: PPC0024066354

Date issued: 27 February 2002

Issued at: City D

Authority: Ministry of Foreign Affairs

Valid until: 26 February 2007

Languages spoken by Manley Bayford Sheridan: English, with a Country C accent, French.

Enclosure II

Particulars of the entity(ies) involved

Shrimp Imports Pty Ltd.

Entity's name: Shrimp Imports Pty Ltd.

Incorporated on: 12 September 1997

Incorporated at: City A

Directors/principals/controllers of Shrimp Imports Pty Ltd.:

Officer: Selma Langdon

Title/position: Secretary

Address: Enterprise Road 51

5626 City A

Country A

Officer: Manley Bayford Sheridan

Title/position: Managing Director

Address: Mangrove Bay 263

City A

Country A

Address at which the entity Shrimp Imports Pty Ltd. is located and/or represented:

Balton Street 45

5691 City A

Country A

Annex XV

Model of a hypothetical request for interception or recording*

Request for assistance by Country A to Country B

Nature of the request

The Competent National Authority of Country A presents its compliments to the Competent National Authority of Country B and has the honour to request the following assistance:

1. *Monitoring, interception or recording by the competent authorities of the requested State of activities, movements or communications (including of computer-based activities and telecommunications, whether in real time or after the event), of persons in that State suspected of involvement in serious criminal offences in the requesting State.*

1.1. Describe the device to be monitored (landline telephone/cell phone/telex/facsimile/dataline/online keystrokes/Internet service provider, etc.).

1.2. State the factual basis giving reason to suspect/believe/know that the target device has been, is being or is likely to be used in future in connection with the commission of (specified) past, present or future (serious) criminal offence(s).

1.3. State why the requested telecommunications interception is legally and operationally preferable to other less invasive evidence-gathering techniques.

1.4. Identify the name and address of the subscriber, to the extent known.

1.5. Specify the time limit when the requested telecommunications interception should terminate.

1.6. If the monitoring/interception/recording period is envisaged for longer than one month, state why such period may be said to be in the interests of justice in the case and not contrary to the wider public interest.

Legal basis

Non-treaty agreement/arrangement or understanding

The request is based on the principle of reciprocity.

* Based on the UNODC Mutual Legal Assistance Request Writer Tool (<http://www.unodc.org/mla/index.html>).

Background to the request

Relevant offence(s)

The Director of Public Prosecutions is a duly authorized authority, under the laws of Country A, to conduct criminal proceedings relating to alleged violations of the criminal law of Country A. That authority is currently doing so in relation to the [alleged] offences of:

1. Importation of controlled substances contrary to article X of the XXX Act of 2000. The relevant provisions of article X of the XXX Act of 2000 are set out below:

Article X

...

(Legal) person(s) involved: full particulars appear in enclosure I.

Sheridan Manley Bayford, born on 9 September 1966 in City C.

Entity(ies) involved: full particulars appear in enclosure II.

Shrimp Imports Pty Ltd., incorporated at City A on 12 September 1997.

Statement of facts

Give a short summary of all the relevant facts, e.g.:

1. Leading to the arrest, charging or conviction of persons involved.
2. Leading to the making of any restraining or forfeiture order.
3. Leading to any seizure of property for evidentiary purpose.
4. Linking the criminal behaviour at issue to the assistance requested.
5. Showing clearly how execution of the request will contribute to the case outcomes.

Current status of the case

Give a short summary of the current status of the case, including, if appropriate, e.g.:

1. Investigation (commenced, continuing, concluded).
2. Relevant assets (restrained, seized, confiscated).
3. Arrests (dates, warrants, etc.).
4. Charges laid.
5. Prosecution (commenced, continuing, concluded).
6. Trial (commenced, continuing, concluded).
7. Convicted/condemned and the date.
8. Appeal(s).

Prior contact between our respective authorities in this case:

Law enforcement contacts and intelligence exchanges to date have been

between the INTERPOL national central bureaux of Country A, Country B and other countries involved in these investigations and proceedings.

Urgency

This request is urgent for the following reasons:

Please execute this request before 31 January 2006. Please consult the contact person indicated on the cover note of this request if the request cannot be executed before the specified date.

Confidentiality of request

This request should be handled in strict confidentiality for the following reasons:

Public disclosure of the fact of the request at this stage may tip off others suspected of being involved in the trafficking network and heighten the risk of property liable to be confiscated being removed from jurisdictions in which it is currently found. Country A undertakes to notify Country B as soon as investigations and proceedings would no longer be prejudiced by premature disclosure. Please consult the contact person indicated on the cover note of this request prior to the execution of this request if confidentiality cannot be maintained.

Request execution requirements

Do you require Country B to follow any special procedures to ensure that the assistance will accomplish its purpose?

If you have already addressed any of the procedural requirements below in the assistance type checklist(s), please indicate.

The need for admissibility requirements for the records from the Central Bank has been specified in the description of the type of assistance being requested.

Transmission channels

This request is being sent via the diplomatic channel (from our Ministry of Foreign Affairs to your Ministry of Foreign Affairs). This request is also being copied to the following authorities/institutions in Country B: Central Authority.

Assurance as to restriction on use of assistance provided

All information, documentation or other evidence provided to Country A by the Central Authority of Country B is intended solely for use in relation to

the investigation or prosecution of the alleged offence(s) described above. It should not be used for any other purpose except with prior consultation with and the consent of the appropriate authorities of Country B.

Assurance as to reciprocity

Authorities from Country A would give similar assistance to the authorities from Country B should a request for assistance be made by Country B in a similar matter.

Yours sincerely,

(Signed) Carlyle Greenidge
Attorney General's Office
Sir Edmont Frank Building 10/25
Broad Street
City A
Country A

Dated at City A, Country A, on 30 December 2005

Enclosure I

Particulars of the suspect(s)/offender(s) involved

Manley Bayford Sheridan

Attach photograph if possible

Name: Manley Bayford

Surname: Sheridan

Alias: Joseph Lindley Newby

Mother's name: Hyacinth Ruth Cardale

Father's name: William Bayford Sheridan

Date of birth: 9 September 1966

Place of birth: City C

Gender: Male

Height: 189 cm

Weight: 91 kg

Eye colour: Brown

Hair: Black

Distinguishing marks: 3 mm (approx.) mole below his left eye at the orbital limit.

Mannerisms: Left-handed cricketer. Also writes with left hand.

Addresses at which Manley Bayford Sheridan resides or resided:

- (a) 158 Victoria Street
Infatagrove
City C
Country C

Last known address: Yes

- (b) Mangrove Bay 263
City A
Country A

Last known address: Yes

Citizenships that Manley Bayford Sheridan is known or thought to carry:

- (a) Country C
Number of document: TTP5003708500
Date issued: 24 June 2003
Issued at: City C
Authority: Ministry of Foreign Affairs
Valid until: 23 June 2008
- (b) Country D
Number of document: PPC0024066354
Date issued: 27 February 2002
Issued at: City D
Authority: Ministry of Foreign Affairs
Valid until: 26 February 2007

Languages spoken by Manley Bayford Sheridan: English, with a Country C accent, French

Enclosure II

Particulars of the entity(ies) involved

Shrimp Imports Pty Ltd.

Entity's name: Shrimp Imports Pty Ltd.

Incorporated on: 12 September 1997

Incorporated at: City A

Directors/principals/controllers of Shrimp Imports Pty Ltd.:

Officer: Selma Langdon

Title/position: Secretary

Address: Enterprise Road 51

5626 City A

Country A

Officer: Manley Bayford Sheridan

Title/position: Managing Director

Address: Mangrove Bay 263

City A

Country A

Address at which the entity Shrimp Imports Pty Ltd. is located and/or represented:

Balton Street 45

5691 City A

Country A

Annex XVI

List of national central authorities in the fight against terrorism*

State	Central authority
Australia	National Counter-Terrorism Committee Secretariat National Security Division Department of the Prime Minister and Cabinet 3-5 National Circuit Barton, ACT 2600 Telephone: (+61-2) 2627 15115 Facsimile: (+61-2) 2627 15050
Belgium	National central authority as regards counter-terrorism: Parquet fédéral Rue Quatre Bras, 19 1000 Bruxelles Telephone: (+32-2) 577 77 11 Facsimile: (+32- 2) 577 77 90 E-mail: parquet.federal@just.fgov.be National central authority as regards international cooperation in criminal matters, including counter-terrorism: Service public fédéral Justice Boulevard de Waterloo, 115 1000 Bruxelles E-mail: jean-yves.mine@just.fgov.be
Cyprus	Coordination: Chair of the Attorney-General of the Republic of Cyprus
Czech Republic	Security Policy Department Ministry of the Interior Nad Stolou 3170 34 Prague 7 P.O. Box 21/OBP Telephone: (+420-2) 974 832 282 Facsimile: (+420-2) 974 833 554 E-mail: OBP@mvcz.cz
Denmark	There is no specific central authority: various Danish ministries (Justice, Foreign Affairs and others) are involved in the fight against terrorism and the Office of the Prime Minister is responsible for global coordination.
Germany	There is no specific central authority: various institutions

* Information provided by Member States to the Terrorism Prevention Branch, United Nations Office on Drugs and Crime. Only States responding have been included.

are involved in the fight against terrorism:

Auswärtiges Amt (Ministry for Foreign Affairs)
Werderscher Markt 1
10117 Berlin
Postanschrift: 11013 Berlin
Telephone: (+49-30) 5000-0
Facsimile: (+49-30) 5000-3402
Internet: <http://www.auswaertiges-amt.de>

Bundesministerium der Justiz (Federal Ministry of Justice)
Hauptsitz Berlin
Mohrenstraße 37
10117 Berlin
Telephone: (+49-30) 2025-70 or (01888) 580-0
Facsimile: (+49-30) 2025-9525 or (01888) 580-9525

Dienststelle Bonn
Adenauerallee 99-103
53113 Bonn
Telephone: (+49-228) 58-0 or (01888) 580-0
Facsimile: (+49-228) 58-8325 or (01888) 580-8325
Internet: <http://www.bmj.bund.de>
E-mail: poststelle@bmj.bund.de

Der Generalbundesanwalt beim Bundesgerichtshof
(Director of Public Prosecution at the Federal Court of
Justice)
Brauereistraße 30
76137 Karlsruhe
Telephone: (+49-721) 81 91 0
Facsimile: (+49-721) 81 91 59 0
Internet: <http://www.generalbundesanwalt.de>
E-mail: poststelle@generalbundesanwalt.de

Bundeskriminalamt (Federal Office of Police)
Thaerstraße 11
65173 Wiesbaden
Telephone: (+49-611) 55-0
Facsimile: (+49-611) 55-12141
Internet: <http://www.bka.de>
E-mail: info@bka.de

Jamaica

Ministry of National Security
Permanent Secretary
Ministry of National Security
NCB Towers
7th Floor
2 Oxford Road
Kingston 5
Telephone: (+1-876) 906 4908 24
E-mail: gilbert.scott@mns.gov.jm

Michelle Walker
Head, Legal Unit
Ministry of Foreign Affairs and Foreign Trade
21 Dominica Drive
Kingston 5

Japan	No specific central authority
Jordan	State Security Court
Malaysia	National Security Department
Mexico	Procuradía General de la República
Slovakia	No specific central authority

Annex XVII

Indicative list of international instruments that mention the role of the International Criminal Police Organization in the transmission of information*

I. United Nations

1. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (article 7, paragraph 8):

“Transmission of requests for mutual legal assistance and any communication related thereto shall be effected between the authorities designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that such requests and communications be addressed to it through the diplomatic channel and, in urgent circumstances, where the Parties agree, through channels of the International Criminal Police Organization, if possible.”

2. International Convention for the Suppression of the Financing of Terrorism (article 18, paragraph 4):

“States Parties may exchange information through the International Criminal Police Organization (INTERPOL).”

3. United Nations Convention against Transnational Organized Crime (article 18, paragraph 13):

“Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.”

II. Council of Europe

1. European Convention on Extradition (1957) (article 16, paragraph 3):

“A request for provisional arrest shall be sent to the competent authorities of the requested Party either through the diplomatic channel or direct by post or telegraph or through the International Criminal Police Organization (INTERPOL) or by any other means affording evidence in writing or accepted by the requested Party. The requesting authority shall be informed without delay of the result of its request.”

* List established by the International Criminal Police Organization. The Instruments may be consulted on the database of the Terrorism Prevention Branch, United Nations Office on Drugs and Crime, at <https://www.unodc.org/tldb>.

2. European Convention on Mutual Assistance in Criminal Matters (1959) (article 15, paragraph 5):

“In cases where direct transmission is permitted under this Convention, it may take place through the International Criminal Police Organization (INTERPOL).”

3. European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders (1964) (article 27, paragraph 3):

“In case of emergency, the communications referred to in paragraph 2 of this article may be made through the International Criminal Police Organization (INTERPOL).”

4. European Convention on the International Validity of Criminal Judgements (1970) (article 15, paragraph 2):

“In urgent cases, requests and communications may be sent through the International Criminal Police Organization (INTERPOL).”

5. European Convention on the Transfer of Proceedings in Criminal Matters (1972) (article 13, paragraph 2):

“In urgent cases, requests and communications may be sent through the International Criminal Police Organization (INTERPOL).”

6. European Convention on the Control of the Acquisition and Possession of Firearms by Individuals (1978) (article 9, paragraph 2):

“When appropriate the notifications may be sent through the International Criminal Police Organization (INTERPOL).”

7. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990) (article 24, paragraph 3):

“Any request or communication under paragraphs 1 and 2 of this article may be made through the International Criminal Police Organization (INTERPOL).”

8. Agreement on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1995) (article 18, paragraph 2):

“Where, for any reason, direct communication is not practicable, Parties may agree to use the communication channels of ICPO-INTERPOL or of the Customs Cooperation Council [World Customs Organization].”

9. Criminal Law Convention on Corruption (1999) (article 30, paragraph 3):

“Any request or communication under paragraphs 1 and 2 of this article may be made through the International Criminal Police Organization (INTERPOL).”

III. European Union

1. Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (1995) (article 53, paragraph 2):

“Paragraph 1 shall not prejudice the possibility of requests being sent and returned between Ministries of Justice or through national central bureaux of the International Criminal Police Organization.”

2. Convention on the Establishment of a European Police Office (Europol Convention) (1995) (article 42, paragraph 2):

“Insofar as is required for the performance of the tasks described in Article 3, Europol may also establish and maintain relations with third States and third bodies within the meaning of Article 10 (4), points 4, 5, 6 and 7.”

(point 7 refers explicitly to the International Criminal Police Organization.)

3. Draft Council Act Establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (1999) (article 6, paragraph 4):

“Any request as referred to in Paragraph 1 may, for the sake of speed, be made via the International Criminal Police Organization (INTERPOL) or any body competent under provisions introduced pursuant to the Treaty on European Union.”

4. Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (article 10, paragraph 3):

“If it is not possible to call on the services of the SIS [Schengen Information System], the issuing judicial authority may call on INTERPOL to transmit a European arrest warrant.”

IV. Commonwealth

Commonwealth Scheme for the Rendition of Fugitive Offenders (clause 4, paragraph 1):

“Where a fugitive offender is, or is suspected of being, in or on his way to any part of the Commonwealth but no warrant has been endorsed ... or issued ..., the competent judicial authority in that part of the Commonwealth may issue a provisional warrant for his arrest on such information and under such circumstances as would, in the authority’s opinion, justify the issue of a warrant if the returnable offence of which the fugitive is accused has been an offence committed within the authority’s jurisdiction and for the purposes of this paragraph information contained in an international notice issued by the International Criminal Police Organization (INTERPOL) in respect of a fugitive may be considered by the authority, either alone or with other information, in deciding whether a provisional warrant should be issued for the arrest of that fugitive.”

V. Organization of American States

Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials (1997) (preamble):

“Recognizing the importance of strengthening existing international law enforcement support mechanisms such as the International Weapons and Explosives Tracking System (IWETS) of the International Criminal Police Organization (INTERPOL), to prevent, combat, and eradicate the illicit manufacturing of and trafficking in firearms, ammunition, explosives, and other related materials.”

VI. Examples of multilateral and bilateral instruments mentioning the International Criminal Police Organization

1. Cooperation Agreement on Police Matters between Benin, Ghana, Nigeria and Togo (1984) (article 3):

“The INTERPOL National Central Bureaux shall serve as a liaison organ between the different security services of the Contracting Parties.”

2. Agreement on Cooperation on Control of Illicit Traffic in Narcotic Drugs and Psychotropic Substances between the Ministries of the Interior of the Republics of Azerbaijan, Armenia, Belarus, Georgia, Kazakhstan, Moldova, Russia, Tajikistan, Turkmenistan, Uzbekistan, Ukraine and Estonia (1992) (article 3, subparagraph (d)):

“Information shall be submitted on unified carriers recommended by INTERPOL.”

3. Agreement on Cooperation to Prevent and Combat Transborder Crime between the Governments of Romania, Albania, Bulgaria, Bosnia and Herzegovina, Greece, the former Yugoslav Republic of Macedonia, the Republic of Moldova, Turkey and Hungary (1999) (article 2, paragraph 4):

“In order to improve the effectiveness of the prevention, detection, investigation and prosecution of transborder criminal violations, and as active members of ICPO-INTERPOL for police matters, World Customs Organization for customs matters, the SECI [Southeast European Cooperative Initiative] participating countries shall exchange and develop criminal information in partnership with their law enforcement authorities and with the INTERPOL General Secretariat and WCO.”

4. The bilateral police agreements passed by Germany since 1994 with States not party to the Schengen Agreement systematically include the phrase: “without prejudice to the exchange of information through channels of the International Criminal Police Organization”.

5. Extradition Treaty between France and Canada (1988) (article 13, paragraph 1):

“In cases of urgency, the competent authorities of the requesting State may request the provisional arrest of the person sought, through diplomatic channels or directly by post or telegraph, or through the International Criminal

Police Organization (INTERPOL), or by any other method that provides a written record of the request.”

6. Treaty on Extradition between France and Australia (1988) (article 9, paragraph 1 (b)):

“The application for provisional arrest shall be transmitted by means of the facilities of the International Criminal Police Organization (INTERPOL), by post or telegraph or by any other means affording a record in writing.”

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