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Digest of Terrorist Cases

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Digest of Terrorist Cases



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This publication is dedicated to victims of terrorist acts worldwide

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“Terrorists may exploit vulnerabilities and grievances to breed extremism at the local level, but they can quickly connect with others at the international level. Similarly, the struggle against terrorism requires us to share experiences and best practices at the global level.”

“The UN system has a vital contribution to make in all the relevant areas—from promoting the rule of law and effective criminal justice systems to ensuring countries have the means to counter the financing of terrorism; from strengthening capacity to prevent nuclear, biological, chemical, or radiological materials from falling into the hands of terrorists, to improving the ability of countries to provide assistance and support for victims and their families.”

Ban Ki-moon
Secretary-General of the United Nations

(The picture on the cover shows the aftermath of the bombing of the United Nations building in Algiers, 11 December 2007)

Preface

Director-General/Executive Director United Nations Office on Drugs and Crime

The United Nations Office on Drugs and Crime (UNODC) brought together senior criminal justice experts—including Attorney-Generals and Chief Prosecutors—to share experiences and good practices on how to deal with terrorism cases. The outcome is this *Digest of Terrorist Cases*, giving policymakers and criminal justice officials practical ideas and expert insights on how to deal with a relatively new field of jurisprudence. It complements other UNODC tools that provide guidance on how to address acts of terrorism within a legal framework, like legislative guides.

The judicial cases featured in this *Digest* cover relevant aspects of the international legal regime against terrorism. It provides a comparative analysis of national statutory frameworks for terrorism prosecutions, and it identifies legal issues and pitfalls encountered in investigating and adjudicating relevant offences. In addition, it identifies practices related to specialized investigative and prosecutorial techniques. It also addresses the links between terrorism and other forms of crime (like organized crime, the trafficking of drugs, people and arms), as well as how to disrupt terrorist financing.

Our hope is that this handbook, which has been made possible by the generous support of donor countries, in particular, Colombia, Germany and Italy, will strengthen the legal regime against terrorism.

Antonio Maria Costa

Minister of Interior and Justice Republic of Colombia

Terrorism is a threat to world peace and security and therefore constitutes a problem affecting the whole of humanity.

Terrorism is the systematic use of terror, and is a method of producing anxiety based on repeated violent action by an individual or group of persons who, from ideological, political or criminal motives, create panic, worry, death, resentment and hatred, leaving behind them destruction, poverty, orphans and widows.

States must join efforts at the local, national, bilateral, regional, biregional and international levels to deal with the various manifestations of terrorism; for this purpose, strengthened international cooperation is called for within the framework of joint and shared responsibility, with a comprehensive, multidisciplinary and sustainable approach.

Narcotics trafficking and other transnational crimes have become the main source of financing for terrorism, serving the interests of illegal armed groups that imperil governability, obstruct economic and social development, weaken democratic institutions, increase violence, violate human rights and destroy the natural environment.

The painful experience of Colombia as a victim of the activities of terrorist groups and their clear links with illicit drug production and trafficking are well known. To counter these activities, we have had to build up an institutional structure including prevention, investigation, law enforcement and sanctions for terrorists. At the same time, this painful experience, which has cost the lives of many soldiers and police officers, has also strengthened us.

Colombia has not confined itself to requesting the understanding, solidarity and support of the international community in the fight against terrorism. We also offer technical assistance and cooperation to those needing it. The *Digest of Terrorist Cases*, which we have the honour to present, is an example of this cooperation.

The *Digest of Terrorist Cases* represents an important contribution towards the prevention, investigation and prosecution of actual terrorist acts in different parts of the world, and aims to provide those responsible for formulating public policy, judicial officials in the criminal justice field and police investigators in all the States Members of the United Nations with valuable tools for disrupting criminal organizations engaged in activities of this type.

This handbook provides a practical guide based on a compilation of investigative work, and offers a general strategy of “good practices” in regard to investigative and judicial techniques and a unique and precious tool for professionals and experts working to prevent and fight terrorism.

I am certain that the handbook will serve as a useful training instrument for all those responsible for combating this pernicious criminal activity.

Fabio Valencia Cossio

Minister of Foreign Affairs Republic of Italy

Terrorism continues to represent one of the greatest global challenges to international peace, stability and security. When Italy agreed to host in Rome, on June 25 and 26 2009, the experts meeting on the final elaboration of this operational *Digest of Terrorist Cases*, it did so on the grounds of a dual international role: as coordinating country for terrorism within the European Union's Permanent Missions to the United Nations Office on Drugs and Crime (UNODC), and as President of the G8.

Terrorism has indeed been very high on our G8 agenda. While UNODC experts were meeting in Rome, on those same two days, in Trieste, among other issues, my colleagues and I were discussing the impact of terrorism in the world's most problematic regions. In accordance with a practice that dates back to 2002, at the Summit of L'Aquila, the G8 Leaders adopted in July 2009 an *ad hoc* Declaration on Counter-Terrorism; the essence of that high-level political document mirrors the core of this Digest, which is that, to be credible and effective, the struggle against this scourge must first of all have a strong legal foundation. Our answer to any kind of terrorist threat that challenges the Rule of Law should be the promotion and the enforcement of Rule of Law itself, including the observance of the whole set of guarantees that must be universally applied, in any trial and procedure, to ensure full respect of fundamental human rights.

As this useful international Digest of different national cases practically demonstrates, to be credible and effective in the war against terror another condition should also be met. I refer to the necessity for strong and continuous cooperation efforts by the International Community at any level, in all competent forums, starting with the United Nations, the only organization suited to fostering a universal consensus on counter terrorism goals and methods. With this in mind, the Italian G8 Presidency enhanced the role of the UNODC's Terrorism Prevention Branch within the Rome-Lyon working group and also, together with the Counter Terrorism Executive Directorate (CTED) of the United Nations Security Council, admitted new partners to the local meetings of the Counter Terrorism Action Group.

In continuance of this firm belief, that favours outreach policies and comprehensive approaches, in April 2009 the innovative G8 Conference of Rome on Transnational Threats and Destabilizing Factors was attended by representatives from several non-G8 countries as well as from relevant international organizations and think tanks. A significant conclusion of that fruitful exercise was that, as some of the cases reported in this Digest specifically demonstrate, the financing of terrorism is often connected to illegal economic circuits handled by organized crime, which, in turn, may be dangerously influenced by international economic trends and their actual or potential interactions with other issues of global concern.

I am confident that this Digest will be of help to law enforcement agencies, prosecutor offices and other critical stakeholders all around the world, both in their training activities as well as in their everyday work. I also expect that it will contribute to the promotion of political debate among Governments and institutions, particularly within the framework of negotiations and initiatives aimed at achieving the goal of universal adherence not only to all international anti-terrorism instruments, but also to the United Nations Convention against Transnational Organized Crime signed in Palermo ten years ago.

Franco Frattini

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I. Introduction

1. In Resolutions 62/71 and 62/172 of 2007, the General Assembly recognized the role of the United Nations Office on Drugs and Crime (UNODC) in strengthening international cooperation mechanisms in criminal matters related to terrorism, including national capacity-building. The General Assembly also commended the Office for facilitating implementation of the universal terrorism-related conventions and protocols. In continuation of that work, soon after adoption of those resolutions UNODC established an Expert Working Group to prepare this Digest of Terrorism Cases. This publication supplements other technical assistance tools available through the UNODC website, which deal with a variety of legislative and international cooperation issues.¹

2. Many technical assistance tools prepared by UNODC and other international organizations describe international standards in the areas of criminalization, international cooperation and human rights law. The publications then discuss how those standards should be applied in hypothetical factual contexts. The current publication follows a different approach. Its methodology is to examine real occurrences, legal cases and legal instruments dealing with the terrorism. The Digest draws operational lessons from those experiences, with particular reference to conformity with internationally binding human rights obligations. Selected materials have been identified by judicial, prosecution and law enforcement experts in terrorism. Expert Group Meetings were held in Vienna, Austria in February 2008; in Medellin, Colombia in November 2008; and in Rome, Italy, in June 2009. Research in open-source public records has been conducted by UNODC's Terrorism Prevention Branch (TPB) staff. Discussion of the Digest materials has been organized on a thematic basis.

3. After an introductory chapter I, the Digest materials are organized around seven thematic chapters: chapter II, Offences for terrorists acts already committed; chapter III, Offences to prevent terrorist acts; chapter IV, The relationship between terrorism and other forms of crime; chapter V, The statutory framework for terrorism prosecutions; chapter VI, Investigation and adjudication issues; chapter VII, International cooperation; and chapter VIII, Innovations and proposals. An annex contains a list of contributors. Chapters II through VII are divided into sections containing subthemes. The subthemes are introduced by a comment or suggested operational lesson for work drawn from the examples examined in that section. Due to practical limitations and the continuing development of events, not all major terrorism cases can be mentioned. In addition, questions concerning the application of humanitarian law in international tribunals have been avoided in order to concentrate upon the application of national legislation in domestic

¹The Legislative Guide to the Universal Legal Regime against Terrorism; Guide for the Legislative Incorporation of the Provisions of the Universal Legal Instruments against Terrorism; Model Legislative Provisions against Terrorism; Model Law on Extradition; Counter-Terrorism Legislative Database; Mutual Legal Assistance Request Writer Tool and Model Law on Mutual Legal Assistance; Preventing Terrorist Acts: a Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments; Criminal Justice Responses to Terrorism Handbook; Frequently Asked Questions on International Law Aspects of Terrorism; all available at the UNODC website, www.unodc.org, under Terrorism Prevention/ Global Project on Strengthening the Legal Regime Against Terrorism. Most of the above publications are available in multiple languages.

criminal courts.² It is hoped that the selected cases and other materials will illustrate how terrorist attacks on civilians are actually dealt with in the reality of national criminal justice systems, and how those systems might be improved.

4. It is important to explain the terminology used in this United Nations publication. Approximately 500 individuals, groups, undertakings and entities have been designated by the Security Council pursuant to the procedures established by Security Council resolutions 1267 (1999), 1390 (2002) and related resolutions. The basis for this listing is a finding by the Security Council's Al-Qaida and Taliban Sanctions Committee that the entity has "participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts or in supporting terrorist acts". Accordingly, these entities are considered and referred to as terrorists and terrorist organizations in this Digest. All of those named entities are associated with the Taliban or Al-Qaida. Member States are required to impose an asset freeze, travel restrictions and an arms embargo on the named entities.

5. In resolution 1373 (2001) the Security Council imposed additional obligations with respect to a broader universe of all persons who commit terrorist acts, whether or not listed by the Al-Qaida and Taliban Sanctions Committee. Member States are required, among other preventive and repressive actions, to criminalize the financing of terrorist acts, to deny safe haven to those who finance, plan, facilitate or commit terrorist acts and to bring all such persons to justice. Resolution 1373 does not include an explicit definition of what is a terrorist act. However, both in the preamble and in paragraph 3 of resolution 1373 the Council stressed the importance of the adoption and full implementation of the international conventions and protocols relating to terrorism. The resolution's paragraph 1 (b), which requires the criminalization of the financing of terrorist acts, parallels the offence language of article 2.1 of the International Convention for the Suppression of the Financing of Terrorism. That article defines the acts for which the Parties must forbid the provision or collection of funds as follows:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;³ or

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

²A partial exception to the rule against citing international tribunals is the reference to the Special Tribunal for Lebanon and its inquiry in regard to the assassination of former Lebanese President Hariri. That Tribunal will apply Lebanese criminal law, rather than international humanitarian law, and is cited only to show the difficulties encountered and resources required for a complex bombing investigation.

³The treaties listed are the Convention for the Suppression of Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973); International Convention against the Taking of Hostages (1979); Convention on the Physical Protection of Nuclear Material (1979); Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988); International Convention for the Suppression of Terrorist Bombings (1997).

6. When the term “terrorist act” is used in this publication, it should be understood to mean an act prohibited by one of the specific terrorism-related agreements or a violent act described in article 2.1 (b) of the International Convention for the Suppression of the Financing of Terrorism. Those instruments are constructed so that some of their international cooperation mechanisms are available only if the offence involves an interstate element, such as the foreign nationality of the suspect, but that jurisdictional requirement is not part of the definition of the crimes of terrorism listed in the Convention. This Digest focuses upon the physical conduct defined in the United Nations terrorism-related instruments, without regard to the international element. The concerns of the experts and of many of the potential readers of this Digest are not confined to terrorist acts with an international element. National laws and concerns include terrorism that threatens public safety and national security within a single country. Offences and procedures to deal with terrorist acts must often be drafted to apply to acts of domestic as well as international terrorism. Domestic terrorism can easily become international in character depending on the nationality of the perpetrator or of the victim, and a fugitive suspected of a crime of terrorism committed elsewhere may be found within a country’s jurisdiction. Consequently, the Digest limits its definition of terrorist acts to the kinds of violence dealt with in the universal terrorism-related instruments of the United Nations. It does not, however, limit its discussion of terrorist cases or counter-terrorism mechanisms to situations involving interstate elements. Rather, references herein to “terrorists” and “persons who commit terrorist acts” or “engage in terrorism” apply to persons and entities who, in the wording of Paragraph 1(c) of Resolution 1373 (2001) “commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts”, whether those acts are domestic or international in nature.

7. A number of violent groups that espouse political, separatist or ideological causes are referred to in the text as having committed terrorist acts or engaged in terrorism. Any such characterization is based not upon the entity’s use of violence per se or upon the goal that it seeks, but upon its commission of or support of violence against civilians in ways that falls within the description of terrorist acts in the universal terrorism-related conventions and protocols.⁴ Moreover, the mere inclusion of a case or factual situation in the Digest does not necessarily imply that it deals with terrorism. The case of Klaus Barbie is discussed in chapter VII, section C, on Lures and expulsions. Barbie was a war criminal, not a terrorist in the sense of the word used in the Digest. Nevertheless, his case is included because its legal principle is relevant to a series of cases dealing with expulsion of fugitives wanted for acts of terrorism.

⁴A number of the expert contributions make reference to the name or description used by that country’s authorities for a particular violent group. Use of that name in this publication does not mean that any United Nations body necessarily categorizes a group by that name as being terrorist in nature. The experts have also been kind enough to provide translations of national laws, some of which are informal and not authoritative.

II. Offences for terrorist acts already committed

A. Violent offences not requiring a specific terrorist intent

8. Violent terrorist acts are crimes against the safety and security of society. Ordinary criminal laws against murder, bombing and other forms of violence allow punishment of those acts without requiring proof of any specific terrorist intent. The limitation of those offences is that they can be prosecuted only after a tragic or disruptive attack has succeeded or has been attempted. Moreover, they focus on the physical perpetrators of the prohibited conduct. That focus may make it difficult to impose criminal responsibility on anyone who is not physically present and directly involved in the violence or threat.

9. No matter what their ideological or political goal may be, terrorists accomplish their intended purposes by inflicting death, serious injury, detention of hostages or significant property damage, or by threatening similar harms. Those types of conduct are criminal offences in every legal system, even if the country has no special terrorism law. Moreover, the elements of such traditional criminal law offences can be established even when it may be impossible to prove what is commonly called a terrorist intent, meaning a specific purpose to intimidate a population or to coerce a government.⁵

10. Many notorious attacks on civilians that by their nature or context suggest a purpose to intimidate a population or to coerce a Government have been successfully prosecuted without the need to use anti-terrorism laws or to prove a specific terrorist intent. Examples include; the taking of hostages by an extremist group during the seizure of Mecca's Grand Mosque in 1979; the bombing of the Turkish Airways area at Orly Airport in 1983 by an Armenian group, and of department stores, government offices and other public places in Paris in the 1980s by members of an Algerian group; the Aum Shinrykio poison gas attack in the Tokyo subway in 1995; the kidnapping for ransom of tourists at the Dos Palmas Resort in 2001 and the bombing of the Superferry 14 in 2004, both incidents in the Philippines attributed to the Abu Sayyaf group.

11. It is not difficult to find an ordinary offence that will provide a legal basis for investigation and prosecution once a terrorist attack has occurred or has been attempted, without necessarily having to secure admissible proof of the motives or ideology behind the attack. National criminal codes and legislation may also contain laws intended to implement the sixteen United Nations terrorism-related conventions and protocols. All of these agreements were adopted in response to or in anticipation of terrorist acts, such as hijacking

⁵For an example of a specific terrorist intent, see article 2.1 (b) of the International Convention for the Suppression of the Financing of Terrorism. That article prohibits the provision or collection of funds with the intent or knowledge that they are to be used in full or in part to carry out any act intended to cause death or serious bodily injury to a civilian or to any other person not taking an active part in 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 abstain from doing any act.

aircraft or seizing hostages. By their nature those forms of violence or threats tend to intimidate a population or to coerce a government. Nevertheless, it is uncommon for any of the offences established in the universal anti-terrorism conventions and protocols to require a specific terrorist intent.⁶

12. The contribution of the United States member of the Expert Working Group describes the charges against Richard Reid. Reid is called the shoe bomber because he attempted to destroy an American Airlines flight from Paris to Miami in December 2001 by igniting explosives concealed in the heel of his athletic shoe. The United States is a party to the Montreal Convention, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971). That Convention requires its Parties to criminalize attempts and offences of violence against persons on board an aircraft in flight registered to that country, as well as attempted destruction or damage to such aircraft that endangers its safety, and placing of any dangerous device on such aircraft. The United States had established the offences required by the Montreal Convention in its domestic criminal law. Those offences make no mention of a terrorist intent to intimidate a population or coerce a government. Accordingly, most of the charges in the nine count indictment against Reid would have been applicable regardless of what his motivation might have been, and even if that motivation could not be proved. However, the prohibitions against the commission of violent acts such as murder, wounding, bombing and hostage taking have the inherent limitations that they apply only to completed or attempted crimes and may reach only the material executors of a terrorist act. Those limitations require that a comprehensive counter-terrorism criminal justice strategy include other repressive and preventive offences.

B. Acts that assist the commission of terrorist offences

13. Legal systems generally recognize the need for laws permitting the punishment of persons who assist the material executors of criminal acts by facilitating the commission of the offence or by helping after the event with knowledge of the crime. Increasingly, these laws include punishment for failure to disclose knowledge of terrorist offences to the police.

⁶The following universal terrorism-related conventions and protocols involve general intent crimes that do not require a specific intent or purpose to intimidate a population or to coerce a Government. Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963); Convention for the Suppression of Unlawful Seizure of Aircraft (1970); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973); Convention on the Physical Protection of Nuclear Material (1979) and its 2005 Amendment, except as to threats; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988), except as to threats; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988), except as to threats; International Convention for the Suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999), except as to the offence in article 2.1 (b); and International Convention for the Suppression of Acts of Nuclear Terrorism (2005), except as to the offence in article 2.1(b).

14. The general part of many penal codes describes the conduct that makes a person responsible for the commission of an offence. Article 61 of Japan's Penal Code provides that any person who induces another to commit a crime shall be dealt with in sentencing as a principal. Section 21 in the Criminal Code of Canada: provides that:

- “(1) Every one is a party to an offence who
- (a) actually commits it;
 - (b) does or omits to do anything for the purpose of aiding any person to commit it; or
 - (c) abets any person in committing it”.

Other systems establish a separate category of an accomplice or accessory to crime, particularly an accessory after the fact, as deserving a lesser punishment than the principal who physically performs the prohibited act. Article 27 of the Chinese Penal Code provides that:

“An accomplice is one who plays a secondary or supplementary role in a joint crime. An accomplice shall, in comparison with a principal offender, be given a lesser punishment or a mitigated punishment or be exempted from punishment”.

15. In a prosecution resulting from the attacks of September 2001, German authorities prosecuted Mounir el Motassadeq, an associate of the Al-Qaida group called the Hamburg cell, headed by Mohammed Atta. El Motassadeq was found by the Upper Regional Court in Hamburg not to be responsible for the deaths of persons in the World Trade Center Towers and in the Pentagon. The basis for this ruling was an absence of sufficient evidence to show that he knew that Atta and his colleagues intended to fly aircraft into occupied buildings to cause thousands of deaths, although he knew that a terrorist action was being planned. This same principle is described in a paper by Croft Michaelson, Senior General Counsel, Public Prosecution Service Canada:

“Criminal offences under Canadian law typically require that the prosecution prove beyond a reasonable doubt that the accused person had knowledge of the specific nature of the crime. Thus it was conceivable that the persons who helped to facilitate the commission of terrorist acts might evade criminal liability if they were unaware of the specific nature of the acts being facilitated”.⁷

16. This principle was applied in the case of the 2002 Paradise Hotel bombing cited by the Kenyan expert. The Court in that case acquitted the defendants despite accepting that the prosecution had proved they were associated in Al-Qaida with the suicide bombers, kept in contact with the bombers in the period leading up to the event, and shared with them a “general common intention to carry out certain unlawful purposes even if those purposes might include or lead to murder”. In the Court's view a high standard

⁷Monograph on file with UNODC, the Canadian National Experience Investigating and Prosecuting Acts of Terrorism (2008).

of specific knowledge and physical involvement was required to make persons who did not physically participate in the bombing criminally culpable:

“... the accused and suicide bombers ought to have met and pre-arranged the plan to prosecute the unlawful purpose i.e. the bombing of Paradise Hotel and the killing of the 15 deceased persons and that they were present at the scene of the killing to be deemed to have committed the offence”.⁸

17. Even though his lack of specific knowledge of the 11 September 2001 plan resulted in el Motassadeq’s being found not responsible for the thousands of deaths on the ground, the practical effects of his participation in a murderous scheme were recognized. The German Court found that the accused served as a sort of financial secretary for the September 2001 aircraft hijackers, paying their bills, sending them money and otherwise facilitating their preparation. Because he knew those preparations were aimed at unlawful seizure of aircraft he was held responsible for facilitating the deaths of the hundreds of passengers on the seized aircraft. The Palestinian leader of the 7 October 2004 attacks on resort areas in the Gulf of Aqaba that killed 34 persons and injured 159 died in the bombing of the Taba Hilton Hotel. However, a submission by the Egyptian expert described how local affiliates sharing the deceased bomber’s Salafi Jihadi beliefs were prosecuted for their roles in supplying explosives left in the Sinai from numerous battles and in fabricating electrical circuits with which to detonate them. Three confederates received death sentences, one life imprisonment and other terms of imprisonment from five to ten years.

18. In 2007 an Indonesian court convicted an individual considered by a number of governments to be a military leader of Jemaah al Islamiyah. That organization is a terrorist entity designated by the Al-Qaida and Taliban Sanctions Committee created pursuant to Security Council Resolution 1267 and successor resolutions. The convictions were based upon Ainul Bahri’s furnishing of support to other terrorists and for illegal possession of weapons and explosive. Prosecution for offences physically committed by Bahri made it unnecessary to prove his leadership role in or hierarchical responsibility for military actions of Jemaah al Islamayah subordinates, which could have required a complicated evidentiary process.

19. The United Kingdom’s laws against support of terrorist activity were used after the unsuccessful attempt to bomb the London underground system that followed within weeks of the successful bombings of 5 July 2005. After the 21 July 2005 attempts failed, a number of persons provided those responsible for the attempt with safe houses, passports, clothing and food and failed to inform police. Among the five persons convicted were a brother and the fiancée of one of the attempted bombers. The United Kingdom does not exempt relatives from the obligations of its laws against harbouring a fugitive or assisting in the escape or concealment of such a person. Section 38B of the United Kingdom Terrorism Act 2000, as amended, also imposes a duty upon anyone who has information that he believes might materially assist in preventing an act of terrorism or in securing the apprehension or prosecution of another person for an act of terrorism,

⁸Opinion of the court in Republic v. Aboud Rogo Mohamed and others, Criminal Case No. 91 of 2003 in the High Court of Kenya at Nairobi.

to disclose that information to a constable as soon as reasonably practicable. The Kingdom of Bahrain has a similar provision in Law No. 58 of 2006 with Respect to Protection of the Community against Terrorist Acts. Article 18 of that law provides for imprisonment or a fine for anyone who becomes aware of the commission of a crime for a terrorist purpose, conspiracy, plot or acts aimed at committing such crimes without reporting it to the public authorities. Section 6 of the Anti-Terrorism Act of Barbados 2002 contains a similar duty to report knowledge of the financing of terrorism.

C. Criminal responsibility for directing and organizing terrorist acts

20. Traditional criminal law offences and procedures were developed primarily to deal with the persons who physically carry out a prohibited act. They are not necessarily effective against organizational structures that separate the material execution of a bombing, assassination or hijacking from its logistical preparation, planning and support. Effective repression of terrorism requires imposition of criminal liability on the persons who plan, organize and direct terrorist acts.

21. Virtually all major terrorist incidents, and certainly movements employing terrorist tactics over a period of time, involve the combined resources and action of a group. Such a group is inherently more dangerous than a single individual could be. Its effective repression requires imposition of criminal liability on persons who organize and direct, but do not themselves commit, physical acts of violence. To combat terrorism one must reach beyond the person who actually places the bomb or seizes the aircraft. Criminal responsibility must also be imposed on the network of instigators, financiers, recruiters, trainers and logistical supporters who make such acts possible through their joint efforts.

22. Examples of manipulation of the intended physical executors of a terrorist act include the case of Nezzar Hindawi. He was sentenced to 45 years' imprisonment in 1986 by a British court for a plot to blow up an El Al flight. He had given his unwitting girlfriend, pregnant with his child, a suitcase containing a timer bomb set to explode during the flight, telling her that he would follow on a subsequent flight. Hindawi himself had been provided an official passport in a false name and claimed to have been furnished the bomb and instructions by diplomatic representatives of a foreign country in London. In the El Nogal Club bombing in Bogota in 2003 a 26-year-old athletic instructor had clearly been provided funds, a cover business and an expensive automobile by the Fuerzas Armadas Revolucionarias de Colombia (FARC). These indicators of success allowed the instructor to establish himself as a member of the club. That membership permitted him to arrange for a relative, using false club identification, to drive the vehicle containing explosives into the club building. The subsequent explosion resulted in the deaths of 36 persons and the wounding of over a hundred others. Included among the dead were the athletic instructor and his relative, a circumstance that is still under inquiry.⁹

⁹It is not unheard of for a terrorist organization to falsely inform the carrier of an explosive device that its triggering mechanism will allow time for an escape, whereas immediate detonation results. Hassan Bashandi, an 18-year-old student, may have been persuaded by a Jihadist group using this deception to place the bomb that killed him and three tourists in the Khan-al-Khalili Bazaar in Cairo's Al-Azhar area on 7 April 2005 according to a press report of an Egyptian Ministry of Interior statement.

23. Theories of legal responsibility have been developed to impose penal responsibility on those who contribute to criminal acts by their leadership or executive responsibility, even if they do not physically participate in the event or provide subsequent assistance. Japan does not have a statutory offence of conspiracy, but has developed a conspiracy-like doctrine of “joint principal” culpability based on article 60 of the Penal Code, which provides that: “Two or more persons who commit a crime in joint action are all principals.” The Japanese Supreme Court has upheld application of this joint action concept when only an implicit understanding existed. A 1997 case involved the conviction of a *boryokudan* (organized crime) boss convicted for the possession of weapons by bodyguards assigned by another gang to protect him during a visit. Although the organized crime boss did not order the possession of the weapons, he was generally aware of it, benefited from it and was in a position to stop or avoid it. This theory of joint responsibility has been applied to terrorist acts in the case of Shoko Asahara, the founder of the Aum Shinrykio sect. He was charged with multiple murders, including the sarin gas attack in the Tokyo subway, another sarin gas attack in Matsumoto, and the murders of a lawyer and his family. At trial a number of Asahara’s subordinates testified as witnesses to his participation and orders. The Tokyo District Court found that he had ordered or directed the subordinates to commit the murders and imposed the death penalty. The appeal of his conviction and sentence to death was rejected by the Supreme Court in 2006.

24. The decision of the Supreme Court of Justice of Colombia, Penal Cassation Chamber, in the case of Nicolás Rodríguez Bautista and others, no. 23825, decided 7 March 2007, dealt with the concept of criminal responsibility by the leaders of a group that blew up a pipeline. Tragically, the contents were highly flammable hydrocarbons that flowed from the break in the line downhill to a river and the village of Machuca, burning nearly a hundred victims to death and causing severe injuries to approximately 30 survivors. Ten defendants were sentenced to 40 year prison terms after conviction at the initial trial level, including the Central Command of the violent subversive group ELN (Ejército de Liberación Nacional) responsible for ordering the destruction of the pipeline. A superior court vacated the convictions for homicide, bodily injury and terrorism, leaving only a charge of rebellion and a penalty of six years. Upon reviewing the second level court’s decision, the Chamber of Penal Cassation found that it would be contradictory to accept the undeniable proof that the ELN leaders issued the order for the pipeline attack and then to ignore the consequences of their criminal act. The Chamber rejected the argument that because those leaders did not desire or foresee the deaths and injuries of the villagers of Machuca they could not be convicted for causing those harms. Under the doctrine of *dolus eventualis*, or indirect intent, the leaders were held responsible for the unplanned consequences flowing from the reckless and dangerous action they had ordered.

25. Unlike the pipeline bombing case, the Club El Nogal bombing in Bogota, Colombia was deliberately planned to cause casualties at a social and sports club. The decision by the first instance Judge of the Specialized Circuit of Bogota, issued 28 November 2008, dealt with the responsibility of the leadership of the FARC for this atrocity. The Court analyzed the applicability of the concept of “dominio funcional del hecho”, translatable as effective control of the act, and also called “coautoría impropia o funcional”, translatable as an external or functional co-authorship or joint responsibility. The subjective mental element of this concept was found by the Court to be a joint decision to accomplish an act. Its material element was the execution of that decision through a division of labour. Evaluating the evidence in the record, the Court found that the FARC was an illegal

organization with a hierarchical structure, in which orders flowed down from the Secretariat through commanders of various levels to the common fighters.

26. The power of the FARC Secretariat to take decisions on proposed actions was found to have been acknowledged by the organization's own magazine. Numerous FARC members also testified that this project would have been presented by a commander to the Secretariat, who must have evaluated it and decided whether to order its execution. The Court also relied upon testimony from subordinates of the same FARC leader who gave the order for the El Nogal bombing. After that event, the commander issued a directive for the bombing of a hospital with instructions that the results should be equal to or greater than those of the El Nogal attack. In doing so, the commander stated that he had received the order directly from the FARC Secretariat. Considering all of the evidence, the Court found that the Secretariat members were individually responsible as indirect authors of the crimes of terrorism, aggravated homicide and attempted aggravated homicide that occurred at the Club El Nogal.

27. The retrial of Abimael Guzmán and other leaders of the Sendero Luminoso organization in 2005-2006 involved application of this same "teoría del dominio del hecho", or theory of effective control of an act. As reflected in the contribution of the Peruvian expert, this principle of law establishes criminal liability based upon a leader's ability to control the acts of others. That theory reflected the reality of the structure of the Sendero Luminoso organization, but its proof imposed heavy evidentiary requirements. In 1963 Manuel Ruben Abimael Guzmán Reynoso, lawyer, professor of philosophy and leader of the militant Red Faction within the Peruvian Communist Party, took control of the Party, including its military commission. Beginning in the 1970s Guzmán eliminated internal competitors and dissent, employing violence to subdue opponents. He imposed his political philosophy, which he called "Pensamiento Gonzalo". This thought process attempted to justify selective assassinations, destruction and guerrilla attacks as a response to class divisions, poverty and social neglect. In 1980 Guzmán began an armed struggle with the purpose of capturing power by violence. Among the first targets of the Sendero Luminoso were Andean communities that maintained a traditional form of local government. Threats, destruction of property and assassinations after public accusation before the community were used to create a vacuum of power in the area and destroy its social framework. The violence and state of intimidation, and attacks on social, economic and communication infrastructure, destroyed the already subsistence level economy in a number of departments of the country.

28. Guzmán and his associates in the party hierarchy were tried and sentenced to life imprisonment by a secret military court shortly after their capture in 1992. Following a change of government, the Constitutional Court declared the existing laws against terrorism unconstitutional. The Congress then nullified the trials in military courts and in civilian courts by anonymous magistrates and provided for new trials in civilian courts with new procedural guarantees. This return to trials according to due process of law required the retrial of the leadership of Sendero Luminoso.¹⁰ In order to prove the guilt of Guzmán and other organizational leaders for the mass murder of villagers when they

¹⁰Retrials in Peruvian civilian courts with public procedures were examined in the case of *García Asto and Ramírez Rojas v. Peru*. The Inter-American Court of Human Rights there found that the applicable anti-terrorism laws sufficiently defined the elements of offences so that criminal conduct could be distinguished from lawful conduct, and that they did not necessarily create any violation of article 9 of the Inter-American Convention, dealing with freedom from *ex post facto* laws and proceedings.

physically were nowhere near the remote rural location of the crime, it was necessary for the prosecution to prove their organizational control over those who physically committed the murders. The seized documentary evidence of the first session of the Congress of Sendero Luminoso was placed in evidence to show the adoption of the Pensamiento Gonzalo, the political philosophy recognizing the leadership and absolute control of Guzmán. Documentation of the Fourth National Conference showed the position of each member of the Central Leadership of the organization. It also demonstrated how the massacre of the villagers of an Andean village named Lucanamarca was ordered and planned. Other evidence proved that in an interview with a sympathetic journalist Guzmán acknowledged his authority and that of the Central Leadership for planning and ordering the Lucanamarca murders.

29. Through the trial process it was proved that Sendero Luminoso was a rigidly hierarchical structure. The domination of “Presidente Gonzalo” reached down through all of its organs, committees, cells and militants to the lowest level. A system of security and party vigilance was enforced, which included physical sanctions. Its leader created general strategies, made plans for implementation, and assigned tasks. He also supervised and evaluated execution of the quota of acts of murder, sabotage and destruction to be committed in the organization’s campaigns. In specific reference to Lucanamarca, the Central Committee met with the directors of the area committee and ordered the destruction of the population and town. The reports on the actions were channeled to the Central Executive (Guzmán) who presented them to the members of the Central Committee in its periodic plenary sessions for evaluation. The leaders and members of the Executive Board thus appear as the co-authors of the crimes committed by the criminal collective. This evidence permitted the application of the theory of the “dominio del hecho”. Guzmán was shown to have controlled the Sendero Luminoso organization to the extent that its members were fungible instruments subordinated to his will. If one member had refused to carry out his orders, the act would have been carried out by others. Claus Roxin, the German proponent of this theory of criminal liability, argued that leaders who possess this kind of power within an organization should be considered personally culpable for the crimes resulting from their policies and decisions.¹¹

30. A judgment of the National Penal Court provided by the Peruvian expert reflected the conviction of Oscar Ramírez Durand, who assumed the direction, planning and supervision of the activities of Sendero Luminoso after the capture of Abimael Guzmán. Other directors, members and combatants of the organization were charged in the same case. They were found to have dedicated themselves to the systematic commission of violence against persons and property in order to generate panic, alarm and fear among the population. This conduct constituted the formation of a terrorist organization, punishable under Decree Law 25475. In this judgment reference was made to some of the same documentation and proof of an illegal hierarchical organization relied upon in the trial of Guzmán and to the applicability of the “teoría del dominio del hecho”.

31. Persons such as Abimael Guzmán and Oscar Ramírez Durand, who conceive a criminal plan and assign or enlist others within a subordinate organization to carry it out, are referred to by some legal writers as the “moral” or “intellectual” authors of an

¹¹See Roxin, Claus, *Autoría y dominio del hecho en Derecho Penal*. Translation of the Sixth German Edition, Joaquín Cuello y Serrano, Marcial Pons 1998, p. 245.

offence. This concept of an author of crimes was demonstrated in a literal way in connection with the Japanese Red Army (JRA) hostage-taking at the French Embassy in The Hague in 1974. A set of “instructing documents” for a hostage-taking campaign in Europe had been written by Fusako Shigenobu, the organization’s executive. These documents had been seized from a JRA member arrested in France for a passport violation. The Embassy hostage-takers’ ransom demands included the return of the “instructing documents”, demonstrating the importance the JRA members attached to them.

32. The United Kingdom has created a specific offence in section 56 of its Terrorism Act 2000 of directing, at any level, the activities of an organization concerned in the commission of acts of terrorism. The first conviction under this statute took place in December 2008. Rangzieb Ahmed received a sentence of life imprisonment for directing the affairs of Al-Qaida, even in the absence of any proof of participation in a specific terrorist act. The conviction was based upon microphone interception of conversations in Dubai and the United Kingdom, his causing a confederate to bring a book with Al-Qaida contacts written in invisible ink into the United Kingdom, and his travels on behalf of Al-Qaida. Subsection 102.2 of the Australian Anti-Terrorism Act 2005 creates a similar offence. Ireland introduced the offence of directing terrorist acts after the notorious bombing of civilians in Omagh, Northern Ireland, which took place in 1998. Article 120 of the Chinese Penal Code was revised in 2001 to provide for penalties of from 10 years to life imprisonment for forming or leading a terrorist organization. Active participants in the organization are subject to imprisonment for three to ten years, and other participants may be sentenced to not more than three years’ imprisonment.

33. A similar differentiation of penalties is found in the Spanish Penal Code. Section 515.2 criminalizes armed terrorist bands, organizations and groups as illicit organizations. Section 516 establishes penalties from 6 to 12 years for the members of such bands, organizations or groups, and from 8 to 14 years for its promoters and directors. The Spanish expert described the criteria utilized in some cases to establish the culpability of the directors of the ETA organization for terrorist attacks committed by its members. Among these one can emphasize the proof of contacts at relevant times between the directors and material executors of the attack, and the undisputed fact that in the hierarchical structure of ETA, such attacks take place only pursuant to superior orders. Italian magistrates relied upon a similar thesis to prove the responsibility of leaders of the Sicilian Mafia for a campaign of terrorism carried out by organizational subordinates. That evidentiary thesis was supported by testimony from convicted and cooperating Mafia members that certain killings and other important actions required approval of the so-called “cupola”, or combined leadership of the various geographic families.

34. The need for a theory of intellectual or functional authorship of terrorist acts has been recognized in the United Nations terrorism-related conventions and protocols adopted since 1997.¹² Those instruments, such as the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism, contain provisions in the following language:

¹²International convention for the suppression of Terrorist Bombings (1997); International Convention for the Suppression of the Financing of Terrorism (1999); International Convention for the Suppression of Acts of Nuclear Terrorism, Amendment to the Convention on the Physical Protection of Nuclear Material, Protocols to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, all of 2005.

“Any person commits an offence if that person:

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2; or

(c) In any other way contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 by a group of persons acting with a common purposes; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or been made in the knowledge of the intention of the group to commit the offence or offences concerned.”¹³

35. Unlike national laws directed at leading, organizing or directing a terrorist organization, the offence definition in these conventions is aimed at organizing or directing a specific terrorist act or the commission of that act by a group. That change in focus raises an important question. Are acts that constitute the offence of organizing, directing or contributing to a completed terrorist offence also criminal if the terrorist act is not accomplished or even attempted? In other words, can offences that criminalize organizing or directing an offence or the commission of an offence by a group be used like the conspiracy or criminal association laws discussed in chapter III? Can one organize, direct or contribute to the commission of an offence if it is not committed?

36. At least in the English language it grammatically seems possible to organize or direct others to commit an offence even if those persons do not progress to the point of attempting or accomplishing the violent act. The opposite would seem to be true with regard to contributing to the commission of an offence. The ordinary understanding of that language would be that one can “contribute to the commission of one or more offences” only if that commission is accomplished or at least attempted. Uncertainties about these questions are impossible to resolve in the abstract. The answers will depend upon the precise language of the national laws dealing with culpability for organizing or directing offences physically committed by others.

37. In the 1999 International Convention for the Suppression of the Financing of Terrorism, all doubt concerning whether the convention offence required accomplishment of the planned violent act was removed by the insertion of article 2.3, expressly stating that:

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

However, the presence of such an article only in the 1999 Financing of Terrorism Convention invites the argument that its absence in prior and subsequent agreements means that under those agreements no offence occurs until the planned violent act is committed. The general rule of criminal law observed in most legal cultures is expressed by the Latin maxim, *in dubio pro reo*, dictating that any doubt must be resolved in favour of the accused.

¹³This standard convention language first appeared in article 2.3 (b) and (c) of the 1997 International Convention for the Suppression of Terrorist Bombings.

38. So, if national lawmakers wish to punish those who direct, organize or contribute to planned terrorist acts even when the violent act is not yet attempted or accomplished, they should use language making their legislative choice clear. With respect to an offence of organizing or directing the commission of offences, one approach is to include an explicit provision that no violent act need occur, such as that found in article 2.3 of the International Convention for the Suppression of the Financing of Terrorism. Another is to ensure that the grammatical object of the “organize or direct” language relates to a terrorist group or its activities generally rather than to the actual commission of an offence. As an example, the French Penal Code was amended in 2004 by the addition of the following sentence to article 421-5.

“Leading or organizing (the type of group or association provided for under article 421-2-1) is subject to the same penalties”.¹⁴

Participation in an association under article 421-2-1 is defined as an offence as soon as the preparation of a terrorist act is demonstrated by a material act. The prospective application of article 421-5 is thus clear under the French legislation.

39. The Philippine expert made the valuable observation that any theory of functional responsibility or intellectual authorship for crimes against the public order must be applied with caution. One danger is that when violent public protests against a government take place, the theory could be misused to prosecute persons who have called for political change but have not directly or indirectly advocated violence.

D. Multiple prosecutions based on a single series of events

40. International terrorist incidents often involve multiple offences and injure the nationals and interests of more than one country. A State may choose to prosecute even after punishment has been imposed for a different aspect of the same incident, or for an offence arising out of the same facts after prosecution in another State.

41. Article 14.7 of the International Covenant on Civil and Political Rights (ICCPR) announces the principle commonly known by the Latin phrase, *ne bis in idem*, meaning that a State shall not try or punish a person twice for the same offence.

“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 procedures of *each country*” (emphasis supplied).

As emphasized through the italics, by its own terms article 17 only applies within each country. However, even within a single State the principle must be applied and interpreted in concrete situations. In October 1985 the Italian cruise ship *Achille Lauro* was seized and a handicapped passenger killed and thrown overboard. Italian authorities faced a number of issues. Two different prosecution offices initially asserted jurisdiction over

¹⁴“Le fait de diriger ou d'organiser le groupement ou l'entente défini à l'article 421-2-1 est puni de vingt ans de réclusion criminelle et de 500 000 euros d'amende”.

the events, with the Genoa office eventually taking over the case. Complex issues of diplomatic immunity and of leadership responsibility for the hijacking had to be resolved. By November 1985 a number of those involved in the hijacking had already been convicted for possession of weapons and explosives and given sentences ranging from four to nine years. These convictions allowed the hijackers to be held in prison so they could not flee while prosecutors assembled evidence concerning the more serious charges of hijacking, kidnapping and murder. Those charges were tried at a later date and additional sentences were imposed.

42. While the ICCPR makes the *ne bis in idem* principle obligatory only within each national legal system, a State can unilaterally apply that protection to foreign convictions or acquittals if it desires. At the bilateral level the principle can be adopted in a treaty. At the level of the United Nations terrorism-related instruments, a decision was taken early in their development not to include such a provision, and that has been the consistent practice since 1970. The International Convention for the Suppression of Unlawful Seizure of Aircraft was the first terrorism-related agreement to require its Parties to criminalize an offence. The travaux préparatoires, the record of negotiations of the Convention, reflect the decision to leave application of the *ne bis in idem* principle to each State Party. This negotiating history was cited in the appellate decision in *U.S. v. Omar Rezaq*,¹⁵ which upheld a life sentence for air piracy resulting in the murder of a United States national and the wounding of others. Rezaq had previously served seven years in Maltese custody for murders in the same hijacking of an Egypt Air flight which was forced to land in Malta. After being released by Malta, Rezaq was turned over to United States authorities upon arrival in Nigeria and prosecuted in the United States. As cited by the court, the travaux préparatoires:

“... show that the treaty’s negotiators considered and rejected the possibility of expressly barring sequential prosecutions through a *ne bis in idem* provision (a term for double-jeopardy provisions in international instruments; another term is *non bis in idem*). The states opposed to this idea, whose views carried the day, argued that ‘the principle was not applied in exactly the same manner in all States,’ and that ‘in taking a decision whether to extradite, the State concerned will in each case apply its own rule on the subject of *ne bis in idem*.’” International Civil Aviation Organization, Legal Committee, 17th Sess., Doc. 8877-LC/161, at 8 (1970).

43. The Spanish expert provided an explanation of how that country’s judicial authorities interpret the *ne bis in idem* principle. A judicially established doctrine of the Supreme Spanish Tribunal concerning membership in ETA is that a French conviction for terrorist association (an offence legally comparable to the Spanish offence of membership in a terrorist organization) constitutes prior jeopardy and prevents trial in a Spanish court. The reasoning is that the ETA organization possesses a pyramidal structure, with a common criminal strategy emanating from its leadership organs, with a clear hierarchy and functional division of its member, and that membership in the organization is an objective fact that does not change with the territory where the person is found. On the other hand, the principal distinguishing feature of what was characterized by the Spanish expert as international “jihadist” terrorism is its lack of a vertical structure. Unlike ETA and

¹⁵*U.S. v. Omar M. Ali Rezaq*, 234 F. 3rd 1121 (D.C. Cir. 1998), West Publishing Company.

other older organizations, its functioning is essentially horizontal. The terrorist activity is developed in autonomous local cells that operate in each country responding to radical inspiration that Al-Qaida transmits through different means of communication (basically Internet and television). The preparation, planning and execution of concrete criminal attacks are exclusively performed by those who belong to the terrorist group or cell in each country. Similarly, each terrorist cell is autonomous and independent in its training, indoctrination and recruitment activities. For this reason, membership in the terrorist organizations is defined by the activity that each cell carries on in its respective territory of operation. Consequently, the participation of the same person in the formation of different cells in distinct countries may be separately punishable in each national jurisdiction.

44. Sequential prosecutions for related but not identical conduct are common. Chapter IV, section D, Using minor offences to catch major criminals, describes the acquittals of persons accused in the attack on a hotel frequented by Israeli tourists in Mombasa, Kenya. One of those defendants, Omar Saidi Omar, was separately prosecuted and convicted for possession of weapons during the same time period, an offence which appears from the judicial opinion to have been part of an overall plan by an Al-Qaida cell for the commission of terrorist acts. Metin Kaplan, the self-described Caliph of Cologne, was convicted by German courts for incitement to murder. After serving four years for this offence he was extradited to Turkey in 2004 and sentenced to life imprisonment for other offences.

45. In *Chraidi v. Germany*, application 65655/01, decided 25 October 2006, the European Court of Human Rights found no violation of human rights resulting from a sequential prosecution resulting in lengthy periods of detention. In August 1984 a Berlin court issued an arrest warrant against Mr. Chraidi on the ground that he was strongly suspected of murdering victim "E". In 1990 the same court issued a further warrant accusing Chraidi and others of having prepared a bomb attack in 1986 on the "La Belle" discotheque to kill members of the American armed forces. The suspect was arrested in Lebanon in 1992 and detained with a view to extradition. In 1994 he was acquitted by a Lebanese court of the murder of victim "E", but was convicted of document forgery. In 1996 Chraidi was extradited to Germany, and detained for trial on the 1990 murder charges. In November 2001 he was convicted and sentenced to 14 years, with credit for time served in the various stages of detention. The period of detention from 1996 to conviction was found to be proportionate to the complexity and circumstances of the case.

46. In October 2007 Rachid Ramda was sentenced by a French court to life imprisonment for murder in connection with a terrorist association. In 2006 he had been sentenced to 10 years in prison for violation of the French terrorist association law involving his providing financing to a metro station bomber. These and other charges were the basis of extradition proceedings that lasted ten years in the courts of the United Kingdom. Ramda also had been convicted in absentia by an Algerian court for a fatal bomb attack at the Algiers airport in 1992. He was never extradited on that charge, but if ever returned to his country could also face punishment for that offence. A Japanese Red Army member was convicted in the United States in 1988 for explosives and immigration violations. When released from prison and returned to Japan in 2007 he was charged

and convicted for having falsified official documents. In 2008 extradition of Abu Hamza to the United States was ordered by a United Kingdom High Court. Hamza was wanted on charges relating to terrorist training camps in the United States and Afghanistan and hostage taking in Yemen. He had previously been convicted in the United Kingdom for encouraging others to commit murder during sermons given at the Finsbury Park Mosque and reproduced for distribution on tapes and discs.

47. The prosecution of the attempted shoe bomber Richard Reid illustrates how many related violations may result from one relatively simple incident. As described in the contribution of the American expert, Reid was convicted of the following offences in a single proceeding: attempted use of a weapon of mass destruction against United States nationals while such nationals were outside the United States; attempted murder of United States nationals while such nationals were outside the United States; placing an explosive device on an aircraft; attempted murder of one or more passengers and crew on an aircraft subject to United States jurisdiction based on its registration; interference with flight attendants; attempted destruction of an aircraft; and using a destructive device during a crime of violence. Similarly, the Madrid bombings of 11 March 2004 involved 13 bombs hidden in bags or backpacks that caused explosions in 10 trains and two stations, killing 191 persons, wounding nearly 2000 victims and causing approximately 18 million Euros in damage. Some days later, seven members of the terrorist group died in a suicide explosion when surrounded by authorities in an apartment building. The Spanish expert described the variety of charges brought against 29 persons for planning the attacks, for materially executing it, for playing necessary roles in the execution of the attacks, for participation in a terrorist group, and for criminal association. Other charges involved illegal trafficking in drugs and explosives, document forgery, vehicle theft and other offences.

E. Suicide attacks and the limits of reactive offences

48. The increasing number of persons willing to die to accomplish their goals has demonstrated the inadequacy of a reactive, deterrence-based regime against terrorism. Investigation and prosecution after a terrorist attack may result in the incarceration and incapacitation of those terrorists who did not die in the attack and some accomplices. Those reactive measures, however, do not permit preventive intervention against terrorists and terrorist groups before they can accomplish their planned violence.

49. Terrorism does not necessarily involve suicide attacks. Many groups seeking to impose their will by terrorist means never adopted a strategy of suicide attacks. In that category are the Italian Red Brigades of the 1970s and 1980s; their French and German counterparts, Action Directe and the Red Army Faction (although some members of the German group did commit suicide while incarcerated); and the current Euskadi Ta Askatasuna (ETA) organization. However, what was once a rarity in terrorist tactics has now become commonplace. Since the 1980s the violent Sri Lankan separatist group, the Liberation Tigers of Tamil Eelam, has committed scores of suicide attacks in public places with hundreds of civilian victims, including one Sri Lankan President and a former Indian Prime Minister.

50. Followers of other causes have adopted suicide tactics. The attacks of 11 September 2001 resulted in the deaths of all those involved in using the hijacked aircraft as impact and incendiary weapons. The Bali nightclub bombing of 12 October 2002 involved at least one suicide bomber and all three explosions in Bali on 1 October 2005 were attributed to suicide bombers. Russia experienced a commuter train bombing outside the town of Mineralnye Vody, Stravropol, close to the Chechen border on 5 December 2003. A male suicide bomber ignited a bomb estimated to possess the explosive force of 5 to 10 kg of TNT, resulting in the death of nearly 50 people. A 6 February 2004 subway bombing in Moscow was carried out by a suicide bomber, as was another subway attack on 31 August 2004, which resulted in guilty pleas by two of its organizers, Chechen sympathizers Tanbiy Khudiyev and Maksim Panaryin. Two female Chechen separatists died in the explosions of 24 August 2004 which destroyed a Volga-AviaExpress flight and a Siberia Airlines flight after each took off from Moscow's Domodedovo Airport. Two terrorist suicide attacks took place in Cairo in 2005. On 5 May 2005 a fugitive sought for the Khan al Khalili Bazaar bomb attack, Gohar el Qae'd Street in the Al-Azhar area of Cairo, described in footnote 9, threw himself off a Cairo highway overpass in a tourist area, igniting a bomb and wounding numerous persons. Shortly thereafter, his fiancée and sister attacked a tourist bus with gunfire, with one killing the other and then shooting herself before they could be captured. The four London transport system bombers of 7 July 2005 all died when their devices exploded. Two of the three bombs used in the 23 July 2005 attacks in the Egyptian resort of Sharm el Sheik were detonated by suicide bombers. The coordinated bombings of the Radisson, Grand Hyatt and Day's Inn Hotels in Amman, Jordan on 9 November 2005 were all suicide attacks, although one female bomber's explosive vest failed to detonate and she was captured. The assassination of presidential candidate Benazir Bhutto in Rawalpindi, Pakistan in 2007 was accomplished by a suicide attacker. The bombings against police and the staff of the Marriott Hotel in Islamabad in July and September 2008 and of the Indian Embassy in Kabul in July 2008 were also carried out by suicide bombers. The attackers in Mumbai, India in November 2008 fought fiercely, but they must have anticipated that there was little likelihood of surviving once authorities responded in force to the buildings where victims were being murdered.

51. The Algerian expert contribution described the suicide bombings that began in Algeria in April 2007 and have included attacks on the Palace of Government, the seat of the United Nations, the Constitutional Council and other government and civilian targets. Police investigations of those attacks have demonstrated that the majority of the suicide bombers suffered intellectual or physical handicaps that psychologically predisposed them to seek martyrdom. Among these were an adolescent of 15 years and a man of 62 years with health problems. Similarly, the 18 year old student who was persuaded by older mentors to carry out the bomb attack at the Khan al-Khalili Bazaar in Cairo on 7 April 2005 was described in an Egyptian Interior Ministry statement as depressed following the death of his father.

52. The prosecutions described in this chapter were all reactive; taking place after terrorist events had already been committed or attempted. Anti-terrorism laws are obviously inadequate if they allow a response only after innocent victims have been killed or injured. In addition, the traditional deterrent effect of post-offence investigation, trial and punishment is irrelevant to individuals willing to die to accomplish their goal. The necessity

to prevent the potentially catastrophic consequences of terrorism requires timely intervention against the preparation and execution of so-called “martyrdom” attacks. Persons with mental or physical infirmities and the desire to die to reach paradise are immune to the deterrent effect of criminal sanctions. Chapter III describes criminal law offences that respond to these concerns by permitting timely preventive action. Laws that criminalize the preparatory steps leading to terrorism can deter offences by those who are unwilling to sacrifice their lives or risk imprisonment. Even those willing to die for a cause, and who therefore cannot be deterred by the threat of imprisonment, can be prevented from inflicting death and injury if incapacitated by timely incarceration for preparatory offences.

III. Offences to prevent terrorist acts

A. Association for the purpose of preparing terrorist acts

53. In some countries, particularly those familiar with the Roman or civil law tradition, forming a group to prepare one or more terrorist acts is qualified as a criminal or terrorist association. Participation in a structure established to prepare a criminal act becomes punishable as soon as that preparation is demonstrated by a material act, even before specific plans are made to attack a particular target

54. The experts from the French judiciary emphasized the importance of anticipation in combating terrorist activity. In their view that concept is well developed in France and needs to be expanded at the international level. France's experience with terrorist attacks, including numerous bomb attacks in department stores, Metro stations and other public locations, and on government offices, led to the adoption of a terrorist association law in 1996. Article 421-2-1 of the Penal Code punishes participation in any group formed or association established with a view to the preparation, characterized by one or more material actions, of any of the terrorist acts mentioned in previous Criminal Code articles.¹⁶ One expert characterized this law as the cornerstone of France's counter-terrorism legal provisions. Its focus is on the existence of a logistical structure whose members have the common purpose of engaging in or supporting a terrorist act. A group may be qualified as a criminal association if it assembles and maintains the capability and logistical structure for terrorist actions and takes some material action toward their preparation, even before a target has been selected or a plan of attack devised. This legal concept facilitates the prosecution of both hierarchical organizations and of horizontal groupings that operate with significant independence and local initiative, such as an Al-Qaida cell.

55. The contribution of the Spanish expert describes how the terrorist association offence is useful for prosecution of hierarchical groups. The contribution describes the judgment of the Spanish Supreme Tribunal, no. 119/2007. That judgment analyses the elements of that country's crime of participation in, acting at the service of, or collaborating with a terrorist organization. Those elements were found to be the existence of a number of persons connected by relationships of hierarchy and subordination, with the purpose of committing violent acts in order to subvert the constitutional order or seriously disrupt the public peace. This participation must be of a non-episodic, lasting nature. Participation also requires acceptance of the purposes of the group and the results of its acts, and must be intended to advance the goal of the group. The contribution of the Spanish expert cites the judgments of the Supreme Tribunal of 19 January 2007 in the case Jarrai-Haika-Segi and of 17 July 2008 in the case of the 11 March 2004 bombings. Those judgments explain that once an organization decides upon the commission of crimes, it is not necessary that those crimes be accomplished or that their execution even

¹⁶(Loi du 22 juillet 1996): "Constitue également un acte de terrorisme le fait de participer à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un des actes de terrorisme mentionnés aux articles précédents".

begins. Some external activity must take place to show that the members of the association have passed from thoughts to action, but this activity can involve various aspects related to the criminal goal, such as training, support to other members, financing, or the preparation of actions to help those who will commit the intended offence. This necessity for a material act is sometimes perceived as a characteristic distinguishing criminal association offence in civil law systems from conspiracy offences in common law systems. That is not always the case, as is explained in chapter III, section B, Conspiracy to commit terrorist acts.

56. Several submissions from members of the Expert Working Group show how potential attackers may be incarcerated and incapacitated before they can accomplish a planned act of violent terrorism. A case submitted by the Russian member of the Expert Group involved a group that had received military training and was furnished with substantial funds, weapons, explosives and detonators. Because its members were detained by security forces after leaving Chechnya they could not accomplish or even attempt their intended acts of terrorism in the target location. Nevertheless, under Russian law they could be and were convicted of membership in an illegal armed group with terrorist aims. The terrorist organization law of Peru, article 322 of the Penal Code, provides a penalty of from ten to twenty years for those who participate in an organization formed to instigate, plan, encourage, organize, spread or commit acts of terrorism, and specifies that punishment will be imposed “por el sólo hecho de agruparse o asociarse”, that is solely for the fact of joining together or associating for the purpose of terrorism. The Federal Law of Mexico against Organized Crime of November 1996, article 2, similarly makes it an offence for three or more persons to organize themselves or agree to organize for the commission of listed crimes, including crimes of terrorism, and provides that they are punishable for this fact alone, “por ese sólo hecho”.

57. The Algerian expert described a 1995 law that integrated terrorist offences into article 87 *bis* of the Penal Code. In addition to previous provisions concerning attacks on public property and on the physical integrity of persons and their property, the legislators added attacks on the environment and on the free exercise of religion and other civil liberties. For the prevention of terrorism, the Penal Code provides penalties for the intellectual authors and planners who:

- Create, found, organize or direct a group to commit the prohibited terrorist acts;
- Belong to or participate in such a group;
- Engage in justification of, encouragement or financing of terrorist acts;
- Reproduce or disseminate documents apologizing for terrorism;
- Are active in or join a terrorist organization even if its activities are not directed at Algeria;
- Without authorization spread subversive preaching in the mosques or other public places.

These new offences were added to the body of law concerning common crimes connected with terrorist acts, such as arms trafficking, use of explosives, use of false identity documents, the theft of vehicles to use as car bombs, etc.

58. The preventive utility of criminal association laws is illustrated by the responses to a plot to bomb the Strasbourg Christmas market in December 2000. Four persons were convicted in March 2003 in Frankfurt, Germany for an association to commit murder in connection with the interrupted plot. Ten members or associates of the group were sentenced in a French court in December 2004 for participation in a terrorist association in violation of article 421-2-1. A more recent example of preventive intervention involves the group known as the Chechen network because some members were trained in Chechnya. In 2006 25 members of the group received sentences up to ten years for criminal association in relation with a terrorist plan to attack numerous sites in Paris, including the Eiffel Tower. They were convicted in a French court after chemicals, bomb-making materials, a chemical weapons protective suit and elements for remote control detonation were seized.

59. Some countries have a specific law for a terrorist association and a general law for other types of criminal associations. This is the case in the French Penal Code. Article 421-2-1 declares participation in an association formed to commit terrorist offences to be an act of terrorism, punishable by a penalty of 10 years for a member and 20 years for a leader or organizer of the group. Participation in a criminal association that does not involve an intention to disturb the public order by intimidation or terror is punishable under article 450-1 by five to ten years imprisonment, depending on the gravity of the offence which the association is formed to commit. Presumably, if the proof of an organization's terrorist purpose was weak but proof of its criminal acts was strong, the case could be prosecuted as participation in a criminal, rather than terrorist, association. In the event of a conviction, the maximum penalties would be those applicable to an ordinary criminal association.

60. The German Penal Code also distinguishes a terrorist association from an ordinary criminal association. Formation of a terrorist organization involves an organization formed to endanger human life or safety in connection with a political purpose of intimidating the population, coercing public authority or eliminating or significantly altering the principles of a State or international organization. Membership of such an organization is punishable under section 129a of the Code by imprisonment from one to ten years, with a minimum of three years for a ringleader. Trial under this section takes place in the first instance in a Higher Regional Court, sitting as a national court, with a right of appeal to the Federal Court of Justice. Section 129 of the Code criminalizes formation of a criminal association directed toward the commission of ordinary crime. Membership is normally punishable by no more than five years imprisonment or a fine, with a minimum punishment of six months for a leader. If the objectives or activity involve certain specified serious offences imprisonment up to ten years is possible. Trial and appeal take place in the state court system.

61. As was the case with offences of directing and organizing terrorist acts mentioned in paragraphs 31 and 32, the statutory penalty for terrorist association offences often varies depending upon the means, purpose or activity of the association or the extent of a person's participation therein. The Turkish member of the Expert Working Group provided the relevant provisions of the Turkish Anti-Terror Law, article 7 (Terrorist Organizations), as follows:

“Whoever founds, leads a terrorist organization, and becomes member of such an organization, with purpose to commit crime, in direction towards objectives prescribed by law in the article 1, through methods of pressure, threatening, intimidation, suppression, and menace, by taking advantage of force and violence, shall be punished according to the provisions of the article 134 of the Turkish Penal Law. Whoever arranges activities of the organization shall be punished as leader of the organization.”

Article 134 of the Turkish Penal Code (Armed Organization) provides that:

“(1) Any person who establishes or commands an armed organization with the purpose of committing the offences listed in parts four and five of this chapter, shall be sentenced to a penalty of imprisonment for a term of ten to fifteen years.

(2) Any person who becomes a member of the organization defined in section one shall be sentenced to a penalty of imprisonment for a term of five to ten years.”

Article 7 of the Turkish Anti-Terror Law provides that whoever makes propaganda for a terrorist organization shall be punished by imprisonment for one to five years. That article also punishes whoever fully or partially covers their face to hide their identity in meetings or marches that constitute propaganda for a terrorist organization, or carries emblems and signs, shouts slogan or wears uniforms or emblems to show membership in or support of a terrorist organization.

62. Article 86 *bis (d)* of the Egyptian Penal Code is a provision designed to discourage participation in terrorism by Egyptian citizens in foreign countries. As described in the contribution of the Egyptian expert, that article punishes any Egyptian national who, in a foreign country, joins any association, body, organization or terrorist group using terrorism or military training to achieve its goals, regardless of its appellation, even if its acts are not directed against Egypt. Other countries apply offence concepts specific to their legal culture. A Sudanese case¹⁷ involved a group that in 1994 robbed police officers of their weapons, murdered three officers and 16 worshippers in a mosque, shot persons at the home of Usama bin Laden, and planned to kill political leader Hassan El Turabi. As described in that English language publication, the Court interpreted a Sharia law concept of aggravated Al-Hirabi crime in determining that the death penalty was the appropriate penalty for the leader of this extremist group.

B. Conspiracy to commit terrorist acts

63. In common law countries the counterpart of the civil law offence of criminal or terrorist association is the crime of conspiracy. This offence permits prosecution of an agreement to commit a terrorist act even before the violent act is attempted or accomplished. Some common law jurisdictions require the commission of an “overt act” before a conspiracy is complete, comparable to the material act required by criminal association laws in civil law jurisdictions.

¹⁷Case of Mohamed Rahman el Khalifi and others, described in the publication “Judicial Precedents in Combating Terrorism in Sudan (2007)” of the Capacity Building Programme Against Terrorism of the InterGovernmental Authority on Development.

64. The common law counterpart of the anticipatory or inchoate offences found in France, Germany and other civil law countries is the offence of conspiracy. That was the offence charged in *Regina v. Khyam* in the United Kingdom in 2006. Prosecution was possible for conspiring to cause explosions dangerous to human life even though the planned explosive material was neutralized by the police and the plotters were arrested before having decided whether their target should be a famous nightclub or some other London location. Conspiracy to murder was the charge brought against the four persons who attempted to ignite improvised devices in the London underground on 21 July 2005, even though the main explosive component of their bombs failed to detonate.

65. The terrorist association laws from France and Spain mentioned in chapter III, section A, Association for the purpose of preparing terrorist acts, require the existence of some external act to demonstrate that the association pursues terrorist goals. This requirement was explained by the Spanish expert as a safeguard to show that the defendants had passed from thought to action. In common law countries there are a variety of approaches to whether a conspiracy agreement must be accompanied by a material act to be punishable. This material action is usually referred to as an “overt act” in common law legislation and jurisprudence. Australia requires the commission of an overt act as an element of its federal conspiracy offence. A large number of common law countries require an overt act for the crime of conspiracy to commit treason, but not as to other crimes. Jurisprudence of the United States Supreme Court has established that an overt act need not be proved unless a statute expressly states that requirement. United States drug and money laundering conspiracy laws do not contain such a requirement. The general conspiracy statute and the statutes defining conspiracies to kill United States nationals outside the United States, to provide material support for terrorism, and to commit terrorist acts transcending national boundaries all require the commission of an overt act.

C. Membership in or support of an illegal organization

66. Terrorist association and conspiracy laws require a court to decide whether a particular grouping of persons existed and whether an individual defendant shared or knew of its illegal purpose. The applicable standard is the criminal law burden of proof. An alternative offence is that of participation in an unlawful organization. This approach to criminalization requires the adoption of a law giving an executive, judicial or other authority the legal power to suppress a group as unlawful. The determination of illegality is often based upon a lesser standard of proof than required in criminal prosecutions. After a designation becomes final, membership in or support of the suppressed organization becomes a criminal offence. In a prosecution, the unlawfulness of the organization is conclusively established by proof of the official suppression order. The only remaining elements to be decided would be whether the accused thereafter participated in or supported the organization and did so knowing that it had been declared unlawful.

67. One way to prevent violence by terrorist organizations is to disrupt their institutional bases. In order to repress the recruiting, propaganda and logistical activities of dangerous groups, many countries have created procedures for declaring a group to be unlawful.

This determination is based upon a finding that the group's purpose or activities result in or are intended to result in the commission or facilitation of terrorist or criminal acts. The legality of the organization is decided by an executive, judicial or other body according to procedures established in the relevant law. This process may be called designation, proscription, suppression or some similar term. The evidentiary standard may be a preponderance of evidence or some other less demanding standard than that applicable in criminal prosecutions. The determination can be judicially contested. Once it becomes final, however, the only elements to be decided in a criminal trial are whether the accused participated in the organization after it was proscribed and did so with knowledge of its illegality. Criminalization of participation in a terrorist organization can deter terrorist sympathizers who are not so committed that they are willing to suffer prosecution and incarceration for their support of organizational violence. Even those potential "martyrs" who are immune to deterrence can be incapacitated through incarceration for their affiliation with a designated terrorist organization. It should be noted, however, that the Special Rapporteur for the Promotion and Protection of Human Rights while Countering Terrorism, in a report to the General Assembly, has observed that:

In some cases, peaceful actions to protect, inter alia, labour rights, minority rights or human rights may seemingly be covered by the national definition of terrorism. Therefore, groups whose aims are the protection of these or other rights could be designated as terrorist groups. The Special Rapporteur stresses that this is not satisfactory from the point of view of the rule of law.¹⁸

68. Suppressing such an organization may have other criminal, civil and administrative consequences. Section 520 of the Spanish Penal Code authorizes the judge or tribunal hearing a case to order dissolution of a terrorist or ordinary criminal association, and the adoption of other measures such as closure of the entities, its premises or establishments, the suspension of its activities, operations or stores that have been involved in committing, facilitating or concealing the crime. The measures of closure and the suspension of activities can be provisionally imposed for a maximum period of five years during the judicial investigation. The European Court of Human Rights, in three judgments dated 30 June 2009, dealt with the dissolution of political parties and disqualification of candidates for public office under this law. The parties had been suspended because they were found to be controlled by an organization engaged in terrorism. The candidates were disqualified because they represented electoral groupings that pursued the activities of the political parties that had been declared illegal because of their terrorist associations. The European Court found that the dissolution of the political parties and the disqualification of the candidates did not violate the European Convention on Human Rights because they were prescribed by law, supported by evidence, necessary to protection of a democratic society, and proportionate to the considerable threat faced by Spanish society.¹⁹

69. Laws allowing Governments to suppress unlawful organizations often authorize the forfeiture of the property of such organizations. The Irish Offences Against the State

¹⁸United Nations Document A/61/27 of 16 August 2006.

¹⁹*Herri Batasuna and Batusana v. Spain*, applications 25803/04 and 25817/04; *Etxeberria and Others v. Spain*, applications 35579/03 35613/03, 35626/03 and 35634/03; and *Herritarren Zerrenda v. Spain*, application 43518/04, all issued 30 June 2009.

Act, 1939 and the Offences Against the State (Amendment) Act, 1985 contain such a forfeiture provision and the Criminal Assets Bureau Act, 1996 and the Proceeds of Crime Act, 1996 formalize a structure and procedure to target assets believed to derive from criminal activity. The case of *Clancy v. Ireland* [1988] IR 326 upheld the constitutionality of forfeiture under the Offences Against the State Act 1939. The judgment in *Gilligan v. Criminal Asset Bureau* [1998], 3 I.R. 185, upheld the constitutionality of the Proceeds of Crime Act, 1996 against an argument that it improperly reversed the burden of proof by requiring a person to show that his assets were not the proceeds of crime.

70. The laws of different countries reflect diverse procedures and decision-makers for designation. The Prevention of Terrorism Act 2002 of Mauritius permits a judge in chambers, based upon an *ex parte* application by the Commissioner of Police, to declare an entity to be a proscribed organization. This order must be based upon a finding that the persons involved associate for the purpose of engaging in an act of terrorism. Subsequent notice must be given to concerned persons, who may contest the proscription and are entitled to judicial review. The consequence of such proscription is that belonging and professing to belong to the organization, providing support to it, and arranging or attending its meetings become offences. No specific standard of proof is stated for the judicial determination. However, a different section of the law allows a competent Minister to declare an entity to be an international terrorist entity or a person to be a suspected international terrorist. There are several statutory bases for that declaration, one of which is that the Minister reasonably believes the entity or person is concerned in the commission, preparation or instigation of acts of international terrorism, or is a member of an international terrorist group or has links with an international terrorist group and is a threat to national security. By analogy, it would seem that the judicial designation of a proscribed organization would require a comparable degree of reasonable belief.

71. The Irish Offences Against the State Act, 1939, Section 19, allows the Government rather than a judicial authority to suppress an organization as criminal in nature. This designation as unlawful does not depend upon an organization being of a terrorist nature, but rather may be based upon commission of ordinary crimes. The suppression is subject to judicial review. If not reversed by a court, the suppression makes membership in the organization an offence. In 2006 the Irish Supreme Court upheld the conviction in *People (DPP) v. Kelly*, [2006] 3 I.R. 115, for membership in the Irish Republican Army, which had been suppressed. A suppression order under the Offences Against the State Act is based upon the belief of the Government. The standard on judicial review is whether the court has been satisfied that the organization is not unlawful, and the applicant contesting the designation must produce some evidence subject to cross-examination to meet that standard. Section 22 of the Act further provides that when a suppression order is made all property of the organization will become forfeited to and vested in the Minister for Justice. Monies in a bank account believed by the Minister to belong to the organization may be frozen under section 2 of the Offences Against the State (Amendment) Act 1985. The Minister may require the bank to pay the funds into the High Court, where they will be held for six months, after which the Minister may apply to have them paid into the Exchequer. Provisions for forfeiture are also found in the laws of other countries proscribing an organization because of its involvement with terrorism.

72. The United Kingdom's Terrorism Act 2000, as amended by the Terrorism Act 2006, provides for an organization to be proscribed if it commits, participates in, prepares for, promotes, encourages or glorifies the commission or preparation of acts of terrorism or is otherwise concerned in terrorism. Terrorism is defined as including various violent or threatening offences, including serious interference with an electronic system. In all cases except those involving the use of firearms or explosives, there must be the intent to influence the government or to intimidate the public, and in all cases there must be a purpose of advancing a political, religious or ideological cause.²⁰ A Proscribed Organization Appeal Commission is provided to hear appeals from a refusal of the Secretary of State to remove an organization from the proscribed list. That Commission, unlike ordinary courts, may consider evidence of intercepted telecommunications, which need not be made available to the appealing organization. A concerned organization may appeal an adverse decision to a Court of Appeal on matters of law. Australia and New Zealand have similar proscription laws.

73. INTERPOL formerly considered membership in a terrorist organization to fall under article 3 of its Constitution. That article forbids the Organization to undertake any intervention or activities of a political, military, religious or racial character. This was based on a 1984 INTERPOL General Assembly Resolution, according to which criminalizing membership of a prohibited organization is political by its very nature. In the aftermath of the attacks of September 2001, member countries sought to reconsider this approach. In 2004, INTERPOL's General Assembly approved collaboration with requests for international police cooperation concerning this offence, so long as the requesting country provides sufficient facts that manifest:

(a) The terrorist nature of the particular organization. No separate proof would be required if the particular group is included in the United Nations list of terrorist organizations pursuant to Security Council Resolutions 1267, 1390 and successor resolutions. Listing by a regional organization such as the European Union may be taken into consideration together with other available information. A decision by INTERPOL that this requirement has been met may not be considered as a legal determination that a given organization is indeed a terrorist organization.

(b) The individual's active and meaningful involvement in the organization. Specifically, the facts provided must show that the involvement exceeds mere general support of the political goals of the terrorist organization. Examples of active and meaningful involvement that have been recognized in INTERPOL's practice since 2004 include: recruitment of individuals for terrorist activities; training in terrorist camps; providing shelter to individuals involved in terrorist activities; and the circulation of materials supports the terrorist activities of the prohibited organization. When the only facts provided were that the individual was sought for the preparation and distribution of flyers containing the slogan of the organization, those facts were considered insufficient to constitute an active and meaningful link between the person and the terrorist organization. Publication of the Red Notice was consequently denied.

²⁰Canada's 2001 Anti-Terrorism Act contains a similar ideological motivation. In a 2006 pre-trial ruling in *R. v. Khawaja*, [2006], No. 425 in the Superior Court of Ontario, the trial judge found that the motive requirement in Section 83.01 of the Criminal Code, that the act or omission be committed "in whole or in part for a political, religious or ideological purpose, objective or cause" infringed the freedoms of conscience, religion, thought, belief, opinion, expression and association guaranteed by the Canadian Charter of Rights and Freedoms.

As of June 2009 there are close to 600 valid Red Notices issued based, among other grounds, on charges of membership in a terrorist organization, out of which over 130 Red Notices are based solely on that offence.

D. Financing and other forms of support for terrorism

74. Experience suggests that administrative and criminal mechanisms are unlikely to permit identification of an ongoing banking transaction as one intended to finance a specific terrorist act. At the strategic level, however, compliance with the International Convention for the Suppression of the Financing of Terrorism, the Financial Action Task Force Special Recommendations on Terrorist Financing and Security Council resolutions related to terrorism combine to diminish the availability of funds to terrorist organizations. Prosecutions and administrative controls that reduce the resources flowing to terrorist entities weaken their institutional infrastructure, their attractiveness and their ability to conduct violent operations. Reducing the incidence of terrorist violence also requires effective controls over funds from legal sources and over charities.

75. The International Convention for the Suppression of the Financing of Terrorism (1999) was the first of the universal terrorism-related conventions and protocols designed for preventive purposes. This agreement achieved a strategic breakthrough by two innovations. Instead of requiring a State to have laws punishing a particular violent act after it had taken place, the Financing Convention required criminalization of the non-violent logistical preparation and support that make significant terrorist groups and terrorist operations possible. Moreover, its article 2.3 eliminated any ambiguity by expressly declaring that funds need not be used to carry out a prohibited violent act for their provision or collection to be punishable.

76. Not only did the Convention criminalize the financing of terrorism, it required provisions allowing forfeiture of the funds provided or collected for terrorist purposes, and for administrative measures to discourage such financing. These administrative measures are amplified by the nine special recommendations of the Financial Action Task Force (FATF), which include:

- (1) Ratifying and implementing the Convention
- (2) Criminalizing the financing of terrorist acts, organizations and individuals
- (3) Freezing and confiscating terrorist assets
- (4) Reporting suspicious transactions related to terrorism
- (5) Providing the widest possible range of assistance to other countries
- (6) Imposing anti-money laundering requirements on alternative remittance systems
- (7) Strengthening customer identification measures in wire transfers

- (8) Ensuring that non-profit entities cannot be used to finance terrorism
- (9) Having measures to detect physical cross-border transportation of currency and bearer negotiable instruments

77. The availability of funds to terrorist entities is further restricted by governmental actions taken pursuant to Resolutions 1267 and 1373 of the United Nations Security Council and successor resolutions. These legally binding decisions require all Member States to freeze the funds of designated persons (Res. 1267) and of terrorists generally (Res. 1373), to criminalize the offence described in the International Convention for the Suppression of the Financing of Terrorism, and to bring offenders to justice.

78. Since the financing of terrorism defined in the 1999 Financing Convention is an offence of a new and technical nature it rarely is completely criminalized by traditional concepts of participation, complicity or even conspiracy or criminal association. The offence required to be criminalized by the Convention is violated the moment funds are collected or provided, knowing or intending that they are to be used for terrorist purposes, whether by an individual or a group. The offence is complete whether or not the funds are ultimately so used or an intended terrorist act is accomplished or attempted, and without regard to whether the funds are of legal or illegal origin. The offence definition in the Convention applies to any person who:

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

- (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex;
- (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or international organization to do or to abstain from doing any act.”

79. The French law on financing of terrorism is article 421-2-2, adopted in 2001, reflects these offence provisions of the Convention:

“It also constitutes an act of terrorism to finance a terrorist organization by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place.”²¹

²¹Article 421-2-2. Constitue également un acte de terrorisme le fait de financer une entreprise terroriste en fournissant, en réunissant ou en gérant des fonds, des valeurs ou des biens quelconques ou en donnant des conseils à cette fin, dans l'intention de voir ces fonds, valeurs ou biens utilisés ou en sachant qu'ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l'un quelconque des actes de terrorisme prévus au présent chapitre, indépendamment de la survenance éventuelle d'un tel acte).

80. Article 8 (Financing of Terrorism) of the Turkish Anti-Terror Law provided by the Turkish expert emphasizes that the act of financing need not result in the intended violent act, and that the law applies to a very broad range of assets:

“Whoever knowingly and willfully provides or collects fund for committing partially or fully terrorist crimes, shall be punished as a member of an organization. The perpetrator is punished in the same way even if the fund has not been used.

Fund cited in the first paragraph of this article shall mean money or all types of property, right, credit, revenue and interest, value of which may be presented by money, and benefit and value that was collected as a result of conversion thereof.”

81. Experience suggests that the possession and transfer of funds to prepare a particular terrorist attack are not susceptible to detection by existing financial system monitoring mechanisms. According to the United Kingdom Report of the Official Account of the Bombings in London on 7 July 2005, those transport attacks cost less than £8,000. Even though the group leader, Mohammed Kahn, had been to Pakistan and was believed to have trained in terrorist camps there, the operation was self-financed. Kahn provided most of the funding, using funds from overdrawn bank accounts, credit cards and a defaulted personal loan. The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (22 July 2004) estimated the cost of those attacks as between US\$400,000 and US\$500,000, financed directly by Al-Qaida. A variety of money transfer techniques were used. Al-Qaida leader Khalid Sheik Mohammed provided cash to the participants, with many receiving US\$10,000 after visits to Pakistan. Members of the Hamburg cell, which included group leader Mohammed Atta, received US\$5,000 dollars each to pay for their return to Germany after visiting Afghanistan, as well as other payments. Cash and traveler’s checks purchased in the United Arab Emirates and Saudi Arabia were brought into the United States. ATM and VISA withdrawals in the United States were made from a UAE bank account.

“The hijackers made extensive use of banks in the United States, choosing both branches of major international banks and smaller regional banks. All of the hijackers opened accounts in their own name, and used passports and other identification documents that appeared valid on their face. Contrary to published reports, there is no evidence the hijackers used their false Social Security number to open bank accounts. While the hijackers were not experts on the U.S. financial system, nothing they did would have led the banks to suspect criminal behavior, let alone a terrorist plot to commit mass murder.”

82. The contribution of the Spanish expert describes how the train bombings of 11 March 2004 in Madrid were prepared and financed. During the 18 months prior to the attack Al-Qaida announced a number of threats related to the presence of Spanish troops in Iraq through the Al-Jazeera television network and other channels of communication. One announcement specifically referred to the need to take maximum advantage of the proximity of the Spanish election on 14 March 2004 to force a troop withdrawal. Another motivation for the formation of the cell that committed the March 2004 attacks was the detention in November 2001 of a leader of Al-Qaida in Spain and dozens of

others. The operative nucleus of the cell in 2003 consisted of persons from two factions. The first group of common criminals was led by Jamal Ahmidan, a violent individual who underwent a process of radicalization during imprisonment in Morocco. The second group was directed by Serhane ben Abdelmajid Faked, alias “El Tunecino”, and composed of adherents to a movement known to Spanish authorities as “Salafia Jhadia”. That group was considered responsible for the series of suicide attacks that took place in Casablanca, Morocco on 16 May 2003 against the Casa de España social club and four other targets, killing over 40 persons and wounding more than one hundred. The cell in Spain acquired explosives from a mining operation in area of Asturias in exchange for dozens of kilograms of hashish. It rented residences for its members in the three months before the attacks to hide the explosives and the bomb making. Vehicles were purchased or stolen. These expenditures were made in cash derived from drug dealing and micro criminality. According to the Government of Spain “Investigative Commission on 11 of March 2004” the Madrid train bombings of that date cost approximately €50,000. Because most of the funds were generated by fraud, drug dealing and thefts, preparations for the attacks would not have been revealed by administrative controls of the type recommended by the Financial Action Task Force for financial institutions and designated non-financial businesses and professions.

83. Another case of financing of terrorism involved the terrorist group that in April 2002 committed the attack against the Jewish synagogue on the island of Djerba in Tunisia, resulting in dozens of dead and wounded. A prosecution in Spain resulted in the conviction of two businessmen for having transferred money to the family of the suicide driver of the fuel truck used in the attack and to recognized members of Al-Qaida. Among those recipients was Khalid Sheik Mohammed, who has been charged in several countries as the intellectual author of terrorist attacks, including those of 11 September 2001. This case is significant because the conviction imposed by the Spanish Tribunal, the Audiencia Nacional, is based upon circumstantial evidence, evaluating particularly the relationships and contacts with persons belonging to the orbit of Al-Qaida, the transfers and delivery of money according to instructions of those persons and for their benefit, the absence of legitimate commercial activity justifying such operations, and the concealment of documents explaining such movements and transfers.

84. Many other authorities and sources reinforce the conclusion that the financing of an actual attack usually consists of such routine financial transfers that it simply could not be recognized as suspicious and prevented without advance information from an intelligence source. Nevertheless, the international community has concluded that repressing terrorist financing through instruments such as the International Convention for the Suppression of the Financing of Terrorism and the Nine Special Recommendations of the FATF is both worthwhile and necessary. As stated in the FATF publication, Terrorist Financing:

“The disruption of specific attacks through the interdiction of specific transactions appears highly challenging. Recent attacks demonstrate that they can be orchestrated at low cost using legitimate funds and often without suspicious financial behavior.

Nevertheless, direct attacks costs are only a fraction of terrorist organizations’ demand for funds. Disrupting financial flows to terrorist organizations limits the

resources available for propaganda, recruitment, facilitation, et cetera, in ways that frustrate terrorists' ability to promote and execute attacks over time.

In large measure, terrorists require funds to create an *enabling environment* to sustain their activities—not simply to stage specific attacks. *Disrupting terrorist-linked funds creates a hostile environment for terrorism*. Even the best efforts of authorities may fail to prevent specific attacks. Nevertheless, when funds available to terrorists are constrained, their overall capabilities decline, limiting their reach and effect.”

85. Requiring records of transactions can also permit the reconstruction of events once a suspicious situation is identified. Rachid Ramda, editor of the Al-Ansar journal in London, was convicted for association with subway bombings in Paris in 1995. Part of the evidence consisted of a Western Union money order receipt for a transfer of £5,000 to one of the bombers, which was found in Ramda's lodging and bore his fingerprint. A case study in an INTERPOL contribution revealed terrorism financing intermingled with multiple illegal activities leading to arrests in multiple countries. A case described by a French expert revealed the use of a hawaladar, or informal funds transmitter, in France to finance the travel of a terrorist from Pakistan via London to join an operational cell of Al-Qaida in the Islamic Maghreb located in Australia. A United Kingdom contribution described how three anti-Khadafy asylees in the United Kingdom plead guilty in 2007 to entering into an arrangement to make property available to another person, knowing or having reasonable cause to suspect that it may be used for the purposes of terrorism. In this case the property consisted of approximately £20,000 yearly and false passports that were provided to a violent Libyan group.

86. The Italian Guardia di Finanza expert in the Working Group described Operation Gebel. Ostensibly legitimate small businesses were used for fiscal frauds. The subjects also engaged in counterfeiting identity documents, providing false employment certificates and in leasing vehicles and then selling them in North Africa. Over €5,000,000 was generated and numerous money transfers were traced to groups associated with terrorist activities. Operation Toureg was also described, which involved small companies engaged in legitimate commerce that transferred over €300,000 through numerous accounts in many countries. The funds eventually reached members of violent groups in North Africa, such as the Salafist Group for Preaching and Combat and the Groupe Islamique Armé. Both operations resulted in multiple prosecutions.

87. The Eurojust expert described a case involving two Iraqi citizens resident in Sweden who collected funds in mosques to finance terrorist cells. Using *hawala* money transmitters they transferred the funds via Germany to Iraq. The Swedish prosecutor coincidentally happened to be the national Eurojust correspondent for terrorism. He communicated to Eurojust that proof was needed of the membership of the individuals in a terrorist organization and of how the money was transferred. This information was in the possession of two other Member States that were already investigating. Eurojust convoked coordinating meetings of the judicial, prosecution and police authorities of the three States involved. Sweden was able to provide the guarantees necessary to protect the interests of the other States, and was thus able to use their evidence to charge and convict the two Iraqis of financing a terrorist organization with more than €133,000 and specifically financing a terrorist act at the cost of €70,000.

88. Groups that commit terrorist acts have been able to accumulate very considerable financial resources from self-financing, although other sources cannot be excluded. The Madrid train bombers engaged in drug dealing, fraud and theft. Their activities were so profitable that over €50,000 and drugs worth €1.5 million were found in the apartment where they blew themselves up when surrounded. The submission of the Russian expert described a group of saboteurs in the Chechen Republic. They were furnished with US\$70,000, 20 kilos of plastic explosives, about 100 detonators with control devices, hand grenades and firearms. The ability to furnish these resources indicates the availability of significant funds to the fugitive leader of the group. The contribution of the member of the Expert Working Group from Mexico described how the Cerezo brothers were arrested with over US\$171,000 and approximately 3,000 Mexican pesos.

89. In section B, Terrorism and narcotics trafficking, of chapter IV the principal sources and percentages of the FARC's income for 2003, the year of the Club El Nogal bombing, are described in a Colombian expert contribution. The minimum estimate of the organization's gross income from all of its activities (drug trafficking, extortion, kidnapping for ransom, earnings on investments and livestock theft) was in the thousands of millions of dollars. These revenue sources provided ample liquidity to acquire weapons and explosives, as well as other means (automobiles, motorcycles and boats) for use in terrorist attacks such as the one against the El Nogal night club. The investigation of that case established that the resources employed in the preparation and execution of the attacks exceeded 100 million Colombian pesos. The plan required six months to develop and had as principal expenses:

- Membership in the Club El Nogal of the person who accomplished the intelligence collection and preparation of the attempt.
- Support of this person for six months, requiring ostentatious expenditures to generate an image of a citizen with a high-income level, which permitted him to pass unnoticed within the Club.
- Generation of a façade for this person, including the simulation of a business and the opening of four bank accounts.
- Acquisition of an expensive vehicle for cash and its preparation as a car bomb.

90. A Colombian expert described that country's efforts to reduce funding from émigré communities and foreign sympathizers of violent domestic organizations engaged in terrorist acts. A contribution was submitted describing the judgment of a Danish court pursuant to that country's Penal Code article 114. That article defines terrorism directed either against Denmark or a foreign country. Its sub-articles criminalize the financing, facilitation and support of groups engaged in terrorist acts. The FARC had been designated as a terrorist organization by the European Union. Seven members of a Danish fund-raising venture that sold shirts and other articles to raise funds for the FARC and another listed organization were prosecuted soon after they began operation. Six were convicted and received sentences from two to six months incarceration. It is of interest that the Court that convicted the defendants did not treat the EU designation as sufficient proof that the listed organizations engaged in terrorism. The Court relied upon reports from international and non-governmental human rights organizations. Among the cited

sources were a United Nations office, Amnesty International, Human Rights Watch, as well as the Danish security and intelligence service. Based on these sources the court found that the FARC had committed kidnappings, assassinations and attacks against the civilian population of Colombia and therefore qualified as a terrorist organization under Danish law.

91. Egypt's Law no. 18/2008 added terrorism, financing of terrorism and organized crimes to the list of crimes for which the laundering of proceeds is forbidden. The specified crimes are those indicated in the international conventions and protocols to which Egypt is a Party and criminalized under Egyptian law, whether committed inside or outside Egyptian territory. A maximum penalty of seven years imprisonment was provided. An independent anti-money laundering unit was established in the Central Bank of Egypt with authority to maintain a database on suspicious transactions, the power of inquiry, and the duty to cooperate with prosecution and judicial authorities. Normally an order from the Cairo Court of Appeal is necessary for access to bank records. Law 88/2003 provided that with respect to those offences listed in section 1, chapter 2, volume 2 of the penal law (that includes terrorism offences) the Prosecutor General or any of his delegated senior deputies "shall directly order to review or receive any kind of data or information related to the accounts, deposits, trusts, safe boxes ... if this is required to unveil the truth in any of the offences listed ..." This provision was used by the public prosecution to penetrate the secrecy of the accused persons' bank accounts in investigating the Salafi Jihadist group that committed the attacks of 7 April and 5 May 2005 in Cairo. As a result it was determined that some of the participants had financed the terrorist operations through bank transfer from abroad. 14 persons were prosecuted. One defendant was acquitted for lack of knowledge. Four of the accused were sentenced to life imprisonment and others were sentenced to terms of imprisonment of ten years or less.

92. The contribution of the Algerian expert describes how the financing of terrorism is facilitated by money laundering. A portion of the funds collected by terrorist extortion and kidnapping is used to create small enterprises and to buy real estate in the name of family members or associates who have been released from prison or have benefited from an amnesty. Attempts to trace transactions in this core group are often inconclusive because of the use of currency, even though Algeria has created a Financial Intelligence Unit and established a suspicious transaction reporting regime. A preventive response to the relationship between money laundering and terrorism is found in a case provided by the expert from the United States. In that country's criminal justice system, infiltration by private citizens who act at the direction of law enforcement and have agreed to testify as prosecution witnesses is a common investigative technique. A naturalized American citizen from Southwest Asia in the Washington D.C. area came under suspicion for money laundering. A cooperating witness, acting at the direction of law enforcement authorities, represented himself to be a drug and cigarette smuggler who wished to transmit money to finance Al-Qaida and affiliated organizations. Over a period of years the cooperating witness sent over two million dollars through the money transmitter, thus permitting the identification of a network of individuals in Canada, the United Kingdom, Spain, Pakistan and Australia willing to participate covertly in what was represented to be the financing of terrorist activities. All of the funds, minus the money transmitting fees, were safely recovered by the use of other cooperating individuals in

the destination countries. The operation resulted in the conviction and incarceration of the defendant for conspiracy to launder money and to conceal terrorist financing, and an order of forfeiture for over two million United States dollars.

93. Special Recommendation VIII on Terrorist Financing of the Financial Action Task Force calls for countries to review their laws and regulations to ensure that non-profit organizations are not misused by terrorist groups. The fear is that terrorists may exploit legitimate entities as means to conceal or obscure the clandestine diversion of funds to terrorist organizations or to avoid asset freezing measures. The contribution by the expert from the United States describes the prosecution of the executive director of the Benevolence International Foundation, an allegedly charitable organization listed by the United Nations 1267 Committee as an entity associated with Al-Qaida. The director pleaded guilty to operating the charity as a racketeering enterprise and was sentenced to ten years imprisonment. He admitted fraudulently obtaining donations for charitable purposes and then using the funds to support Al-Qaida and other violent groups in Chechnya and Bosnia-Herzegovina. In November 2008 the organizers of the Holy Land Foundation were convicted in a federal court in Texas for the offence defined in American law as material support for terrorism. Also in 2008 the founders of another fund raising organization using a name resembling a legitimate international charity were convicted in Boston, Massachusetts. The conviction was not for the actual financing of terrorism, but for concealing and providing false information about their affiliation with violent groups in Bosnia and Afghanistan and their related travel. Submissions from Italian experts described how funds from both lawful sources and ordinary criminality were transferred in sums beneath reporting thresholds, and how donors of charitable contributions in Italy were misled as to the use of their funds.

94. The experts from Peru and Colombia commented on their experience with certain foreign non-government organizations that allegedly carry on humanitarian activities or social reform but also collect and transmit funds to terrorist and subversive organizations. Instances were reported wherein the States where the fund raising was being conducted failed to look behind the allegedly noble purpose of an organization and to realize the support it was providing to violent activities. The monograph of 29 February 2008 published by the Financial Action Task force and entitled Terrorist Financing contains the observation that:

“Terror networks often use compromised or complicit charities and businesses to support their objectives. For example, some groups have links to charity branches in high-risk areas and/or under-developed parts of the world where the welfare provision available from the state is limited or non-existent. In this context groups that use terrorism as a primary means to pursue their objectives can also utilize affiliated charities as a source of financing that may be diverted to fund terrorist attacks and terrorist recruitment by providing a veil of legitimacy over an organization based on terrorism”.

The Kenyan expert remarked on the desirability of yearly audits of the source and expenditures of allegedly humanitarian organizations, both to avoid diversion to dangerous organizations and to limit corruption, thereby protecting legitimate charities.

E. Individual preparation for terrorist acts

95. The consequences of terrorism are almost always tragic and may be catastrophic. This dictates the adoption of preventive measures that permit intervention before violent acts are committed. Prohibiting the financing of violent groups diminishes their ability to commit terrorist attacks. Another preventive measure is the criminalization of preparation for terrorist acts. This offence is not limited to the provision or collection of funds. It can involve any act of preparation, such as renting a storage space for bomb making, training with weapons, acquiring bomb ingredients or engaging in surveillance of an intended target.

96. Some countries' laws punish various physical preparations for terrorist acts, explicitly stating that a violent act need not be accomplished. The Anti-Terrorism Act 2005 of Australia provides that with regard to the offences of training for terrorism, possession of a thing or document connected with preparation or engagement with terrorism, preparing for or planning terrorism, or financing terrorism it is not necessary that a terrorist act occur or that the defendant's action be directed to a specific terrorist act, so long as it is intended that terrorist acts result. Other countries criminalize any act intended to further, facilitate or promote terrorist acts generally, even though a specific terrorist act is not yet planned. Part I of the United Kingdom Terrorism Act 2006, section 5, provides that:

“A person commits an offence if, with the intention of:

- (a) committing acts of terrorism, or
- (b) assisting another to commit such acts,

he engages in any conduct in preparation for giving effect to his intention.

It is irrelevant for the purposes of subsection (1) whether the intention and preparation relates to one or more particular acts of terrorism, acts of terrorism of a particular description or acts of terrorism generally.”

97. This law has resulted in a number of guilty pleas since its adoption, including that by Parvis Khan for his preparations to kidnap and behead a British soldier of Gambian extraction in order to intimidate other Muslims in the United Kingdom military. Khan was sentenced to life imprisonment in 2008. No conspiracy charge would have been successful because none of Khan's associates agreed to participate in his plan, even though they committed offences such as not divulging their knowledge of his plans. Nor could Khan have been convicted for any attempted act of violence, as his efforts did not progress to a kidnapping. The preparatory acts that permitted his conviction included his efforts to identify a particular victim and to secure a video camera to record the planned beheading.

98. A general crime of preparing for terrorism or of possessing property intended for use in terrorism can overcome technical difficulties such as that described by a Colombian expert. A law prohibiting the possession of explosives might not permit prosecution if the ammonium nitrate fertilizer component of an improvised explosive were kept separate

from the necessary hydrocarbon ingredient. Individually the two substances are both legal and would become an illegal explosive only when mixed together, which might be done only minutes before the intended delivery and detonation. However, in a country that has established an offence of preparation for terrorist acts, possession of the two separate ingredients in a storage facility could furnish sufficient circumstantial evidence of an intended terrorist purpose to permit a conviction in the absence of an innocent explanation.

F. Incitement to commit terrorism and related offences

99. Article 20-2 of the International Covenant on Civil and Political Rights obligates its 163 States Parties to prohibit by law advocacy of national, racial or religious hatred that constitutes incitement to violence. At the same time, Covenant article 19-2 guarantees the right to freedom of expression, including the right to impart information and ideas of all kind, although this right may be limited to protect national security. The United Nations Security Council and the Council of Europe have called attention to the need to criminalize incitement to violence. A number of criminalization approaches are available. Inducing or inciting others may be defined as one of the means of committing the violent offence, subject to the same penalty as a material executor. Incitement may be treated as a lesser offence that includes the concept of justifying or praising terrorist crime. Alternatively, conduct justifying or praising terrorism may be criminalized separately from incitement, with a different punishment.

100. In chapter II, section B, Acts that assist the commission of terrorist offences, paragraph 13, article 61 of Japan's Penal Code was mentioned. That article makes one who induces a crime, directly or through an intermediary, subject to sentencing as though the inducer had been one of the material executors of the offence. Other systems have separate offences of incitement or provocation to commit an offence, particularly with regard to conduct calling for or attempting to justify acts of terrorism. Article 87 bis 1. of the Penal Code of Algeria makes acts of violent terrorism punishable by death, life imprisonment or other lengthy sentences. Article 87 bis 4 provides that whoever justifies, encourages or finances the listed terrorist acts is subject to imprisonment for from five to ten years together with a fine.

101. A description of a Sudanese case in a publication by the Inter-Governmental Authority on Development illustrates the distinction between culpability as a material executor of a terrorist attack and as one who incites the attack. Multiple attacks were committed in 1994 by a group of religious extremists who had concluded that Sudanese society did not properly observe Islamic Sharia law. This group acquired weapons, attacked a police station and seized its weaponry. At another security post they killed three policemen, and then proceeded to a mosque where they killed 16 persons and wounded 20 others. The next day they engaged in a running gun battle with security forces, then entered the house of Osama bin Laden and shot a number of persons there. The group then attempted to reach the house of political leader Dr. Hassan El Turabi to kill him but two of the attackers were killed and the leader captured. He was convicted of various offences and sentenced to death. A second accused was a follower of the sect's doctrines. He lived with the leader and the others who were killed in the attacks,

and participated in collecting weapons and training in their use. However, on the day of the attack he was absent. The Superior Court found that this accused did not have to affirmatively prove that he withdrew from the plan. The lack of his physical participation in the violent acts was sufficient to result in his acquittal on the capital offences of intentional killing and armed robbery. Nevertheless, the first instance court convicted this second accused. The Superior Court upheld this conviction under Section 21/51 of the Criminal Law of 1991. It observed that the accused prepared weaponry and equipment and decided with his friends on the targets to be attacked, and was thus guilty under the definition of incitement in article 24 of the Criminal Law of 199. His acts of assembling weapons and participating in the planning of the attacks were found to deserve the maximum penalty for incitement of ten years.²²

102. The contribution of the United States expert presented a case study of the attempted shoe bomber who tried to destroy a flight from Paris to Miami in December 2001. Its conclusion emphasized that:

“The case of Richard Reid represents a dangerous and disconcerting phenomenon—rootless young men drawn to international terrorism by their sense of victimization and willing to carry out catastrophic acts of violence. Although Reid’s plan was thwarted, it was ingenious, simple and quite deadly.”

The case study on Reid noted possible similarities between Reid and his accomplice Badat and some of the July 7 London 2005 transport suicide bombers, including an 18-year-old British national and a 19-year-old long-time resident of Jamaican origin, both of whom were radicalized while living in the United Kingdom. The group members who failed in their attempted bombings of the London underground on 21 July 2005 shared similar backgrounds. Most were born in Britain of immigrant families or immigrated themselves as children or teenagers—some as refugees. They were not strangers to British society, yet a number of reports detail a sense of disconnection and isolation from society. Some had a history of juvenile crime, drug abuse or having dropped out of school. Some apparently underwent a political and religious radicalization in prison, after extended trips abroad, or in places such as the Finsbury Park mosque, where a violent ideology was preached by Abu Hamza Al-Masr, subsequently convicted of incitement.

103. The contribution from the United Kingdom expert referred to the defendants in the planned bombing of a nightclub or other public venue discussed in section B of chapter III, Conspiracy to commit terrorist acts, as “home grown terrorists”. Within months of the transport bombings of 7 July 2005 and the unsuccessful bombing attempts of 21 July 2005 the United Kingdom’s Government took steps to address the issue of radicalization. Its Prime Minister personally presented to the United Nations Security Council the proposal which was adopted as Resolution 1624 (2005). That resolution expressed concern over the civilians of diverse nationalities and beliefs who had become victims of terrorism motivated by intolerance or extremism. It then called upon all Member States to:

²²Description of the case of Mohamed Abdel Rahman el Khalifi and others in a publication of the Inter-Governmental Authority on Development’s Capacity Building Programme Against Terrorism entitled *Judicial Precedents in Combating Terrorism in Sudan* (2007).

“... adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;
- (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.”

104. The anti-incitement language of Resolution 1624 calls for implementation of an obligation already existing under the ICCPR, article 20 of which requires its States Parties to ensure that:

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

Article 20 of the Covenant must be read in conjunction with its article 19, which provides in pertinent part that:

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

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

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.”

105. The Council of Europe has developed a European Convention for the Prevention of Terrorism (2005).²³ That agreement requires its Parties to establish an offence of incitement to terrorism, which is described in its article 5 as follows:

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

2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.”

²³The European Union’s Framework Decision of 13 June 2002, 2002/474/JHA required that incitement of terrorist offences be made punishable by Member States. That Decision was amended by Council Framework Decision 2008/919/JHA of 28 November 2008, which included provisions similar to those found in the European Convention on the Prevention of Terrorism.

106. The Convention's article 5 offence only reaches public provocation, leaving private, individual incitement to be dealt with by other theories of criminal culpability, such as solicitation or criminal association. The requirement for a subjective intent to incite the commission of a terrorist offence protects against any possibility of prosecution for negligent or reckless conduct. No legislative or executive authority is given the power to categorically forbid a particular form of expression of opinion or belief. The danger that a statement, sign, symbol or other expression creates a danger of the commission of a terrorist offence must satisfy the criminal standard of proof in a specific factual context. The European Convention's offence definition was drafted with the freedom of expression guarantee in article 10.1 of the European Convention on Human Rights (ECHR) in mind. Article 10.1 of the ECHR is very similar to article 19 of the ICCPR, making this offence definition relevant for non-Council of Europe States considering how to criminalize incitement while protecting freedom of expression.

107. The jurisprudence of the European Court of Human Rights includes numerous judgments interpreting the protection provided by article 10 of the European Convention on Human Rights, which is the Convention's counterpart to article 19 of the ICCPR on freedom of expression. Turkey is a country that has had considerable experience with domestic terrorist acts and with incitement prosecutions. The decisions in *Ceylan v. Turkey*, *Karatas v. Turkey* and *Surek v. Turkey* were all issued on the same day by the Grand Chamber of the European Court of Human Rights in 1999.²⁴ In *Ceylan v. Turkey*, the conviction of a trade union leader for incitement to hatred and hostility was held to violate the freedom of expression guaranteed by the European Convention on Human Rights. He had written an article accusing the government of state terrorism and genocide against Kurds, which in the view of the Court did not encourage the use of violence or armed resistance or insurrection". In *Surek v. Turkey*, published letters accusing the military of conspiring in the imprisonment, torture and killing of Kurdish fighters were held not to be protected expressions but rather an appeal to revenge and hatred capable of inciting further violence. In *Karatas v. Turkey* a published poem also called for Kurds to seek revenge and to "sacrifice our heads, drunk on the fires of rebellion" against what were repeatedly referred to as "whelps of the Ottoman whore", but the Court's opinion stated that:

"Taken literally, the poems might be construed as inciting readers to hatred, revolt and the use of violence. In deciding whether they in fact do so, it must nevertheless be borne in mind that the medium used by the applicant was poetry, a form of artistic expression that appeals to only a minority of readers."

108. In the case of *Leroy v. France*, No. 36109/03, decided 2 October 2008, the European Court of Justice found no violation of the freedom of expression. An artist and a newspaper's publishing director were convicted under a French press law punishing whoever provokes or justifies an act of terrorism. The defendants had caused to be circulated a cartoon depicting the attacks on the World Trade Center with the caption "NOUS EN AVIONS TOUS REVE ... LE HAMAS L'A FAIT" The Court's opinion, as translated in its press release, stated that:

²⁴(Applications 23556/94, 33179/96 and 26682/95, decided 8 July 1999)

“... by making a direct allusion to the massive attacks on Manhattan, by attributing these attacks to a well-known terrorist organization and by idealizing this lethal project through the use of the verb 'to dream', [thus] unequivocally praising an act of death, the cartoonist justifies the use of terrorism, identifies himself through his use of the first person plural ("We") with this method of destruction, which is presented as the culmination of a dream and, finally, indirectly encourages the potential reader to evaluate positively the successful commission of a criminal act.”

109. Another case in the European Court of Human Rights punished an expression of opinion involving an accusation of terrorism, rather than praise of a terrorist act. Together with the Leroy case, this case from the United Kingdom is instructive concerning the limits of the protection offered by article 10 of the European Convention on Human Rights. The Court found that United Kingdom authorities did not violate that article by convicting a Mr. Norwood. He had displayed a poster in his window showing the Twin Towers in New York in flames with the words “Islam out of Britain—Protect the British People” and a symbol of a crescent and star in a prohibition sign.²⁵ The Court acknowledged the right to freedom of expression guaranteed by article 10 but emphasized that it must be reconciled with Convention article 17:

“Nothing in (the) Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent that is provided for in the Convention.”

110. The Court interpreted article 17 as intended to prevent persons with totalitarian aims from exploiting the freedoms enunciated by the Convention. Its judgment stated that:

“The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom. Such a general, vehement attack against a religious group, linking the group as a whole with a grave act of terrorism, is incompatible with the values proclaimed and guaranteed by the Convention, notably tolerance, social peace and non-discrimination.”

It is thus difficult to generalize about how a particular conviction for incitement to hatred or violence or justification of terrorism will be reconciled with the right to free expression by the European Court of Human Rights or by another regional or national court. The result appears to depend on a Court’s reaction to the facts of a particular case rather than upon any absolute doctrinal rules.

111. The contribution of the Egyptian member of the Expert Group describes how in 1992 that country’s legislature adopted comprehensive anti-terrorism provisions within its Penal Code. Article 86 *bis* of the Code furnishes a useful example of an anti-terrorism

²⁵Norwood v. United Kingdom, no. 23131/03, decided 11 November 2004. See also Ivanov v. Russia, no. 35222/04, decided 25 February 2007.

law that criminalizes many of the specific offences and theories of criminal responsibility discussed in previous sections, that is executive and support responsibility, planning and preparation of terrorist acts, membership in or support of an illegal organization, financing and material support of terrorist organizations, and incitement offences. The Egyptian statute punishes anyone who founds, establishes, organizes or manages an association, body, group or gang for illegal purposes, as defined by the law. The law stipulates the aggravation of penalties against whoever leads, commands, or provides the same with material or financial assistance while knowing its purpose, along with whoever joins any of the aforementioned groups, participates therein in any way, while knowing its purpose, or promotes mentioned purposes orally or in writing or by any other means, or whoever obtains or produces on his own or through someone articles, publications or recordings of any kind promoting or encouraging any of the above, if meant for distribution or information; and whoever obtains or produces any kind of printing, recording or publishing used or meant to be used, even if temporarily, to print, record or publish any of the above mentioned.

112. Subsection 102.1 (1A) of Australia's Criminal Code Act defines an entity as terrorist in nature if it "advocates" the doing of a terrorist act, meaning:

- “(a) the organization directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) the organization directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) organization directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act”.

113. Under this law an association can be declared to be a prohibited terrorist organization only if its praise of a terrorist act might lead a person to engage in an offence. This focus on the risk resulting from praising a terrorist act resembles the safeguard in the European Convention on the Prevention of Terrorism that a message to the public must cause a danger that one or more terrorist offences may be committed. It is logical to assume that praising terrorist acts could in some circumstances increase the likelihood that a member of a sympathetic audience would commit such an act. However, it could be very difficult to demonstrate which member of an audience is likely to be so influenced, and when. If authorities wait for unequivocal evidence that a member of an audience is likely to take unlawful action they must allow the advocacy of violence to continue, with the risk that a susceptible listener will imitate the acts being praised during the investigation. A contrasting difficulty is that a judicial finding that there is “a risk ... of leading a person ... to engage in a terrorist act” is a subjective forecast of a future possibility rather than a factual determination of a concrete, observable event. A national legal system must therefore ensure that the process of deciding whether there is a risk of harm is more than mere speculation; is not subject to interpretation in an arbitrary and unpredictable manner; and does not unduly interfere with freedom of expression.

114. Some national laws avoid the difficulties of forecasting the subjective risk that a particular message will result in terrorist acts by focusing on the objective content of

the message and providing very detailed criteria of what constitutes encouragement or glorification of terrorist offences. The United Kingdom Terrorism Act 2006 makes the indirect encouragement of terrorism punishable by up to seven years' imprisonment and provides that:

“(3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.

(4) For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—

(a) to the contents of the statement as a whole; and

(b) to the circumstances and manner of its publication.”

115. Articles 18 and 579 of the Spanish Penal Code punish public incitement to commit a crime of terrorism as a preparatory act of the crime of provocation. Article 578 punishes the crime of praising terrorism, an offence that was incorporated in the Penal code by Organic Law 7/2000 of 22 December 2000. As informally translated this article provides that:

“The praising or the justification by any means of public expression or dissemination of the offences included in articles 571 to 577 of this Code (Crimes of Terrorism) or of who has participated in their execution, or commission of acts that involve discredit, contempt or humiliation of the victims of a terrorist offence or of their family will be punished with imprisonment from one to two years.”²⁶

The Organic Law also provided a penalty of a period of civil disability upon conviction.

116. It is to be noted that the Spanish law carries a penalty limited to a maximum imprisonment of two years; that the defendants in the French Leroy case were fined €1,500 each, without any sentence of imprisonment; and that Mr. Norwood was fined £300 in the United Kingdom, also without any period of incarceration. These relatively moderate punishments demonstrate how a menu of offences of solicitation, incitement and justification with differing penalties help to achieve proportionality in punishment. Justification and praise of terrorist acts are properly punishable if a legislature finds that they have a tendency to produce more violence. Nevertheless, a legislature may decide

²⁶Artículo 578. El enaltecimiento o la justificación por cualquier medio de expresión pública o difusión de los delitos comprendidos en los artículos 571 a 577 de este Código o de quienes hayan participado en su ejecución, o la realización de actos que entrañen descrédito, menosprecio o humillación de las víctimas de los delitos terroristas o de sus familiares se castigara con la pena de prisión de uno a dos años.

that indirect, rhetorical encouragement may not deserve to be punished as severely as efforts to directly persuade others to commit specific violent acts.

117. Other countries resist or limit the criminalization of incitement and the offence of justification due to their legal tradition. United States courts apply an expansive interpretation of the freedom of speech guaranteed by the First Amendment to that country's Constitution. The international law principle of dual criminality normally permits assistance only when the conduct in question is punishable in both the requesting and requested countries. As a consequence international cooperation from the United States may not be available with regard to acts that would clearly be punishable in other countries as incitement to or justification of terrorist acts. That is particularly true if the requested cooperation requires the coercive intervention of a court, rather than merely the provision of information by executive authorities of the Government.

118. INTERPOL's submission indicates that the Organization has generally enabled cooperation in cases concerning incitement to terrorism. This corresponds to the recognition by the United Nations Security Council in its Resolution 1624 (2005) and by the Council of Europe through its European Convention for the Prevention of Terrorism (2005) of the need to criminalize such acts. Cooperation in cases of incitement to terrorism is also consistent with the current approach taken by INTERPOL with regard to offences of incitement to religious and racial hatred, which had previously been considered by the Organization as generally falling outside the scope of article 3 of its Constitution. In a recent case, information against an individual who publicly praised a terrorist attack in a Northern African country was authorized for registration in INTERPOL's databases. As is the case with respect to membership in a terrorist organization, Interpol will review each request to ensure that it is based upon more than mere ideological support for a cause, and will require a charge based upon specific factual conduct.

119. Significant convictions have been secured in recent years under incitement laws. Said Monsour, a distributor of videos depicting decapitations and other murders in Pakistan, Chechnya and Iraq was convicted and sentenced to 42 months imprisonment in 2007 under Denmark's incitement law. His materials were recovered in connection with investigations in a number of countries, including Spain. The United Kingdom has used its anti-incitement legislation in a number of cases. Section 1 of the Terrorism Act 2006 criminalizes intentional or reckless "Encouragement of terrorism" and another section of the law prohibits dissemination of terrorist publication, specifically included Internet dissemination. These provisions are subject to the test that the encouragement or publication be "likely to be understood by some or all ... (of its intended audience) as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism." Abu Hamza Al-Masri, formerly associated with the Finsbury Park Mosque in London, was convicted in 2006 for solicitation to murder and a violation of an earlier statute for "using threatening, abusive or insulting words or behaviour with the intention of stirring up racial hatred".

120. In July 2007 Younis Tsouli and two other defendants pleaded guilty to using the Internet to incite acts of terrorism outside the United Kingdom by showing videos of hostage beheadings and other atrocities. Attila Ahmet, Abu Hamza Al-Masri's successor

at the Finsbury Park Mosque, pleaded guilty in 2007 to three counts of soliciting murder in connection with a training camp for terrorist bombers. Mohammed Hamid, called “Osama bin London” by the U.K. media because of his television appearances, and a number of his associates were convicted in 2008 after a jury trial. The convictions were for solicitation to murder, providing training for the purpose of terrorism and attending a terrorist training camp. These charges illustrate some of the offences available to interdict and deter the recruitment, indoctrination and preparations that precede terrorist acts. In those cases very specific charges were possible because of the presence of a covert police agent in the training camp and the availability of microphone surveillance recordings. Camp attendees included members of the group who were subsequently convicted of the attempt to bomb the London underground transport facilities on 21 July 2005, which failed when the detonators did not ignite the main charges in the improvised devices.

IV. Relationship between terrorism and other forms of crime

A. Corruption

121. The extent to which individual acts of terrorism, and perhaps more importantly the activities of terrorist groups, have been facilitated by corruption has not been a subject of extensive attention. However, some concrete examples demonstrate the risk factor and the need for rigorous attention to integrity and security measures in vulnerable sectors.

122. Because of negligence and corruption, two female suicide bombers who boarded flights at Moscow Domedovo airport in Moscow in August 2004 were not intercepted. The two females and two male companions were stopped in the airport by police captain Mikhail Artamonov to be searched for weapons and to be identified, but he failed to do the search. Armen Aratyunyan sold the women flight tickets without getting proper identification for a bribe of approximately \$140. He then helped them bribe the ticket-checking clerk, Nikolai Korenkov, so one of the women could board without proper identification. Captain Artamonov was convicted of criminal negligence in performance of his duties and on appeal was sentenced to six years imprisonment. Aratyunyan and Korenkov were convicted of bribery offences and sentenced to imprisonment for 18 months.

123. A case study in the submission by the INTERPOL expert described a security vulnerability identified as the result of the arrest of persons connected with the Tamil Tigers separatist group. When informed, INTERPOL was able to generate an exchange of intelligence. This exchange resulted in identification of airport personnel whose role was to facilitate illegal immigration. As noted previously, this group has a documented history of suicide bombings that would make the presence of its sympathizers in secure areas of an airport a matter of concern.

B. Terrorism and narcotics trafficking

124. Examples of narco-terrorism by the Sendero Luminoso and the FARC, and of narcotics involvement by the Madrid train bombers and persons associated with the Taliban, demonstrate that willingness to engage in ideological or religious violence is not necessarily accompanied by any scruples against drug trafficking. The publication *Terrorist Financing* by the Financial Action Task Force examines cites a number of cases in support of the observation that “The degree of reliance on drug trafficking as a source of terrorist funding has grown with the decline in state sponsorship of terrorist groups”.²⁷

²⁷29 February 2008, pages 15-17.

125. The term “narco-terrorismo” is attributed to former Peruvian President Belaúnde Terry’s description of Sendero Luminoso protection of drug production and trafficking. The contribution of the Peruvian expert mentioned the continuing risk of terrorism in the interior of that country, where coca is grown. Serious indications exist that terrorists are providing protection to narco-traffickers and together committing acts of destruction of human life and property. Italy’s Direzione Nazionale Anti-Mafia has reported on a Colombian drug-trafficking cartel that supplies the ETA organization. The cocaine is then traded for arms procured by the Neapolitan Camorra through its contacts with criminals in the Balkans. The head of that prosecution office has described the close contacts between the ‘Ndrangheta organized crime groups of the Southern Italian mainland and the Colombian cartels, the FARC and other Colombian paramilitary structures.

126. Armed revolutionary organizations such as the FARC control an important portion of drug production in Colombia. A Colombian contribution references the intelligence estimates of the Sistema Integral de Monitoreo de Cultivos Ilícitos (Integrated System of Monitoring Illicit Cultivation) that throughout the country 98,899 hectares were cultivated for narcotics. Based on the presence of the Southern Bloc of the FARC in the areas of cultivation, approximately 20 per cent of the total was under the control of the FARC. A Colombian contribution to the Expert Working Group explained that even if the El Nogal nightclub terrorist bombing was done by the FARC rather than by traditional narco-traffickers, it was financed with revenue derived from drug trafficking. That is because the FARC is the criminal organization that receives the largest revenues from the country’s drug traffic. As described by the Colombian experts, the authors of the El Nogal bombing belonged to the Teófilo Forero column of the FARC’s Southern Bloc. Since the 1990s, the heads of the Southern Bloc have led the process of symbiosis of the FARC and narco-trafficking. They participate directly in the coordination of activities of production, marketing and trafficking of drugs. One of them, before joining the FARC, was an assassin and bodyguard for the notorious drug cartel leader Pablo Escobar.

127. As a result of information seized from the FARC and obtained from human sources, especially persons formerly with the organization, together with facts known about the organization’s income-producing activities, the Unit of Information and Financial Analysis of the Colombian Ministry of Defense estimated the FARC’s income and expenses. The principal sources and percentages of the financing of the FARC in 2003, the year it committed the El Nogal bombing, have been estimated as: US\$1,728 million from the sale of cocaine; US\$1,569 million from extortion; US\$256 million from kidnapping for ransom; US\$115 million from earnings on investment and US\$52 million from livestock theft. By reducing the income of the FARC the National Police are neutralizing its capacity for terrorist actions of groups, although a car bomb caused deaths in Cali at the Palace of Justice in September 2008. In three years the hectares of illicit cultivation have been reduced from 102,071 to 77, 870. The destruction of cocaine laboratories has increased from 474 to 1,141. The extortion activities of the FARC have fallen from 223 cases in 2002 to 142 in 2005, and kidnappings from 1,044 in 2002 to 120 in 2006. Between 2002 and 2007 attacks on the civilian population fell from 178 attacks annually to 78.

128. Numerous examples illustrate the points of intersection between terrorism and drug trafficking. The well-recognized profitability of drug dealing allowed the 2004 Madrid train bombers to purchase the explosives for those multiple bombs with drugs

and leave €52,000 and drugs with a street value of €1.5 million in their apartment. In December 2008 Hicham Ahmidan was sentenced to a ten-year prison term in Morocco for involvement in the Madrid bombings, where he was already serving a five-year term for international drug trafficking. Airline hijacker Fawaz Yunis, discussed in chapter VII, section C, Lures and expulsions, was arrested when he was lured to a meeting to discuss a drug transaction.²⁸

129. According to INTERPOL's submission, it has been well established by many law enforcement agencies that money gained from drug trafficking is a major part of the financial resources of a Middle Eastern separatist organizations that engages in violent attacks against civilians. This organization not only collects so-called "revolutionary taxes" from narcotics traffickers and refiners to finance its operations, but is also directly involved in transporting and marketing narcotics in Europe. According to a report from the concerned Government in 2008, the Department of Anti-Smuggling and Organized Crime of its National Police conducted three operations and seized 50 kg of heroin in cases involving this organization. INTERPOL's criminal database currently has over 100 cases showing this organization's involvement in drug trafficking. A specific example is a case in a European country conducted since 2006 following the arrest of two members of the organization who tried to exchange euros at a foreign exchange office. Traces of heroin and cocaine on the notes led to further investigation and the arrest of 13 members of the violent separatist organization, who were charged with membership in a terrorist organization and financing of terrorism. In 2009 an operation in a North African country led to the arrest of four suspected terrorists. The investigation revealed links between the terrorist activities of the particular terrorist cell and trafficking in drug and in motor vehicles stolen abroad.

130. The United Nations Office on Drugs and Crime's 2008 World Drug Report identifies the zones in Afghanistan where the level of production and traffic in opium has increased. Those zones coincide with the ones identified in other public sources as those where Al-Qaida and the Taliban are most powerful and where there are the most terrorist acts. The cause and effect relationship between terrorist violence and opium production can be reciprocal. The traffic of drugs constitutes an important source of revenue for terrorist organizations and of funding for their terrorist acts. At the same time, the terrorist organizations contribute to opium production by protecting the areas in which they are most active, such as Helmand Province, from government anti-narcotics efforts. A recent example illustrating the links between the Taliban terrorist organization and opium trafficking is the May 2008 conviction in Washington D.C. of Khan Mohammed described by the American expert. Mohammed was a Taliban member who dealt in opium and heroin for importation into the United States, intending to use the sales proceeds to buy rockets for Taliban attacks in Afghanistan. On 30 June 2008, the Security Council adopted resolution 1822. Operative paragraph 9 of that resolution encourages the inclusion on the applicable United Nations Sanctions list of all those who finance or support Al-Qaida, Usama bin Laden and the Taliban. Operative paragraph 10 then:

"Notes that such means of financing or support include but are not limited to the use of proceeds derived from illicit cultivation, production, and trafficking of narcotic drugs originating in Afghanistan, and their precursors;"

²⁸United States v. Younis, 924 F. 2d 1086, (Ct. App. District of Columbia 1991), West Publishing Company.

131. During the years 2008 and 2009 the drug organizations of Mexico have increasingly targeted public officials in order to coerce the government to change its anti-drug policies. Hundreds of police and military have been murdered in recent months, often by beheading, in an obvious attempt to intimidate the Government, its representatives and the public. In this way the drug gangs are acting similarly to the Italian Mafia, whose unsuccessful war against the State is described in section C of this chapter, Terrorism and organized crime. There are also indications that drug traffickers may contribute to the financing of violent groups whose ideology they support. In October 2008 Colombian authorities announced arrests in connection with an international cocaine smuggling and money laundering ring that allegedly provided a percentage of its proceeds to a violent Middle Eastern group.

C. Terrorism and organized crime

132. Terrorist groups have characteristics of organized crime and sometimes may be punishable under laws directed at those groups. A significant difference is that the ultimate ideological motivation of a group may limit the use of some legal mechanisms aimed at profit-oriented organized crime unless the terrorist group acts for an intermediate financial goal, such as self-financing. Sophisticated organized crime groups often try to arrive at an accommodation with authorities through political support and corruption, but may resort to terrorist tactics when threatened. In the 1990s the Sicilian mafia made a strategic decision to attack the Italian State to coerce changes in its enforcement policies. The documented details of that confrontation and the successful response of the criminal justice system in Italy are worthy of examination. A Colombian expert described how his country survived an attack on the forces of order that resulted in the murders of thousands of police personnel in one year, and of several presidential candidates. That same expert, with decades of police experience, drew parallels with the confrontation Mexico is now experiencing with narco-traffickers.

133. In some situations an act of terrorism may be punished not only under ordinary criminal laws, such as murder, but also under laws specifically designed to deal with dangerous criminal organizations. The Cerezo brothers and their associates in the Fuerzas Armadas Revolucionarias del Pueblo, who bombed Banamex offices in Mexico City in 2001, were convicted under a Mexican law that includes terrorism as a form of organized delinquency. When terrorist groups threaten or engage in violence to extort resources for their organization, they become virtually indistinguishable from organized crime. An example can be found in the bombing of the Philippine Superferry 14 in 2004 with 63 deaths, which reportedly followed the rejection of a one million United States dollar extortion demand attributed to the Abu Sayyaf organization. In 2008 Hassan el-Khattab, also known as Abu Osama, and others were convicted in Morocco for forming the Ansar Al-Mahdi group to commit armed robberies for self-financing of bombing attacks. Some terrorist organizations become known for their self-financing criminality. Fourteen Abu Sayyaf members were convicted in 2007 for kidnapping tourists for ransom from a Philippine resort. Another Abu Sayyaf kidnapping for ransom took place at Sipadan, Malaysia in 2000. North Africa has experienced kidnapping for ransom, and a group calling itself Al-Qaida in the Islamic Maghreb has claimed responsibility for some incidents. Four foreign telecommunications engineers were kidnapped in 1998 in the

Chechen Republic. A contribution by the Russian expert reported that the beheading of the hostages was videotaped and the images distributed in the mass media as the result of a payment by Osama bin Laden.

134. The Algerian expert's contribution describes how terrorism in that country has been financed by extortion of funds from numerous activities. Faced with resistance to such demands, the Salafist Group for Preaching and Combat currently favours kidnapping for ransom. Smuggling groups in the Sahel on the borders with sub-Saharan countries derive large profits from smuggling and arms trafficking with terrorists in Northern Algeria. It is noteworthy that these terrorists resort to ordinary criminals to be able to execute their attacks, using money to recruit delinquents to conduct surveillance of targets, to steal vehicles for use in car bombings, to act as couriers and informers and to furnish other logistical support. Some of these delinquents have become followers of terrorist principles and have even served as suicide bombers.

135. The Red Brigades in Italy and the Red Army Faction in Germany in the 1970s financed themselves through armed robberies. As claimed by the hostage-taker Carlos, true name Ilich Ramírez Sanchez, an undisclosed but substantial ransom was paid to secure the release of the OPEC oil ministers his group seized as hostages in Vienna in December 1975. An international Independent Monitoring Commission for the Northern Ireland peace agreement concluded in a report of 10 February 2005 that the robbery in December 2004 of £26.5 million from the Northern Bank in Belfast was planned and undertaken by the Provisional Irish Republican Army. The Commission also concluded that the Provisional IRA was responsible for a number of other major robberies listed in its report. Although organized crime laws may be violated by these kinds of self-financing activities, they may not apply to purely destructive acts such as bombings and assassinations committed for ideological goals without a material benefit. For a number of years after 1983 an appellate court decision in *Ivic v. United States*²⁹ discouraged efforts to use organized crime laws against terrorist violence in the United States. The court's reasoning was that the concept of a racketeering enterprise in the American organized crime law implied the purpose of material gain, and attacks motivated by political considerations were outside the law's scope of application. That implied limitation was rejected years later by the Supreme Court in an unrelated case.

136. At the international level, the United Nations Convention against Transnational Organized Crime (2000) is explicit in its requirement of a material motivation. Because the Convention has approximately 150 Parties it offers an attractive vehicle for international cooperation against criminal groups, including terrorist groups in some situations. If a hostage taking or hijacking were to be committed by three or more members of a terrorist group for the purpose of self-financing the organization or supporting a lavish lifestyle, the Convention could be extremely useful as a vehicle for mutual legal assistance or extradition. If, however, the offence committed were a bombing, assassination, destruction of property or other violent act committed for ideological reasons without any goal of material benefit, it would be outside the scope of the Convention. Article 2 of the Transnational Organized Crime Convention defines "organized criminal group" as a structured group of three or more persons who associate "in order to obtain, directly or indirectly, a financial or other material benefit".

²⁹700 F. 2d 51 (2nd Cir. 1983), West Publishing Company.

137. The categorization of a violent attack as being organized crime or terrorism can have other consequences in some legal systems. Section A of chapter III, Association for the purpose of preparing terrorist acts, discusses the judicial structures and procedures adopted in France to permit the effective repression of terrorism. If a local prosecutor does not recognize or communicate the possible terrorist implications of a case, the advantages offered by the central pool of specialized investigating judges and prosecutors in Paris and the use of a professional court without a jury may not be realized. The Constitution of Ireland authorizes the use of Special Criminal Courts for the trial of offences where the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. Special Criminal Courts sitting with three judges without a jury have power to try such offences as are scheduled by the Government under section 36 of the Offences Against the State Act, 1939. Non-scheduled offences can be tried there on the basis of a certificate from the Director of Public Prosecutions as to the inadequacy of the ordinary courts to secure the effective administration of justice.

138. A contribution by an Italian expert notes that to finance themselves terrorist groups often commit offences typical of organized crime, such as kidnapping for ransom, robberies, drug trafficking and other crimes. Organized crime, on its part, is more and more using methods typical of terrorism, such as attacks with car bombs that cause the death of random victims and murders intended to intimidate the population and Government representatives. Several Colombian contributions made reference to the attacks directed by the drug trafficker Pablo Escobar against the National Police and Colombia's political and judicial authorities, which claimed thousands of victims, including presidential candidates. A recent example is the car bombing of the Palace of Justice in Cali, Colombia organized by the FARC. Four passing civilians died and 26 persons were wounded.

139. This use of terrorism by organized crime has been well-documented in judicial sentences imposing punishment for direct assaults on the Italian State by the Sicilian Mafia. The judicial sentences in the prosecutions for these offences establish that violence against civilians was undertaken for a specific terrorist purpose, which was to compel a government to do or abstain from doing an act. In Italy in the early 1990s that purpose was to compel the Italian Government to retreat from its repression of organized crime. The events are laid out in scrupulous detail in the judicial sentences in a number of cases involving the murder of prosecutors Giovanni Falcone³⁰ and Paolo Borsellino,³¹ and the bombing campaign against historic churches and art museums throughout Italy.³² In the 1980s the efforts of investigating magistrates Giovanni Falcone, Paolo Borsellino and others resulted in a massive trial for murders and other crimes committed by Sicilian Mafia families over many years. Of nearly 500 defendants, 360 were convicted. Initially, many of the sentences were vacated because of the influence of an appellate judge who was identified in later proceedings as subject to improper influence. At a crucial point, Falcone and others succeeded in having these maxi-trial appeals assigned to a different appellate panel, which upheld many convictions.

³⁰Republic of Italy v. Pietro Aglieri and others, Court of Assize of Caltanissetta, sentence of 24 June 1998.

³¹Republic of Italy v. Mariano Agate and others, Court of Assize of Caltanissetta, sentence of 9 December 1999; Republic of Italy v. Salvatore Riina and others, Court of Assize of Caltanissetta, sentence of 13 February 1999.

³²Republic of Italy v. Leoluca Bagarella and others, Court of Assize of Florence, sentence of 21 July 1999.

140. Mafia members who later cooperated with the authorities testified that the Mafia leadership collectively decided that they had been betrayed by the failure of political allies to manipulate the judicial appeal process. Salvatore Riina, the principal Mafia boss, directed an initial attack upon the State designed to punish unfaithful allies and open the path to new alliances based upon respect for Mafia power. The first act was to murder the Sicilian office holder long considered the Mafia's chief political representative, who was held personally responsible for failure to secure reversal of the convictions. Salvatore Lima was a former mayor of Palermo, a former Member of Italy's Parliament and cabinet minister, and in 1992 a Member of the European Parliament and the most powerful political figure in Sicily. He was shot to death near Palermo in March 1992. The next step was to eliminate dangerous enemies in the criminal justice system who were symbols of the State. In May 1992 Dr. Falcone was returning from his work as the head of the Criminal Division of the Ministry of Justice in Rome to his home in Palermo, where his wife worked as a judge. On the highway from the airport into the city, a culvert had been packed with explosives. Detonation of the explosives resulted in the death of three of his escorts and of Falcone and his wife. In July 1992 Dr. Borsellino, Falcone's long-time colleague and a candidate for leadership of a new anti-Mafia agency, together with five bodyguards, was killed in a car bombing outside his mother's apartment. In addition to removing incorruptible and capable enemies of the Mafia, another purpose of these murders, as explained to his colleagues by Mafia leader Riina, was to prevent the election of a candidate for the Presidency of the Republic that Riina felt had not acted to help reverse the maxi-trial convictions. The murder of the Minister of Justice was also considered, and a bomb attack was made on a popular television personality who had made anti-Mafia comments.

141. The public, political and official reactions to these attacks had not been anticipated by the Mafia leaders. Law enforcement efforts to arrest fugitives were intensified and Riina himself was captured in January 2003. Among the techniques of particular utility was the practice of electronic surveillance. This paralleled the experience of the United States, which achieved only marginal success against organized crime until the widespread use of electronic surveillance and the admission of the resulting interceptions as evidence in the 1970s and 1980s. Italian legislation also subjected incarcerated leaders and members of the criminal organization to a severe prison regime which made it impossible for them to direct criminal activities or to enjoy a comfortable lifestyle, as had previously been the case. Criminal income decreased because of the law enforcement attention. In desperation, the remaining Mafia bosses broadened the attack on the State to include symbols of Italian history and culture. The Uffizi Gallery in Florence, a modern art museum in Milan and two historic churches in Rome were bombed on the same night, causing deaths and destruction. Other terrorist actions considered by the organization's leaders, according to their testimony after being captured, included the murder of penitentiary guards throughout Italy, destruction of power, radio and ferry services, bombing of the Tower of Pisa, spreading infected syringes on the beach at the Rimini resort and stealing famous works of art. Bomb attacks against a significant collaborator with justice were attempted twice and against two busloads of Carabinieri arriving to provide security at a football game but they failed.

142. In response to the Mafia violence the forces of order and the Italian criminal justice system made full use of their existing powers within lawful limits, and new laws

were enacted providing for increased use of special investigative techniques. The resources for investigation, prosecution and protection of witnesses and officials were provided by Parliament with the support of public opinion. Legislation was successfully implemented to motivate accomplices to collaborate with criminal justice authorities. Sentence reductions and a Witness Protection Programme became available and the number of witnesses from within the criminal families multiplied. In chapter VI, section C, Fair and effective trial procedures, reference is made to the careful attention given by Italian judges to the need for corroboration and careful evaluation of the testimony of these witnesses on the inner working of the Mafia leadership. The judgments in these cases illustrate how investigative and prosecution authorities devoted tremendous effort to verifying the smallest details in the statements of these witnesses in order to judge their credibility. They constitute a dramatic and uniquely detailed historical record of how organized crime's use of terrorist tactics to intimidate a society and coerce its government can be defeated.

143. In section B, Terrorism and narcotics trafficking, of chapter IV, reference was made to beheadings and other attacks by Mexican drug traffickers designed to coerce the Government to change its anti-drug policies. That campaign of intimidation has also extended to inflicting casualties on the public to create terror. On 15 September 2008 in Morelia, Michoacan, two fragmentation grenades exploded in the midst of crowds during a public celebration. Eight were killed and 106 wounded. Prompt investigation made use of film from nearby bank surveillance cameras to identify members of the Zetas drug gang. Three persons are in custody and the investigation and fugitive search continues.

D. Using minor offences to catch major criminals

144. Collateral offences committed by terrorists, particularly weapons offences and frauds, create investigative and prosecution opportunities to lawfully incapacitate or to gain the cooperation of otherwise dangerous persons, and to trace terrorist movements and activities.

145. The contribution of the Kenyan expert described the prosecutions for murder and conspiracy to murder in connection with the November 2002 fatal car bombing at the Paradise Hotel and an unsuccessful attempt to shoot down an aircraft departing from Mombasa Airport carrying tourists returning to Israel. All defendants were acquitted of these charges. One of the defendants, however, Omar Said Omar, was successfully prosecuted and received an eight year sentence for a weapons offence. The judgment of the Nairobi Chief Magistrate's Court in Criminal Case 1274 of 2005 details the careful presentation of detailed evidence by the prosecution proving that the defendant presented a false identity card bearing his picture in order to rent an apartment in which the weapons were found. The apartment was rented by the defendant and two associates, one of whom killed himself and a police officer with a hand grenade on the day he was arrested. Eight days after the arrest the police identified the apartment and searched it. In the apartment was a sofa that the defendant and his associates had been observed bringing to the building. Concealed inside the sofa's wood frame were six automatic

weapons with magazines and cartridges and five anti-tank missiles. Also recovered were a saw, hammer and pliers, a hand grenade in a haversack, and training materials and diagrams on the use of the various weapons found in the apartment. A laminating machine and materials suitable for making identity cards were also found.

146. In Uganda, even before adoption of the Terrorism Act 2002, the Penal Code Act of 1984 defined certain activities as terrorism. Section 28(4) of that Act provides that:

“... without prejudice to the right to adduce evidence in rebuttal, any person who imports, sells distributes, manufactures or is in possession of any firearm, explosives or ammunition without a valid license or reasonable excuse shall be deemed to be engaged in acts of terrorism”.

Another subsection of section 28 defines terrorism as including a specific intent to promote or achieve political ends in an unlawful manner. However, a number of Ugandan court cases have found that in view of the language of section 28 (4) that an unlawful possessor of firearms “shall be deemed to be engaged in acts of terrorism”, no further proof of a terrorist intent is required.³³

147. In the United Kingdom, Younis Tsouli and his associates Mughal and Al-Daour pleaded guilty in July 2007 to using the Internet to incite terrorism. Their method was to use stolen identification and credit card information to pay for websites and Internet services which they used to distribute pictures of beheadings and bomb making instructions. Other forms of micro-criminality directed at providing funds for subsistence and for terrorist purposes may include theft, drug sales and fraud in connection with public assistance payments. Making the connection between these relatively minor offences and the status of their perpetrators as potential terrorists depends upon effective intelligence sources and management of data bases. If a terrorist suspect can be identified as engaged in micro-criminality, it may be possible to incapacitate a potentially dangerous terrorist by prosecution for an offence not directly related to terrorism, or to develop useful cooperation from that suspect. In the next section on False identity and immigration offences, the criminal career of Ahmed Ressam is discussed. As is apparent from that description, there were multiple violations for which he might properly have been prosecuted, or by means of which his cooperation might have been secured, before he was eventually arrested in route from Canada to bomb the Los Angeles International Airport in December 1999.

148. The Italian Guardia di Finanza’s expert contribution described that agency’s Operation Gebel. Small businesses were found to have generated five hundred thousand euros to support violent groups by fiscal and identity frauds and from leasing vehicles and selling them in North Africa. The prosecutions resulting from the Guardia’s Operation Toureg involved companies transferring three hundred thousand euros through multiple countries that eventually reached members of the Salafist Group for Preaching and Combat and the Groupe Islamique Armé. Other cases of kidnapping for ransom and robbery to finance organizations using terrorist means are listed in chapter III, section C, Terrorism and organized crime. The tenth Report of the Independent Monitoring

³³These cases are found in a publication of the Inter-Governmental Authority on Development’s Capacity Building Programme Against Terrorism entitled *Compendium of Terrorism Cases in Uganda (2007)*.

Commission in Northern Ireland addressed Provisional IRA involvement in a 26.5 million pound bank theft. That same Report noted that members of paramilitary organizations bring to organized crime groups existing networks of associations familiar with operating clandestinely, as well as experience and a readiness to resort to threats and violence against civilians. The disciplined structures in place in paramilitary organizations allows them to evolve from terrorist organizations into lucrative criminal enterprises, combining organizational financing and personal gain.

149. The Irish expert also advised the working group concerning the danger of vigilantism from violent groups that seek to impose political goals on the community. By attacking social evils, such as drug trafficking, such groups can appeal to community sentiment, while reinforcing their power to intimidate through the use of violence against street level drug dealers. That power to intimidate can be and has been used to extort funds both for personal and organizational use. Similarly, in emigrant communities some funding for separatist groups is collected voluntarily. Other contributions result from the reputation of certain groups as being willing to use violence against unwilling potential donors. When this occurs, the use of special investigative techniques to permit prosecution is often necessary, because the victims of extortion are often reluctant to come forward voluntarily

150. The Algerian expert acknowledged that some terrorist organizations engaged in organized crime activity, as was the case with a sub-Saharan smuggling situation in his own country. However, his experience was that terrorist actions were more frequently associated with micro-criminality. Acquisition of cell phones by theft, securing vehicles by theft or other illegal means, and self-financing by illegality had been found in almost every one of the many terrorist attacks his country had experienced in the last ten years. Each isolated non-violent criminal offence does not itself suggest any connection to terrorism. However, even micro-criminality should be a cause for concern if the offences are linked to persons with connections to terrorist organizations or terrorist acts. Arrest and prosecution of a member of a terrorist group for property offences while that group is planning and preparing a violent attack may prevent the violence, even if the more serious crime of preparing a terrorist act ultimately cannot be proved.

151. In the opinion of the Spanish expert the investigation of the crimes of terrorist cells preceding and instrumental to attacks is necessary to guarantee a more effective and rigorous penal response to these groups. Local cells linked to international terrorism frequently engage in micro-criminality to finance themselves, such as crimes against property, falsification of credit cards and other documents, drug trafficking and money laundering. This enforcement approach has been applied to the struggle against the terrorist activities of ETA. In September 2008 two members of ETA were detained in France, who had met to arrange entry into Spain to commit attacks and who had arms, false documents and stolen vehicles. These crimes will be judged in Spain, together with the offence of membership in ETA, as the French judicial system has renounced handling of the case in favour of Spanish justice. In various cases of international terrorism it has been proved that the cells finance themselves by micro-criminality. The attacks of 11 March in Madrid were shown to have been financed by the traffic of hashish, which was exchanged for explosives and generated the money to support the infrastructure of the group. In the "Operation Green" conducted in early 2006 by Spain and France, a Salafist cell was shown to have financed its activities with thefts from residential areas. In all cases the use of false documents is the general rule.

E. False identity and immigration offences

152. Terrorists are dependent upon false papers to conceal their true identity and to travel, and they frequently traffic in them. These vulnerabilities suggest the need for more effective identity verification procedures to diminish the ease with which a terrorist can travel, enter a country and secure asylum based on false documents.

153. A demonstration of the importance of passport, visa and immigration violations is found in the history of the apprehension and prosecution of Japanese Red Army (JRA) members over several decades. The contribution of the member of the Expert Working Group from Japan describes the violent history of the JRA, an extremist group engaged in armed uprising against established governments with the goal of provoking a world-wide revolution. Among its major crimes were: the 1972 Tel Aviv airport shooting that killed 24 and left many times that number wounded; the hijacking of a JAL flight leaving Paris for Tokyo that resulted in the destruction of the plane in Libya; the 1974 seizure of the French Embassy in the Hague by three JRA members resulting in the shooting of two police officers and the holding of hostages for ransom; the 1975 hostage taking at the Swedish Embassy and United States consulate in Kuala Lumpur, Malaysia which secured the release of five JRA prisoners; the 1977 hijacking of another JAL flight diverted to Dhaka, Bangladesh which secured the release of six JRA members detained in Japan and payment of six million United States dollars ransom; and a car bombing at a nightclub for United States military personnel in Naples, Italy killing five, in which the fingerprint of a JRA member was found at the scene. As a result of the hostage exchanges associated with The Hague and Kuala Lumpur seizures of diplomatic establishments and the Dhaka aircraft hijacking, by the late 1970s over a dozen JRA fugitives were living either clandestinely or in safe havens throughout the world.

154. It is useful to examine the significance of passport, visa and other false documents in the apprehension and conviction of these fugitives. Japan's police intelligence authorities diligently pursued the perpetrators of these terrorist acts for decades on many continents, resulting in the return to Japan for trial of nearly all of them, although one of the Tel Aviv attackers, Kozo Okamoto, was granted political asylum by a Middle Eastern country in 1999. The organization's plan for self-financing by hostage-taking for ransom in the 1970s was found with Yoshiaki Yamada at Orly Airport, Paris, when he was arrested for possession of a false passport. Yukiko Ekita was arrested in Romania in 1995 and Kazue Yoshimura was arrested in Peru in 1996 on false passport charges and deported to Japan for trial. JRA founder Fusako Shigenobu was convicted in 2006 for the 1974 taking of hostages at the French Embassy in The Hague and for passport violations. Five JRA members were convicted in Lebanon for passport and visa fraud and four were subsequently expelled to Japan where they were prosecuted for terrorist attacks in the 1970s and passport violations in the intervening years (Haruo Wako; Masao Adachi for using a false name to enter Czechoslovakia in 1989; Mariko Yamamoto; and Kazuo Tohira for using a false passport to enter Ecuador in 1994. Tohira had been on trial for forged documents in 1975 when released in an exchange for hostages). Yu Kikumura was convicted in the United States in 1988 for explosives and immigration offences, having entered the country under a false identity. When returned to Japan in 2007 he was charged with falsifying official documents and convicted.

155. The JRA examples provide a concentrated sampling of the abuse of travel documents regularly practiced by persons engaged in or intending to commit terrorist offences. The Report of the National Commission on Terrorism Attacks on the United States, chapter 6, *A Case Study in Terrorist Travel* (2004) described the background of Ahmed Ressay. Ressay had attempted to cross the Canadian-United States border with a bomb in his car intending to use it to attack the Los Angeles airport in December 1999.

“Following a familiar terrorist pattern, Ressay and his associates used fraudulent passports and immigration fraud to travel. In Ressay’s case, this involved flying from France to Montreal using a photo-substituted French passport under a false name. Under questioning, Ressay admitted the passport was fraudulent and claimed political asylum. He was released pending a hearing, which he failed to attend. His political asylum claim was denied. He was arrested again, released again, and given another hearing date. Again, he did not show. He was arrested four times for thievery, usually from tourists, but was neither jailed nor deported. He also supported himself by selling stolen documents to a friend who was a document broker for Islamist terrorists.”

156. The three supporters of an anti-Khadafy group mentioned in chapter II, section C, Criminal responsibility for organizing and directing terrorist acts, provided not only funds but also forged passports to the violent Libyan group. Two of the defendants had previously been convicted of fraudulent passport offences, one of them being the document forger who operated what the United Kingdom expert described as a “passport factory” in his home. At their sentencing the judge noted that all three had been given refuge in the United Kingdom and recommended their deportation after service of their prison sentence. Nearly every legal case encountered in researching this Digest revealed the use of fraudulent documents. The subject of the Committee against Torture’s Communication in *Aziza v. Sweden*, discussed in chapter VI, section B on Diplomatic assurances, who resisted expulsion on the grounds that he feared torture if returned to his home country, had arrived in Sweden using a false Saudi identity. The decision of the South African Constitutional Court in *Mohammed v. President of the Republic of South Africa* (CCT 17/01 2002), describes how Khalfan Mohamed was identified when a review of asylum applications identified an applicant who left Dar es Salaam the day after an Embassy bombing. In due course this person requested asylum “under his assumed name and on spurious grounds—and was afforded enhanced temporary residence status”. In *Ramzy v. Netherlands*, pending before the European Court of Human Rights, the applicant is resisting deportation based upon an asserted risk of torture if returned to his home country. The Court’s press release refers to the subject as being known to Dutch authorities by that name and ten other identities. The subject of the European Court of Human Rights’ finding in the case of *Saadi v. Italy*³⁴ that deportation would be improper because of a risk of torture was appealing a conviction for falsification of a large number of documents, such as passports, driving licences and residence permits.

157. The subject of the Tantoush case in South Africa, discussed in chapter VII, section D on Diplomatic assurances, was described in the court decision as having lived in Peshawar, Pakistan from 1988 to 2001, during which time he operated totally illegally by obtaining fraudulent visa extensions from counterfeiters. When his visa expired he

³⁴No. 37201/06, decided 28 February 2008.

obtained a counterfeit one. He eventually left Pakistan, travelled to Malaysia, and in Malaysia obtained a false South African passport. He was arrested in Jakarta while visiting there, gave false information to Indonesian authorities and was thereafter deported to South Africa, where he was granted refugee status by the court. The Indonesian expert contribution concerns the case of Ainul, a leader of the Al-Qaida-related terrorist entity Jemaah Islamayah. The Indonesian expert contribution describes its subject as Ainul Bahri, also known as Yusrom Mahjmudi, aka Abud Dujana, aka Abu Musa, aka Sobirin, aka Pak Guru, aka Dedy, aka Mahsun bin Tamli Tamami, demonstrating the use of multiple false identities by a terrorist with a history of international travel. Three Irish nationals linked to the Irish Republican Army were arrested in Bogota in 2001 for possession of false passports. They were charged with passport offences and with providing training for illegal activities in the form of explosives instruction to members of the FARC organization. At the trial level only the passport violations resulted in convictions and prison sentences. The three were ultimately convicted on the explosives training charges by a higher level court, but by then had been released during the appeal process and had fled Colombia.

158. The European Court of Human Rights' case of *Selahattin Erdem v. Germany*, No. 28321/97 (2001) dealt with monitoring of communications and the length of confinement, but incidentally emphasized the prevalence of false documentation. The Court's press release noted that the accused had been granted refugee status and had lived in France. Upon attempting to enter Germany he was arrested for terrorist activity and false documentation. The Court noted that while his case was filed in the name *Selahattin Erdem*, his true name was not Erdem. In fact, it was Duran Kalkan, and he was a founder of the PKK, the Kurdistan Workers' Party. Cesare Battisti, accused of terrorist crimes in Italy, was arrested in Brazil using a false name after his decades-long asylum under the Mitterand doctrine (discussed in chapter IV, section C, Lengthy periods of proscription) was reversed by a French court in 2004. Mohammed Abbas, the person who smuggled into Italy the weapons used in the 1985 hijacking of the cruise ship *Achille Lauro*, had been arrested before the actual attack took place carrying false passports. Ramzi Youssef, convicted in the United States of a plot based in Manila to bomb 12 American aircraft, had entered the Philippines on a false passport but avoided arrest when bomb-making chemicals caused a fire in his apartment. He had previously entered the United States and claimed political asylum under a false name when detained for illegal entry. He was released pending further processing and committed the first World Trade Center bombing in 1993. Rachid Ramda, the subject of the ten year extradition proceeding described in chapter, IV, section C, Lengthy periods of proscription, achieved part of the delay due to an asylum claim under a false name.

159. In chapter IV, section D, Using minor offences to catch major criminals, reference was made to the acquittal of one of the suspects in the attack on a hotel frequented by Israeli tourists in Mombasa, Kenya. In a separate prosecution of that same person, Omar Saidi Omar, alias Ahmed Mohamed, the proof showed that the three-man Al-Qaida cell in that case had in their possession a laminating machine and other materials for creating identity cards, that Omar used one false identity card to rent the apartment where their weapons were found; and that he had two other false identity cards and his genuine identification document. That evidence permitted his conviction and imposition of a sentence of eight years' imprisonment.

160. The contribution of an Italian prosecutor to the first Expert Working Group listed numerous examples of forgery and false documents created for entry, work permits, identity theft, fraud and driver's licenses. An overall observation was that:

“As it has been shown in the course of investigations and further supported through the acquisition of evidence deriving from investigations abroad (in European and extra-European countries), acquiring and circulating clearly forged documents is fundamental not only to ordinary but also to more specific terrorist activities. Getting masterly forged documents enables terrorist leaders—typically having to keep in contact with scattered cells—and material executors of terrorist acts to travel throughout the world at minimum risk. Furthermore the hypothesis of persons external to the international terrorist organization who aid and abet it should not be excluded. In fact this is the case with persons—already individuated in the course of the investigations—who do not belong to the terrorist organizations but are “professionals” expert in ID forgery working on a permanent basis for Al-Qa'ida's members; it is clear these outsiders are well aware that they are collaborating with terrorists providing them—upon payment—with false documents.”

To the same effect are the references in the Italian Guardia di Finanza's contribution describing the extensive use of and trafficking in false identity documents proven as a result of the Guardia's Operation Gebel and Operation Toureg.

161. The United States expert made reference to the known theft of over 20,000 passports from only three countries in recent years. He also made reference to the case of Fazul Mohammed, also known by multiple other identities. Mohammed was a leading figure in the bombings of the United States Embassy in Nairobi, Kenya, has a history of using false passports and is now an international fugitive. INTERPOL has recognized the gravity of this continuing global problem and is addressing it with its Stolen and Lost Travel Documents (SLTD) database and its creation of two systems for accessing that database called FIND and MIND. As of June 2009 the database contains information on over 18 million documents, over 10 million of which were passports, from approximately 150 countries. Its use can also be linked to further searches of additional millions of records in other INTERPOL databases over its secure communications network. INTERPOL has also developed extremely user-friendly web-services for national authorities to access this database. These can be implemented at the national level, using Fixed INTERPOL Network Database (FIND) or Mobile INTERPOL Network Database (MIND). These services allow an officer to pass a passport through a digital scanner or manually enter its identification number. The query passes automatically to any national database and to the database at the INTERPOL General Secretariat if connectivity exists. If not, the INTERPOL General Secretariat sends out continuously updated data every time the central database changes, which is copied into a MIND device within the country so it can be queried by the national system. Moreover, when a travel document is checked using FIND or MIND, it can also be checked against travel documents associated with INTERPOL's Nominal Travel Document (NOMTD0) web services.

162. The Algerian expert also described the case of Youcef Millat. Cooperation furnished by the INTERPOL National Central Bureau for Algeria to the National Central Bureau for Italy resulted in the identification and extradition of the fugitive. Millat was

the subject of Algerian charges for membership in an armed terrorist group, justifying terrorism and sabotage, and had been convicted in absentia and received a twenty-year sentence. Case studies submitted by INTERPOL show the significance of identity documents and illegal movements in terrorism investigations. One case dealt with the reporting of arrests of members of a violent separatist movement. A number of those arrested were identified as already in INTERPOL files, their correct names and nationalities were provided, and an intelligence exchange was initiated between two countries. A second case involved the reporting of arrests in connection with another violent separatist organization. Information provided about the suspects' flight details led to further investigation, which resulted in identifying persons working in airports who facilitated illegal immigration. In a third case an investigation by national authorities revealed a terrorist cell to be involved in: production of forged passports, driving licenses and residence permits; organized illegal transport/entry of persons; commission of terrorist suicide attacks; production of propaganda material; production of audio-visual terrorist training material; and sending and receipt of money to support the operation through money-transfer organizations. Following a meeting with an INTERPOL specialist, the country sent out diffusion notices and arrests were confirmed in other countries. A number of the individuals involved were found to be the subject of INTERPOL—United Nations Special Notices.

163. The INTERPOL expert described these Special Notices, a form of notice first issued in December 2005. They alert national authorities to individuals that are the target of United Nations sanctions against Al-Qaida and the Taliban and Associated Individuals and Entities. Notices issued by INTERPOL are relevant in other terrorism contexts. Red Notices are particularly important as the method of notification used to seek the provisional arrest of wanted individuals with a view to their extradition. INTERPOL Orange Notices, or Security Alerts, are particularly important after mass escapes of terrorists. Morocco promptly secured INTERPOL Orange Notices after nine extremists convicted in the Casablanca bombings that killed 45 persons in 2003 escaped, thus making the fugitive search global. INTERPOL has issued other Orange Notices on its own initiative after mass escapes because of the danger to other societies and to law enforcement officers who might encounter the escapees. An INTERPOL contribution described a situation in 2006 in which members of Al-Qaida escaped from prison in a member country. The national authorities were contacted immediately but information was not supplied as requested. Accordingly, INTERPOL was unable to alert its member countries to the situation. Following this incident, INTERPOL's General Assembly adopted its Resolution no. AG-2006-08, urging member countries to:

“1. Immediately inform other member countries via INTERPOL's General Secretariat whenever there are escapes of suspected or convicted terrorists or other criminals who could pose a danger to the police or citizens of any country to which the escaped prisoners might flee:

2. Immediately, whenever such an escape occurs, issue a diffusion to other member countries via INTERPOL's General Secretariat and provide the General Secretariat with the information it needs to issue a global security alert (Orange Notice) and other appropriate notices, thus enabling law enforcement world-wide to identify, locate and apprehend the escaped prisoners.”

164. These efforts by INTERPOL are highly relevant to the mandatory obligation of States under United Nations Security Council Resolution 1373, Paragraph 2 (*g*) to:

“... prevent the movement of terrorist or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.”

Paragraph 3 (*f*) of the same Security Council Resolution further calls upon States to:

“Take appropriate measures in conformity with relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts.”

165. The cases of persons using false identities described in this Digest, and others too numerous to mention, demonstrate that the identity verification essential to preventing the movement of terrorists has not been effectively achieved in the past. Any meaningful exclusion of terrorists from entry requires knowledge of the applicant's true identity and background. This is true even in the processing of a request for asylum based upon a claim of fear of torture or discriminatory treatment. The Fifth Periodic Report of Sweden to the Committee against Torture, dated 23 December 2005, advised that over 90 per cent of the asylum seekers in Sweden do not present any form of passports, identity cards or other documents that can prove their identity or even show that they are citizens of the country where they claim to face persecution.

166. The United Nations High Commissioner for Refugees' recommended policy is that the authorities processing an applicant should not seek background information from the country where the possibility of mistreatment is alleged. While the possibility of retaliation against family and friends is an obvious motivation for such a suggested rule, an equally obvious consequence is that false claims can be made without substantial fear of contradiction, because the most practical sources of evidence to disprove them cannot be accessed. So, immigration officials and officials processing refugee applications currently face a dilemma in ascertaining the true identity of refugees, given the absence of authentic documents. Exceptions to the recommended policy against contacting knowledgeable authorities are allowed upon the approval of a high-level decision-maker in some countries. Linguistic analysis and knowledge tests are increasingly used to test the true identity of asylum claimants. However, biometric identification databases and controls would offer far more precise and reliable identification. An INTERPOL proposal relating to reporting of arrests of terrorist suspects is discussed in chapter VIII, Innovations and proposals, that might help alleviate this identity dilemma to a limited extent.

167. Not all immigration violations involve forged documents. The entry into Kenya of Abdullah Öcalan, leader of the violent separatist movement PKK, was accomplished without securing immigration clearance due to the intervention of a foreign Embassy's personnel, as is described in chapter VII, section C, Lures and expulsions. Nezar Hindawi was convicted in 1986 of giving his unwitting pregnant girlfriend a timer bomb to carry on an El Al flight from London. He held an authentic official passport of a foreign

country in a false name and claimed to have received the passport, money, explosives and instructions from representatives of that government.

168. The contribution of the United States expert describes how in December 2001 Richard Reid attempted to ignite explosives hidden in his shoe on an American Airlines flight from Paris to Miami. He had attempted to board a flight on the previous day but was delayed by security personnel because he arrived without any baggage, paid cash for his ticket, appeared unkempt and presented a newly issued passport. Although the newly issued passport itself aroused suspicions, it concealed the fact that Reid had travelled extensively through Europe, the Middle East and Southwest Asia in the preceding six months on his previous passport. In early July 2001 Reid had flown to Amsterdam where he obtained a new passport from the British consulate, and then flew to Israel, Egypt, Turkey and Pakistan. In December Reid flew from Pakistan to Belgium and obtained another new British passport from the British consulate, thus concealing his suspicious prior travel. This same technique of falsely claiming the loss or theft of a British passport in Brussels to secure a new one to conceal suspicious travel was used by Reid's associate Saajid Badat. Badat was convicted in the United Kingdom after explosives and bomb components identical to those in Reid's shoes were found in his home.

169. In chapter VIII, Innovations and proposals, it is suggested that steps be taken to track requests for replacement passports and that increased use be made of INTERPOL's Stolen and Lost Travel Document database. Problems associated with false identity and immigration violations can only grow worse, and the need for more accurate identity controls more urgent, with increasing globalization and the trend toward relaxation of visa and passport controls within regional groupings. In the view of the experts, realistic sentences capable of deterring identity fraud are also necessary. The Egyptian expert's contribution noted that whereas forging or using forged travel documents had previously been misdemeanours punishable by either fine or imprisonment, in 1992 such forgery or use had been made a crime punishable by imprisonment.

V. The statutory framework for terrorism prosecutions

A. Courts with specialized competence

170. The power and willingness of terrorists and other criminal groups to interfere with the judicial process have led to the use of courts with specialized competence for terrorism and other high-risk offences. The advantage of these specialized and centralized courts is that they facilitate security arrangements and the development of an experienced corps of specialized practitioners. One principle that has emerged concerning specialized courts is that they may not include military officers subject to direct executive supervision, because the appearance of judicial independence and impartiality would be lacking. Special procedures relating to the length and conditions of detention and the availability of a jury trial in terrorism cases are also used in some countries.

171. The 1985 seizure and murder of members of the Colombian judiciary in the Bogota Palace of Justice by the M-19 guerrilla group is a reminder of how vulnerable the judicial organs of a State and its criminal justice system are to terrorist violence. For a period of time in the 1990s Colombia adopted procedures allowing prosecutors and judges to sign official documents with a code to protect against retaliation. After the country's security situation improved the provision expired and was not renewed. However, the focus of violent groups upon the symbolic importance of the Colombian judicial system was again demonstrated by the events in Cali on 1 September 2008. On that date a car bomb was detonated in front of the Palace of Justice. Four innocent civilians were killed, and 26 persons wounded. Within days a team of National Police units, in coordination with the Prosecutor of the Specialized Court, were able to arrest those believed responsible. Those arrested included individuals charged with parking the camper containing explosives at the Palace of Justice, the person who constructed the explosive device, the driver of a taxi designed to block any pursuit, the purchaser of the bomb vehicle, the brother of the bomb builder who assisted in the work and the renter of the location where bomb materials were stored and the bomb was constructed.

172. The contribution from the Peruvian expert described how, in a 2002 decision, that country's Constitutional Tribunal called upon the legislature to adopt laws providing for retrial of cases decided in secret military trials which lacked independence, transparency and accountability because conducted before anonymous judges. New trials with constitutional guarantees of transparency and judicial independence were then conducted for Abimael Guzmán and the leadership of Sendero Luminoso in the public civilian courts, using normal criminal processes. These trials resulted in convictions in 2006, with sentences ranging from life for Guzmán down to 24 years. The Peruvian expert noted that the Inter-American Court of Human Rights has ruled that in these circumstances, retrial under procedural guarantees does not violate applicable guarantees against being tried twice for an offence for which he or she has been finally convicted or acquitted.

173. In June 1999 the Turkish Constitution was amended to eliminate military officers from National Security Courts. The decision of the European Court of Human Rights in *Öcalan v. Turkey* (Application 46221/99, judgment of 12 May 2005), dealt with a trial in which a military judge participated in the proceedings before the Turkish Constitution was amended and he was replaced by a civilian judge who actually participated in the verdict. The Court found that a panel including a judge subject to military rating and discipline could not be considered to enjoy the independence from the executive power necessary to ensure the perception of a fair trial. This judgment was based upon provisions of the European Convention on Human Rights, an instrument having effect only at the regional level. It should be noted, however, that the pertinent article of the European Convention relied upon as establishing the irregularity of Öcalan's conviction was article 6.1. The wording of that article is almost identical to the fair trial and independent judiciary language of article 14 of the International Covenant on Civil and Political Rights (ICCPR). Since the obligations of the ICCPR have been accepted by 163 countries, the reasoning of the European Court of Human Rights concerning an independent judiciary is of interest to all countries that are Parties to the ICCPR. The significance of the Öcalan ruling is reinforced by an INTERPOL submission which describes how INTERPOL became aware of a series of judgments by a regional court wherein the court found that the mere presence of a military judge on a court negatively impacted the impartiality of the court. As a result INTERPOL notified the country involved in those cases that it could not cooperate with any request based upon a decision of a court affected by the participation of a military member. In most systems the presence of military members is now considered an unacceptable departure from the required independence of the judiciary. The contribution of the Irish expert reflects that while by law Irish Special Criminal Courts may include officers of the Defence Forces not below the rank of commandant, all members of the court since 1986 have been serving members of the judiciary. Even the power to appoint retired judges is no longer exercised, to avoid concern that there may be a lack of security of tenure and independence.

174. In Pakistan the Anti-Terrorism Act of 1997 created Special Courts for terrorism cases, appeals from which were directed to special Appellate Tribunals. In the case of *Hehram Ali and Others v. Federation of Pakistan* (15 May 1998) the Supreme Court decided that only the High Courts of the regular judicial system could hear appeals from Special Anti-Terrorist Courts. The court reasoned that this was necessary in order to maintain the constitutional independence of the judicial system. In the case of *Liaquat Hussain v. Federation of Pakistan* (17 February 1999), the Supreme Court held the military courts established for trial of civilians by the Pakistan Armed Forces (Acting in Aid of the Civil Power) Ordinance to be unconstitutional and without lawful authority. All cases were directed to be transferred to the Anti-Terrorist Courts.

175. In France, the Court of State Security, instituted in 1960 to deal with terrorism and attacks on the security of the State, was an exceptional court with respect to its composition and applicable procedures. It was abolished in 1981 and its caseload transferred to the courts of ordinary jurisdiction. However, it appeared necessary to the authorities, while strictly maintaining the principle of equal treatment of cases of terrorism in the framework of ordinary law, to permit certain adaptations to take into account the particular characteristics of terrorism. The centralization of proceedings, of investigation

and of judgment in the Tribunal of Paris has thus been provided in the framework of a concurrent competence with other courts having territorial jurisdiction. General or specific directives control the transmission of files on cases involving terrorism to the specialized court of Paris so that it has a global vision of all the cases that merit being considered together. This centralization avoids isolated treatment of cases, and mechanisms of control are provided in cases of conflict of competence. The centralization assures an in-depth knowledge of the environment in which the terrorists operate and of the means that they utilize. This facilitates effective cooperation both at the national and international level among the structures in charge of combating terrorism, including with the headquarters of the internal intelligence service.

176. The law of 1986 also provides, in order to avoid the risk of intimidation of citizen jurors, that the criminal jury in terrorism cases will be composed of professional magistrates. The law of 3 September 1986 has been recognized as constitutional by the French Constitutional Council. It has been amplified by additional provisions in recent years. Since 2007 the centralization also extends to the consequences of conviction in proceedings on measures of conditional liberty and more generally concerning the application of penalties. The expert from the International Association of Prosecutors is a member of the French judiciary. He described the benefit of the centralization of the investigation and trial of terrorism cases in the Tribunal of Paris introduced in 1986. This centralization requires sensitivity by the local judiciary to the importance of treating terrorist cases in the appropriate venue as well as a means for promptly resolving conflicts of competence. An example would be a series of armed bank robberies that might be regarded as acts of an organized crime group, whereas in fact they serve as a means of financing of terrorism and should be investigated by the authorities competent for terrorist acts.

177. Spain created a specialized Audiencia Nacional in 1977. The judges and prosecutors of this court have national jurisdiction and exclusive competence for offences of terrorism. According to article 520 of the Law of Criminal Adjudication the normal three day period of police detention can be increased by two more days with authorization of a judge. The detainee can be held *incomunicado* during this period if a judge so authorizes. However, this measure does not eliminate the right to be assisted by a lawyer, but the counsel must be publicly appointed. The measure of *incomunicado* detention can be applied to any criminal inquiry for crime and has the purpose of avoiding the flight of other suspects and to impede the concealment or destruction of evidence. With the exception of these particular measures, one applies the same procedural laws and the same probative standards as in any ordinary criminal case. In the opinion of the Spanish expert, specialized jurisdictions like the Audiencia Nacional enhance the capacity to deal with terrorism and other criminal phenomena because they allow judges and prosecutors to become expert in the subject matter. Centralization of investigation and of trials in one single organ permits the provision of greater security to the judicial officials and of greater efficiency in operations. Colombia has also created a group of prosecutors within the Prosecutor General's Office, the Unidad Nacional contra el Terrorismo, specializing in investigations of terrorism and related crimes. Specialized courts with jurisdiction limited to serious offences, including terrorism, exist throughout the national territory to judge these offences. It was a judge of a specialized court who issued the decision in the El Nogal case described in chapter II, section C, Criminal responsibility for directing and organizing terrorist acts.

178. Special courts have been used to deal with terrorism in other countries from time to time. A State Security court existed in Algeria but was abolished in 1989. In the early 1990s the first terrorist extortions resulted in the establishment of Special Criminal Courts in certain regions. They were dissolved in 1995 and the ordinary criminal courts now handle crimes of subversion and terrorism. Trial of terrorist cases now takes place in the civilian courts of justice before a presiding judge, two assistant judges and two jurors. Certain courts also have magistrates specialized in terrorism and organized crime to deal with cases requiring the extension of territorial competence. In Colombia, five regional courts to deal with drug trafficking and terrorism were created by the Constitution of 1991. Since 1999 specialized judges and prosecutors have jurisdiction over cases dealing with drugs, money laundering, terrorism and trafficking in military arms. Even in those cases intelligence information is admissible only according to the rules of evidence and must be fully disclosed and verified.

179. As explained in the contribution of the Irish expert, the danger of intimidation upon jurors in a divided community has long been recognized in Ireland and led to the creation of Special Criminal Courts. Article 38.3.1 of the Constitution of Ireland 1937 authorizes Special Criminal Courts to try offences:

“... where it may be determined ... that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.”

These courts consist of three judges sitting without the normal jury. Once a proclamation is issued by the Government determining that Special Courts are necessary, they are used to try offences against the State, firearms and explosives substance violations. A Special Criminal Court is also available in cases in which the Director of Public Prosecutions certifies there is a need for handling by a Special Court without a jury. These courts have been used not only for terrorism-related cases but also for cases such as *People (DPP) v. Gilligan* (Unreported, Special Criminal Court, 15 March 2001), in which the defendant was convicted of drug offences but acquitted of the murder of a journalist, Veronica Guerin. In *People (DPP) v. Kelly* [2006], 3 I.R. 115, a Special Criminal Court was held to have properly heard a case involving membership in the IRA as an illegal organization. Unlike a verdict returned by a jury, which is not accompanied by any statement of reasons, a Special Criminal Court opinion must be accompanied by an explanation of the Court's findings and reasoning. This written judgment facilitates appellate review and the correction of any erroneous action.

180. The procedure for establishment of Special Criminal Courts was held to be constitutional by the Irish Supreme Court in the case of *Joseph Kavanagh v. Ireland* [1996] IR 321, wherein the defendant asserted that the Special Criminal Courts were no longer necessary. An application was made to the ICCPR Human Rights Committee, which communicated its views that Kavanagh had been denied his right to equality before the law. Kavanagh sought enforcement of the Committee's opinion in Irish courts, but in 2002 the Supreme Court found that it could not be given effect or prevail over domestic legislation or a conviction. Mr. Kavanagh returned to the Human Rights Committee complaining of this action. On 25 October 2002 the Committee found Mr. Kavanagh's claim inadmissible. Its reasoning was that the claim presented nothing new except his failure to obtain a remedy in respect of a violation which the Committee believed had

been committed. This position seems consistent with the language of article 5.4 of the Optional Protocol to the ICCPR. That Protocol gives the Committee the authority to “forward its views” to the consenting State Party and to the concerned individual. Those views have moral weight, but not any enforceable status under international law.

181. In Northern Ireland, a Commission appointed by the Government recommended that certain cases connected to the emergency situation should be heard and determined by a judge sitting alone, without a jury. In 1973 legislation provided for a schedule of offences appropriate for trial by a judge alone, with a proviso that the Attorney General could de-schedule an offence not connected to the emergency, resulting in its trial with a jury. The judge hearing a case without a jury was required to provide a reasoned judgment in support of a decision to convict. These provisions were renewed in the Terrorism Act 2000, but allowed to lapse in 2007 when the Justice and Security (Northern Ireland) Act 2007 came into operation. The Director of Public Prosecutions for Northern Ireland was given power in the 2007 Act to certify that any indicted offence should be heard by a judge without a jury if: (a) he suspects that one of four conditions exists, and (b) he is satisfied that in view of that condition there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. The four conditions are:

- (1) The defendant is a member of a proscribed organization, or is an associate of such a person or has been a member of a proscribed organization;
- (2) Any of the offences charged was committed on behalf of a proscribed organization or such an organization was involved with or assisted in carrying out any offence charged;
- (3) An attempt has been made to prejudice the investigation or prosecution and the attempt was made on behalf of a proscribed organization or a proscribed organization was otherwise involved with, or assisted in the attempt;
- (4) Any of the offences was committed to any extent (directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.

182. In chapter III, section A, Association for the purpose of preparing terrorist acts, sections 129a and 129 of the German Penal Code were described. Section 129a criminalizes the formation of a terrorist organization. This offence is prosecuted in the first instance in a Higher Regional Court, with appellate jurisdiction in the Federal Court of Justice. The Chief Federal Prosecutor decides whether that office or a state prosecutor will handle the case. An offence under Section 129 of the Code involves an organization formed to commit an ordinary criminal offence not involving a terrorist purpose. That offence is handled by a state prosecutor with the court of first instance being a regional or county court, depending on the severity of the case and applicable punishment. Appellate jurisdiction for a section 129 case lies in a Higher Regional Court. In December 2008 Russia adopted amendments to its Federal Criminal Code and Code of Criminal Procedure. Crimes of terrorism, hostage taking and other serious offences against the security of the State will now be prosecuted before a court consisting of three profes-

sional judges. Previously, those crimes were subject to trial by a court sitting with twelve jurors in those regions of Russia, including Moscow, which had adopted jury trials.

183. The use of military courts, of special courts acting without a normal jury, of an extended period of police detention, of incommunicado detention or of specialized courts are among the more controversial means that can be taken to deal with terrorism investigations and prosecutions and to avoid intimidation. The submissions of the expert from the Republic of the Philippines describe how the simple physical transfer of the location of court proceedings, in that country's geographical circumstances, has helped to protect the judicial process from being blocked by intimidation or violence. In 2004 the trial of *People v. Khadaffy Janjalani*, an Abu Sayyaf leader charged with the kidnapping for ransom of an American visiting his wife's relatives was moved to the Manila area because of the influence of Abu Sayyaf and separatist groups in the Mindanao region. Similarly, the 2004 trial of the Abu Sayyaf members accused of kidnapping over 20 hostages from the Malaysian resort of Sipadan and holding them on Sulu in the Mindanao region was also moved to the Manila area. In the national capital it was much easier to physically protect the participants and the integrity of the trials. The Abu Sayyaf members responsible for the 2001 kidnapping at the Dos Palmas resort on Palawan Island were held for trial in 2007 at an installation in the Manila area. The wisdom of holding the defendants at an installation near the capital rather than in a less secure provincial facility was demonstrated when four of the defendants awaiting trial seized weapons from guards. Their escape attempt was frustrated by the presence of superior military force at the large installation which might not have been immediately available in a rural facility.

B. Relationship of intelligence collection to criminal investigation

184. Several experts described the integration of intelligence activities with the criminal justice system as a fundamental problem in dealing with terrorism. The division of counter-terrorism intelligence collection along geographical and functional lines between ministries, the desire to protect sensitive sources and methods, and concerns about protecting civil liberties create inherent difficulties in coordinating inquiries and prosecutions while protecting legally recognized rights.

185. A typical pattern in countries with large security establishments is to divide counter-terrorism intelligence collection along geographic, functional or technical lines. In Russia foreign intelligence collection is the responsibility of the Foreign Intelligence Service (*Sluzba Vneshney Razvedki*), and the Main Intelligence Directorate of the Armed Forces (*Glavnoye Razvedovatel'noye Upravlenie*), while internal security intelligence collection and enforcement are the responsibility of the Federal Security Service (*Federalnaya Sluzhba Bezopasnosti*). The counterpart structures of the United States Government are the Central Intelligence Agency, the Defense Intelligence Agency and the National Security Agency (concerned only with technical means of collection) for foreign intelligence, and the FBI for both internal security intelligence and evidence collection for prosecution purposes.

186. The Report of the National Commission on Terrorist Attacks upon the United States, in its Executive Summary, acknowledges the advantages of hindsight, but reaches the following conclusions concerning the attacks of September 2001:

“Nonetheless, there were specific points of vulnerability in the plot and opportunities to disrupt it. Operational failures—opportunities that were or could not be exploited by the organizations and systems of that time—included

- not watchlisting future hijackers Hazmi and Mihdar, not trailing them after they traveled to Bangkok, and not informing the FBI about one future hijacker’s U.S. visa or his companion’s travel to the United States;
- not sharing information linking individuals in the Cole attack to Mihdar;
- not linking the arrest of Zacarias Moussaoui, described as interested in flight training for the purpose of using an airplane in a terrorist act, to the heightened indications of attack;
- not discovering false statements on visa applications;
- not expanding no-fly lists to include names from terrorist watchlists;
- not searching airline passengers identified by the computer-based CAPPS screening system; and
- not hardening aircraft cockpit doors or taking other measures to prepare for the possibility of suicide hijackers.”

187. The above list illustrates failures of communication and execution by multiple agencies, including the Central Intelligence Agency, the Federal Bureau of Investigation and airport and aircraft security personnel. It is speculation to assume that a differently organized and coordinated system might have prevented the attacks of September 2001. What did seem evident to the so-called 9/11 Commission was that integrating the abilities of all relevant participants in the anti-terrorism process was the approach most likely to achieve optimum results. One of the obstacles to effective domestic communication was a self-imposed policy limitation within the United States Department of Justice that was removed by a 2002 court decision, *In re Sealed Case*, 310 F. 3rd 717 (United States Foreign Intelligence Surveillance Court of Review 2002). The centralized Foreign Intelligence Surveillance Court in Washington, D.C. authorizes domestic intelligence collection by electronic surveillance and other covert searches against agents of foreign powers and terrorists. Collection of evidence for use in criminal prosecutions is authorized by the ordinary federal district courts located throughout the United States under a different law. Prior to 2001, internal Department of Justice policy limited communication between intelligence agents and criminal investigators and prosecutors so that intelligence tools would not be used for criminal investigative purposes. The purpose of this limitation was to prevent the lower evidentiary standards and more permissive operational rules applicable to intelligence operations being misused to evade the necessity to comply with the higher standards required for collection of evidence. The relevant statutory language permitted use of certain covert collection techniques within the United States under the more permissive national security standards when “the purpose” of their use was to collect intelligence. The law was changed in October 2001 to allow such techniques when “a purpose” was to collect intelligence. This removed the implication that

an intelligence warrant could be sought only for intelligence purposes, and not to collect material that could be useful both as intelligence and as evidence.

188. Nevertheless, a judge of the Surveillance Court ordered that the former “wall” between criminal investigation and intelligence collection continue to be observed. The Government appealed. The appellate chamber of the Foreign Intelligence Surveillance Court expressed doubt that the Constitution had ever required a “wall” between foreign intelligence and criminal agents of the FBI (which serves as both the internal security agency and the judicial or investigative police of the United States national government). The court held that the 2001 statutory change made it clear that cooperative management of intelligence operations, taking into account both intelligence collection goals and criminal evidentiary purposes, was legitimate and should not be restricted.

189. An issue has arisen between the Tribunal of Paris, acting as the court of first instance, and the Court of Appeal of Paris concerning utilization of the results of intelligence activities for evidentiary purposes in criminal proceedings. In December 2008 the Tribunal condemned five former detainees at Guantanamo for the offence of terrorist association. In May 2009 the Court of Appeal reached the opposite result and released them. The case has been appealed to the Court of Cassation, and it will be necessary to await the result of that appeal before drawing final conclusions on this important question. The Court of Appeal in this particular case, contrary to the Tribunal, regarded the results of the questioning conducted by agents of the French secret service at Guantanamo to be inadmissible as evidence against the defendants.

190. More generally, the system in place in France has the advantage of permitting the pertinent facts resulting from intelligence activities to be admitted under certain conditions in criminal judicial proceedings. Thus, while a judge acts to authorize a telephone interception to collect evidence, it is the Government that has the responsibility of authorizing such interceptions for intelligence purposes, although any resulting recordings cannot be directly introduced as evidence at trial. However, the elements collected through intelligence operations can be summarized and included in the judicial investigative file without the sources or the methods of collection being specified. It is the task of the professional magistrate to decide whether or not to consider the intelligence information as admissible evidence. Nevertheless, this information cannot be sufficient in itself to justify a charge and must be supported by other elements. The power of the trial or appeals judges to make limited use of the product of intelligence activities in the context of the judicial proceeding reflects an ideal integration between those in charge of intelligence and those that act in the framework of the judicial police. The decision to come from the Court of Cassation in the case mentioned above will be valuable to illustrate the degree of separation that must be observed between the search for intelligence and the collection of judicial evidence.

191. Other countries achieve coordination by means such as Colombia’s Integrated Centre of Intelligence and Investigation (Centro Integrado de Inteligencia e Investigación). As described in the contribution of the Colombian expert the CI3 intelligence system as applied to a terrorist action like the El Nopal case is an investigative and operational strategy based upon six major components:

1. Leadership and command from a high-ranking official of the National Police of the efforts of police intelligence and of the Judicial Police;
2. Evidence gathering from the civilian population, the operation of human and technical sources, together with urgent actions such as searches and inspection at the scene of the events;
3. Verification of the information gathered by weighing its reliability, truthfulness and utility in the operational process;
4. An analytical process, followed by the identification of the *modus operandi* in order to establish the responsible parties and elements utilized in previous terrorist acts and to form hypotheses about the motives and authors of the terrorist act;
5. A judicial process with total legal transparency in operational activities, in which the Police undertake the collection of information and identification of persons and places;
6. Operational plans are the last phase of the CI3. This phase consolidates the operational results, having fully identified the material and intellectual authors of the terrorist crimes, and the legal support necessary in order to accomplish arrests, custody and searches. This phase requires a plan of attack to dismember the terrorist grouping and to identify the criminal typology responsible for the planning and execution of the terrorist act.

192. The contribution of the Kenyan expert described insufficient inter-institutional coordination. In a country such as Kenya, where the police are legally independent of the prosecutor's supervision, they may choose not to consult a prosecutor until investigative work is, in their opinion, complete. That situation can occur in a country where investigators and prosecutors are organizationally separate, where the police have no duty to file a notice of crime with a prosecutor or judge to begin an investigation, and where prosecutors have no judicial authority to direct investigations. However, when voluntary cooperation is achieved, it can be as effective as the typical civil law structure in which an investigating judge or prosecutor can require the police to conduct certain investigative steps. The contribution of the United Kingdom expert on *Regina v. Omar Khyam* listed cooperation between police and prosecutors as a factor contributing to success. That process was characterized as one in which the police recognized the utility of prosecutorial advice and voluntarily sought it during the investigation, while the prosecutors recognized their role as advisors who did not attempt to dictate operational activities.

193. An effective use of intelligence information was reflected in *People (DPP) v. Michael Kelly* [2006]. 3 I.R. 115. A statute allowed the opinion of a Chief Superintendent of the An Garda Síochána (the Irish national police force) to be considered as evidence of a person's membership in a suppressed organization, which is a criminal offence. This statute was attacked in the context of Kelly's trial because the Chief Superintendent had been allowed to assert a privilege against disclosure of his sources. The Supreme Court of Ireland upheld the admissibility of the evidence and found no resulting unfairness, as there was quite extensive evidence other than the opinion testimony. Among the

Court's reasons for allowing opinion evidence were the fear of reprisal that made direct evidence unavailable and the organizational position of the witness, which ensured that the opinion would be responsibly based. The Court was further reassured by the practice of the Director of Public Prosecution not to initiate a case based upon opinion evidence alone, and of the Special Criminal Court not to convict solely upon that basis.

194. Spain, Peru and the United States admit expert testimony by experienced police and intelligence officers at trial to establish such elements as the organization, history and terminology of groups accused of terrorist activity. The Spanish expert specifically mentioned that in the trial related to the attacks of 11 March 2004 in Madrid, experts of intelligence of the police testified to explain the structure, modus operandi and functioning of a terrorist cell. In none of the countries mentioned would such information be considered sufficient for conviction, as it serves only as corroboration or as background information. For the same purposes, the United Kingdom relies upon academic or other non-governmental experts who have studied particular movements, ideologies and regions. As explained by the United Kingdom expert, this approach is compelled because court rules allow cross-examination concerning the sources that contribute to an expert's opinion testimony. If government experts were to be used as expert witnesses, some of their sources and the methods by which information was acquired might be sensitive, or of foreign origin. While normally protected by secrecy provisions, such sensitive sources and methods would have to be disclosed on cross-examination or in pre-trial discovery procedures if they contributed to the expert's testimony. Consequently, the alternative has been adopted of using academics, who rely solely upon open-source information that can readily be disclosed.

195. As mentioned previously, in the French system police intelligence may be entered into the investigative file without a description of its ultimate source. In other legal systems, intelligence can contribute to the investigative process without directly becoming evidence. This can be accomplished by using the intelligence product as the confidential grounds for a judicial order to search a person or location or to utilize special investigative techniques. That search or those techniques may yield admissible evidence. In Hungary, Act XXXIV of 1994 on the Police Investigation of Terrorist Acts provides that covertly collected information, the identities of involved persons and the technical details of collection shall be state secrets until they are used as evidence.³⁵ Many countries allow judicial orders for intrusive evidence gathering based upon information received by the police from sources which remain confidential. The statutes or judicial rules of a particular country may require that the investigating officer swear or affirm, subject to criminal penalties, that he knows the unidentified source has the means to observe or acquire the asserted knowledge and that there is reason to believe the source is reporting accurately, such as corroborating surveillance of events reported by the source. Sometimes a prosecutor may also be required to verify that the use of a special investigative technique is necessary because other investigative techniques have been tried without success or reasonably appear unlikely to succeed.³⁶

196. The continued availability of domestic and foreign intelligence information for the development of criminal prosecutions will depend upon how well the legal system

³⁵See also the Law of the Republic of Moldova, No. 45-XIII of 04 April 1994.

³⁶Sections 2518, Title 18, United States Code.

protects such information. Courts in some systems have the explicit statutory power to treat information as privileged if its disclosure would threaten national security or the interests of the foreign Government that provided it. The Court may also summarize the information, rely only upon selected portions, or allow the prosecution to admit contested facts rather than disclose sensitive information, or combine these approaches. The German prosecution of Mounir el-Moutassadeq, an associate of the Hamburg cell that carried out the attacks of September 2001, presented this problem. The defendant demanded that an Al-Qaida prisoner held by the United States be provided to testify in his behalf. The United States authorities refused to send this prisoner, Ramzi Binalshibh, to testify in Germany. Eventually, the problem was solved by the production of summaries of the interrogation of Binalshibh and others. Those summaries provided the evidence sought by el-Moutassadeq, which was that Binalshibh disclaimed any knowledge of el-Moutassadeq being involved in the plot with his friend Mohammed Atta. El-Moutassadeq was nevertheless convicted for the deaths of airline passengers, as a result of other evidence that he knew an aircraft hijacking was planned, even though he may not know of the intent to crash the aircraft into occupied structures.

197. Canada and the United States both have legislation providing courts with mechanisms to resolve potential conflicts between an accused person's right to an effective defence and the need for protection of sensitive intelligence sources and methods. The Canada Evidence Act 1985 as amended in 2001 provides in article 38.06 that:

(2) If the judge concludes that the disclosure of the information would be injurious to international relations or national defence or national security but that the public interest in disclosure outweighs in importance the public interest in non-disclosure, the judge may by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any injury to international relations or national defence or national security resulting from disclosure, authorize the disclosure, subject to any conditions that the judge considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

198. The relevant United States legislation is called the Classified Information Procedures Act (CIPA) (1980), Title 18, United States Code Appendix III, Sections 1-16. It establishes procedures for pre-trial determination of the discoverability, admissibility and the use of classified information in criminal prosecutions. Classified information is defined as "any information or material that has been determined by the United States government pursuant to an Executive order, statute or regulation, to require protection against unauthorized disclosures for reason of national security". According to applicable Executive Orders 12,958 and 13,292, this includes material that would reveal intelligence activities, sources or methods, information about the military or foreign relations, and information provided to the United States by foreign governments with an expectation of confidentiality. The CIPA legislation provides an ex parte judicial determination in advance of trial of what classified information will be disclosed and gives the government the final choice whether a prosecution is worth the disclosure determined to be necessary by the court or should be dismissed. CIPA is used in terrorism cases to obtain a judicial determination if classified information must be produced to the defence, to permit a pre-trial resolution as to whether classified information is admissible at trial;

to obtain court authorization to substitute unclassified summaries for classified information; and to prevent the defence from publicly eliciting classified information that a court has determined should be protected from witnesses. Classified information from other jurisdictions and from international sources may also be protected under this legislation. An important feature that can give foreign intelligence providers confidence that their information will be protected is the provision that the United States Government has the final decision as to whether information will be disclosed. The judge may dismiss a prosecution but cannot compel the prosecution to produce information protected by the CIPA.

199. Unlike Spain, where security agents may testify using a government identification number, in the United States even undercover agents have routinely been required to testify using their true name and actual background information. The only exception to this practice has normally been to allow accomplice witnesses who are in a witness security program (and who must reveal their true original identity at trial and the benefits they have received for testifying) to conceal their relocated name, address and employment. The rationale has been that virtually complete transparency is necessary to effectively cross-examine the witness, but some minimum secrecy is necessary to prevent retaliation. That practice was extended to official witnesses in certain terrorism cases. In the case of *U.S. v. Padilla*, a Central Intelligence Agency officer was permitted to testify using a false name concerning the source of documents seized in Afghanistan.³⁷ The so-called Holy Land Foundation conviction in *U.S. v. Shukri Abu Baker and others*³⁸ involved alleged material support to terrorism by a large charitable organization. An Israeli intelligence agent was allowed to testify anonymously concerning the tracing of funds. Concealment of the true identities of the witnesses in those cases was a relatively minor departure from the normal rule of full disclosure. The official status and duties of the witness were revealed and the defence was able to explore and present to the jury the possibility of bias or lack of knowledge on cross-examination even without knowing the true name of the witness. The fact that innovative approaches were used show that not only the executive and legislative branches of government but also courts are aware of the need to devise innovative solutions to problems of national security and international intelligence cooperation.

C. Lengthy periods of prescription

200. Long-term investigative and prosecutorial commitment to terrorism cases and correspondingly lengthy periods within which prosecution is possible are necessary because of terrorists' mobility and success in use of false identity documents. Even before the massacre of tourists in Luxor in 1997, Egypt's Law No. 97 of 1992 eliminated prescription for terrorism offences because of their devastating impact on people and society's sense of safety and stability.

³⁷Case 04-60001-CR, *United States v. Adham Amin Hassoun, José Padilla and others*, Southern District of Florida, filed 17 November 2005.

³⁸Case 304-Cr, *United States v. Holy Land Foundation for Relief and Development, Shukri Abu Baker and others*, Northern District of Texas, filed 26 July 2004.

201. A number of cases show the utility of laws either abolishing proscription for certain serious offences, establishing a long time period before proscription makes it impossible to bring a terrorist to justice, or extending, suspending or renewing that period when the accused or convicted person flees a country. Prosecution was possible for most of the murders committed by the November 17 revolutionary group in Greece after a member was injured by a bomb in 2002 and revealed the history of the organization's murders, but only laws suspending or extending proceedings would have allowed prosecution for assassinations in the mid-1970s, which were beyond the period prescribed by law. A conviction in absentia that provides necessary procedural guarantees can also make possible the subsequent arrest and incarceration of the defendant. Khalid Husayn was convicted by an Italian court in 1987 for preparing the seizure of the cruise ship *Achille Lauro*, in which a passenger was killed. He was a fugitive from justice until arrested in Greece in 1991 for arms trafficking. In 1996 he was extradited to Italy, where he died in 2009 while serving a life sentence. Ilich Ramírez Sanchez, also known as the terrorist Carlos, was prosecuted in France in 1997 for murders committed in 1975, also after having been convicted in absentia and then re-tried after being returned from Sudan.

202. Japanese Red Army executive Fusako Shigenobu was indicted in 2000 for her role in directing the unlawful capture and confinement of hostages and the crime of attempted murder during the seizure of the French Embassy in The Hague in 1974. She was convicted and sentenced to 20 years in 2006 even though the period of prescription for the 1974 offence was 15 years at the time of the offence. The conviction has been upheld on appeal and is now pending before the Supreme Court. Prosecution was possible, as explained by the Japanese expert, because she was proved to have been outside of Japan between 1974 and 1997, and prescription is suspended when a fugitive is outside the national territory.³⁹ As a consequence Japanese authorities continue efforts to arrest persons who hijacked a Japanese aircraft to North Korea and have been fugitives there since March 1970. JRA member Kazue Yoshimura was deported from Peru to Japan in 1996 to be prosecuted for the same 1974 hostage taking at the French Embassy in The Hague, Netherlands. Yukiko Ekita was deported from Romania and convicted in Japan in 2002 for attempted murder and explosives violations. Her trial had been interrupted in 1977 when she was released in exchange for hostages seized on a flight from Japan to Bangladesh. Upon its resumption she received a 20-year sentence. Four other JRA members were prosecuted in Japan for terrorist acts and passport violations committed in the 1970s after being expelled from Lebanon in 2000. In 2004 Japan increased its period of prescription for homicide from 15 to 25 years.

203. Italy enacted legislation in 2007 providing that offences punishable by life imprisonment are not extinguished by proscription. The necessity to provide for a long fugitive search for international terrorists was recognized in the French anti-terrorism law of 1986, which extended the period of proscription from 20 to 30 years for the most serious terrorism offences and from 10 to 20 years for less serious crimes. Even an

³⁹Paragraph 1 of article 255 of the Code of Criminal Procedure stipulates that: "Where the offender is outside Japan or he/she conceals him/herself so that it is impossible to serve a transcript of the charging sheet or notification of the summary order, the statute of limitations shall be suspended during the period when the offender is outside Japan or conceals him/herself"

active extradition request can last a decade, such as the French request to the United Kingdom for the return of Rachid Ramda. Ramda provided material support to the Groupe Islamique Armé in subway and rail bombings in Paris and elsewhere. Extradition was requested in 1995 and granted by the United Kingdom in 2005, with convictions following in 2006 and 2007.

VI. Investigation and adjudication issues

A. Characteristic investigative obstacles

204. The history of terrorism cases reflects characteristic obstacles. Bombing cases by their nature make the physical collection of evidence a painstaking process of dealing with human remains, collecting and analyzing explosives residue, and searching for the means of delivery and triggering mechanism. Terrorism investigations are resource intensive, often require extensive forensic capabilities and depend upon having investigative tools capable of penetrating a conspiratorial group. The admissibility of the results of electronic surveillance and the means of motivating the cooperation of accomplices, including a witness security programme, were viewed by the experts as particularly necessary. Finding effective means of dealing with terrorists' use of the Internet requires dramatic improvements in the legal structure for international cooperation.

205. The enormity of the effort required to investigate terrorist acts can initially seem overwhelming. Investigation of the 1989 bombing over Niger of a flight of the airline Union des Transport Aeriens required a vast area of desert to be searched and 15 tons of material to be sent to France for analysis. A high level of technical skills is necessary to keep pace with the sophistication of persons trained to commit terrorist acts. The contribution of the Colombian experts on the El Noyal bombing detailed the forensic skills required for bomb blast analysis, identification of the remains of over 30 victims and potential perpetrators, and the ability to reconstruct and analyse communications information. The contribution of the Russian expert described how in a 2005 pipeline bombing in the Republic of Tatarstan, forensic examination demonstrated that explosive traces on a rucksack and from the suspect's clothes matched traces from the explosion. In another case, members of a violent group trained in Chechnya were taught the skills to build an improvised explosive device using a commercially available watch, requiring investigators to be able to recognize such devices in addition to their other police skills.

206. In *People (DPP) v. Kelly*, [2006] 3 I.R. 115 the Irish Supreme Court upheld the admissibility of opinion evidence on membership in illegal organizations in part because "witnesses will not come forward under fear of reprisal". The contribution of the Kenyan expert cited the same reluctance of witnesses, compounded by lack of a protection or relocation programme. Other obstacles to successful prosecution were the lack of skilled forensic examiners, absence of advance protocols on management of a crime scene, confusion over division of responsibilities and lack of standard operating procedures. The same forensic and organizational deficiencies cited by Kenya figure prominently in the reports of the International Investigation Commission concerning the investigation of the Hariri assassination in Lebanon. In contrast, the simultaneous bombings of four Banamex offices in Mexico City were solved by careful forensic examination, coupled with traditional neighborhood investigation and mining of databases for available intelligence to identify suspects.

207. The Spanish expert contribution referred to problems involving an accurate determination of the explosives used in the 11 March 2004 attacks in Madrid, and to identification of the suspects. The trial of that prosecution involved the declarations of 29 accused persons, approximately 300 witnesses, and approximately 100 experts in matters of explosives, DNA, fingerprints, ballistics, documents, translation, medical forensics, psychiatry and other matters. According to the Spanish expert, the oral trial proceedings served to correct erroneous public impressions and to demonstrate that the rights of the accused and of the victims were respected. In the view of the Spanish expert, this victory of the rule of law in the Spanish judicial system is the greatest tribute that could be paid to the victims by establishing the true facts and punishing the guilty.

208. The materials supplied by an Italian expert describes several cases in which organized crime adopted terrorist tactics to influence state policy, previously described in chapter IV, section C, Terrorism and organized crime. The judgment in the Aglieri prosecution lists the witnesses who testified concerning the bomb explosion that killed Director of Penal Affairs Giovanni Falcone and others. The scientific testimony included the expected medical, explosives, DNA, fingerprint, communications and crime scene experts, as well botanists to testify on the foliage conditions of the lookout position from which the bomb was detonated, and the records of an earthquake monitoring centre which could place the exact time of the explosion from its shock wave recorded 65 kilometres away.

209. An indication of the resources required to effectively investigate acts of terrorism involving bombing is revealed by the United Nations 2007 personnel budget for the International Investigation Commission, created to investigate the bombing of former Lebanese Prime Minister Rafiq Hariri and related crimes. 188 international and 51 national positions are provided, in addition to Lebanese Government resources devoted to the investigation of the Hariri assassination. That investigation has been ongoing for years, which is not uncommon because terrorism inquiries tend to be slowed by the destruction of evidence and the successful concealment tactics of experienced terrorists. In addition, the organizational nature of the crime may result in the slow accumulation of evidence of relationships and activities, rather than a sudden discovery of evidence identifying the perpetrator of an offence.

210. The contribution of an Italian expert described how Italy's Operation Al- Muhajirun lasted six years. Phase 1 involved the Salafist Group for Preaching and Combat sending fighters from Italy to Chechnya and resulted in convictions of Essid Sami Ben Kemais and others for criminal association, stolen goods offences involving false documents and aiding illegal migration. Phase 2 resulted in additional convictions for criminal association and support activity related to attacks to be carried out in Germany and France. Phase 3 also resulted in criminal association and stolen property convictions, and searches in the case produced a large volume of documents requiring further investigative and evidentiary analysis. Each of the phases of this complex inquiry resulted in investigative leads and connections to other situations, demonstrating the immense resources required to properly conduct inquiries into international terrorist organizations and activities.

211. Use of electronic communication media by terrorists poses particular investigative problems both because the Internet knows no geographic boundaries and the current

structure and operation of the World Wide Web facilitate anonymity. Many substantive offences related to incitement, recruitment, praising of terrorist and terrorist acts apply to electronic contact just as they would to personal interaction. However, the anonymity that can easily be achieved by even minimally sophisticated Internet users can be a difficult investigative obstacle to overcome. The United States expert explained how constitutional concepts of free speech in his country create dual criminality problems that obstruct cooperation when a cooperation request is received from another country that requires compulsory judicial action, such as interception assistance, or website and stored communication information, some of which is available only from United States sources. Moreover, the rapidity with which Internet operations can be carried out requires international cooperation mechanisms capable of operating with unprecedented speed and flexibility. All these problems dictate the need for a legal regime responsive to the technical and legal issues, and the industry pressures, involved in terrorist attacks on computer security, terrorist use of the Internet for communication, self-radicalization by access to sites depicting and praising violence, and the easy availability of instructions on the construction of bombs and other weapons. The well-known Encyclopedia of Jihad has been available on websites used by Al-Qaida since at least 2003. It consists of several thousand pages of instructions on fabricating explosives and bombs, use of firearms, security precautions, first aid, reconnaissance, infiltration, map reading and sabotage. The Egyptian contribution indicated that the persons responsible for a bomb attack on 7 April 2005 in a bazaar in the Al-Azhar area and the suicide bombing and shootings of 5 May 2005 were all committed by a Salafi Jihadist group. A leader of that group had a document described as a Jihadi encyclopedia with instruction on how to manufacture explosives and files on electrical circuits and timers for explosive devices, a hard disc with files on electric circuits and information on planting landmines, explosives and making poisons.

212. With respect to the issue of coordination, the French system operating under the legal authority and guidance of an experienced corps of investigating magistrates and prosecutors was described by several experts as providing an effective and efficient means of utilizing all necessary means of inquiry. The United Kingdom contribution emphasized the synergy that results when investigators voluntarily seek prosecution advice to guide an investigation and prosecutors provide legal advice without trying to direct the investigation. The contribution of the Japanese expert is to the same effect—that investigations of terrorist acts are usually very complicated and it is difficult to gather evidence and apply laws. For this reason, it is common that the police, even though they are legally independent, report the case to the public prosecutor in the early stages of an investigation and consult with the public prosecutor when evaluating evidence and interpreting laws.

213. Despite extensive investigation, terrorism trials are difficult, if for no reason other than their length, which creates continuity of staffing and logistical problems. Much of the relevant evidence may have been destroyed or simply be unavailable, and errors may occur in the investigation and prosecution. The prosecution in Argentina of a car thief and four policemen suspected of complicity in the Buenos Aires bombing of a Jewish community centre ended in acquittal in 2004 after nearly three years of testimony by nearly 1,300 witnesses and experts. The Canadian trial of two Sikh militants accused of murdering 329 victims in the bombing an Air India flight on 23 June 1985 lasted from

28 April 2003 until 16 March 2005 and ended in acquittal. Even successful prosecutions may become endurance contests because of their length and complexity. The trial of the 1988 bombing of Pan-Am Flight 103 over Lockerbie, Scotland involved the application of Scottish law by a court sitting in the Netherlands, and lasted from May 2000 until 31 January 2001, with the appellate proceedings not completed until 2002. The trial of the November 17 group assassinations in Greece lasted ten months in 2003 and involved approximately 500 witnesses and scores of lawyers. Convictions for the financing of terrorism resulted from the retrial of persons associated with the Holy Land Foundation, a fund raising organization based in the state of Texas in the United States. However, the convictions followed an inconclusive two month trial in late 2007 and a two month re-trial in late 2008, and were based upon an investigation reaching back nearly 15 years. The 11 March 2004 train attacks in Madrid resulted in the prosecution of 18 persons, even though seven of the plotters had blown themselves up in an apartment in a nearby town and others escaped. Several of the actual bombers were captured and prosecuted with other accomplices.

214. The submission of the United Kingdom expert described the trial of Omar Khyam and others for plotting to bomb a London nightclub or other location. Even though the planning for the attack had been monitored for much of its duration the trial still lasted almost an entire year. Practical consequences mentioned in the United Kingdom submission included the need for an ongoing verbatim trial record that could be consulted to recall the details of evidence given months before and the desirability of electronic presentation of evidence to enhance its intelligibility. That same submission also mentioned the need for firm judicial control of a lengthy proceeding, which might suggest the desirability of a panel of experienced or particularly qualified judges to handle lengthy and particularly challenging cases. In the United Kingdom all terrorism cases have a Mandatory Preparatory Hearing. These hearings allow an early decision and an immediate appeal on disputed points of law and resolve questions concerning the continued detention of the defendants.

215. Experience shows that it is difficult to demonstrate to a court the scope of a criminal conspiracy without electronic surveillance, infiltration of the group by a police agent or the cooperation of a member of the group as a testifying witness, and the ideal is the availability of all of these means of proof. In order to furnish better tools for the investigation of terrorism in 2006 Algeria adopted a law permitting microphone and video surveillance and the interception of correspondence. These means must be authorized and executed under the direct control of the prosecutor. The same law authorizes the technique of infiltration for the purpose of investigating terrorism or organized crime, and foresees and allows the agent to commit specified minor infractions in the course of the infiltration. The secrecy of the agent's identity is carefully protected by law but the infiltration must be conducted under the authority of the prosecutor or investigating magistrate. The utility of technical surveillance of communications was demonstrated by the ability to prevent the planned bombing of the Strasbourg Christmas market in December 2000 and the success of the prosecution described in the United Kingdom expert's presentation on *Regina v. Khyam*. As mentioned in chapter III, section F, Incitement to terrorism and other violent offences, Mohammed Hamid and a number of his associates were convicted in 2008 in the United Kingdom for solicitation to murder, providing training for the purpose of terrorism and attending a terrorist training camp.

The charges were supported by a number of means of proof, including physical and microphone surveillance and the testimony of a covert police agent who had infiltrated Hamid's group. These special investigative techniques are an essential aspect of a preventive anti-terrorism strategy. It would accomplish little to create modern preventive offences allowing punishment of the preparation of terrorist acts, without equipping government authorities with the powers to secure timely information and secure admissible evidence about those preparations.

216. Cooperative witnesses have proved their value in overcoming some of the difficulties inherent in terrorism prosecutions. The Spanish expert described a case in Barcelona in which eleven persons had been charged with membership in a terrorist organization and possession of explosives for terrorist purposes and are in custody awaiting trial. Their intent was to construct explosive devices, to be detonated between the dates of 18 and 20 January 2008 on the public transport network in Barcelona. A cooperating witness furnished the intelligence services with information that a meeting would be held to organize the bombings within the next 72 hours. This information necessitated an urgent operation by the Guardia Civil. The persons gathered to commit the offence were arrested, including the two spiritual leaders of the group, five persons involved with explosives, and three intended suicide bombers. One additional person was transferred for prosecution pursuant to a European Arrest Warrant.

217. The conviction of the Taliban member in *U.S. v. Khan Mohammed*, described in chapter IV, section B, Terrorism and narcotics trafficking, depended upon the testimony of a cooperating witness who negotiated for the purchase of narcotics with the defendant in Afghanistan. In the Khyam case contributed by the United Kingdom expert, Babar, an American citizen of Pakistani descent, was an influential member of the conspiracy. Although not charged in the United Kingdom, he had been arrested in the United States after returning from Pakistan, confessed his terrorist activities, and pleaded guilty to multiple charges. He also became a cooperating witness, with the promise that he would be placed in the American Witness Security Program after service of a prison sentence. His testimony in the United Kingdom was thoroughly corroborated as a result of careful investigation and trial preparation. Such corroboration is crucial to overcome the natural suspicion that a person testifying in order to secure a reduced sentence will do whatever he hopes will make his testimony seem more valuable to the prosecution. In the prosecution of the 1998 Nairobi and Dar es Salaam Embassy bombings, the background of the planning was furnished by the accomplice Jamal Al-Fadl. Al-Fadl had been an associate of Osama bin Laden and other defendants in Afghanistan and Sudan until a financial dispute occurred. After being prosecuted he pleaded guilty and recounted numerous conversations about the planning of terrorist acts, thus placing the various defendants in their proper roles in the complex plot.

218. A cooperating accomplice can serve as a witness to those acts in which he or she participated. In addition, subject to technical rules about hearsay evidence in some countries, the witness can furnish valuable evidence about other terrorists and violent acts which the perpetrators discussed with him. If the participant's cooperation can be secured while he is still accepted as a member of the group, his information can allow the conduct of technical operations, the introduction of undercover agents and the operation of ruses. These imaginative techniques can lead to spectacular successes such as

the 2008 rescue by Colombian authorities of a number of hostages after years of captivity by the FARC. When accomplice testimony is used in conjunction with covert surveillance of communications, the persuasiveness of the witnesses is reinforced by the recorded voices of the defendants corroborating the story being told by the witness. Evidence, such as computer messages and discs, documents and intercepted conversation, which previously were meaningless because of the use of code or simply a lack of knowledge of their context, can now be interpreted by a knowledgeable witness.

219. Philippine cases are examples of cost-effective use of a witness protection programme. In the Sipadan kidnapping foreign witnesses could testify against the Abu Sayyaf kidnappers and safely return to their distant homes, but a Filipino national had to be admitted to the programme to preserve his safety and that of his family. In the case of *People v. Khadaffy Janjalani* against Abu Sayyaf kidnappers, a cooperating former member of Abu Sayyaf testified under the protective custody of the Witness Protection and Security Benefit program of the Philippine Department of Justice. Such a programme must have a legal foundation for effectively re-documenting persons, hiding their criminal pasts, and dealing with such mundane issues as the visitation rights between divorced spouses with children and the person's credit history. The Hungarian Act XXXIV of 1994 on the Police Investigation and Prosecution of Terrorist Acts allows creation of false official documentation to provide personal histories for protected persons.

220. Legislative provisions that can motivate cooperation are described in the submission of the Egyptian expert concerning the applicable Egyptian law. Acquittal from sanctions in crimes of terrorism may be obligatory or optional. It is obligatory when the offender cooperates with authorities prior to perpetration of the crime and before investigation is initiated. Acquittal is optional when notification takes place after the crime is committed and when the offender enables authorities, during the investigation, to catch other perpetrators, or perpetrators of another crime similar in type and severity. Statistics furnished by the United Kingdom's Crown Prosecution Service suggest that incentives, such as the hope of a lower sentence, may be motivating guilty pleas in terrorism cases. The conviction rate for terrorism-related prosecutions in 2007 and 2008 was 88 per cent. Forty-five individuals were found guilty after trial and 35 pleaded guilty.

B. Interrogation laws and protections

221. Experienced investigators recognize that no other techniques are as fundamental and effective against all forms of criminality as the basic police tools of witness interviews and interrogations of suspects. Custodial interrogation plays a central role in effective counter-terrorism investigation and prosecution. The importance of this technique is demonstrated by the widespread legislative attention given to its authorization and conditions, and by the contributions furnished by the Expert Working Group members. It also must be remembered that terrorists, perhaps because of their belief in the righteousness of their actions, have frequently and voluntarily confessed to their crimes.

222. The contribution by the Kenyan expert described how the Evidence Act of 2003 limited the admissibility of confessions to police officers during the period when the Nairobi Embassy bombing was being investigated. A confession is theoretically

admissible if made in court or under certain restricted conditions. In the cases of *Republic v. Aboud Rogo and others* and of *Republic v. Kubwa Mohammed Seif and others* these conditions were not found to exist and a detailed confession was suppressed. The Rogo case involved an attack which killed 15 victims, mostly Kenyans, at an Israeli vacation hotel. In the Seif case three defendants were charged with four counts of conspiracy to bomb the American Embassy in 1998, a subsequent plot to bomb the replacement Embassy, the bombing of the Paradise hotel, and the attempted destruction of an Israeli airliner with a missile. One defendant confessed his role, but the confession was ruled inadmissible. The inadmissibility of the confession, together with the inability to use information from confidential sources or to provide witness relocation, left insufficient sources of evidence to secure a conviction. All defendants in both trials were acquitted.

223. The United States trial of M. Sadeek Odeh and M. Rashed Dhoud Al-Owhali, both charged with participation in the Nairobi, Kenya bombing, reached a different result. Al-Owhali made a full confession and Odeh made incriminating admissions to FBI interrogators, all of which were admitted at trial and contributed to their convictions and sentences to life imprisonment. United States practice attaches great emphasis to interrogation, but requires explicit legal warnings before custodial interrogations. Moreover, presentation to a judge is required without unnecessary delay, meaning as soon as practical and usually within 24 hours, so the prisoner will be advised of the charge and of applicable rights by a neutral magistrate. Despite being advised of the right to remain silent and to consult with legal counsel, terrorism suspects have readily, and even proudly, acknowledged their role in murderous attacks. The appellate court opinion reviewing the Embassy bombing convictions noted that Mr. Al-Owhali asked as a condition for speaking to FBI agents in Kenya that he be promised he would be tried in the United States, as that country was his enemy and not Kenya.⁴⁰ He then insisted that the form waiving his right not to be questioned be corrected to reflect his true name rather than the alias he had used until that time. A co-defendant in the same trial, Khalfan Mohamed, also made a full confession with regard to his role in the Dar es Salaam Embassy bombing when questioned by FBI agents in South Africa.

224. Similar results were observed in the trial of Ramzi Youssef and co-defendant Abdul Murad. After being expelled from Pakistan, Youssef voluntarily confessed to FBI agents on the flight to the United States. He described how he organized the first attempt to destroy the World Trade Center in 1993 with a truck bomb in its underground garage. Murad confessed his part in the Manila plot to bomb 12 United States airliners in 1995. Airline hijacker Fawaz Yunis was arrested on a yacht on the high seas and confessed while sailing to the aircraft carrier from which he would be transported to the United States for trial. Richard Reid, who attempted to destroy a flight from Paris to the United States by igniting the fuse leading to plastic explosives in the heel of his tennis shoe, confessed within eight hours of his attempt. His subsequent claim that the confession was not voluntary was rejected and he pleaded guilty to the charges. These examples illustrate that highly motivated persons may, for their own reasons, be eager or at least willing to admit their involvement in terrorist acts. Reid, for example, told agents after

⁴⁰In re Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93 (2nd Cir. 2008), West Publishing Company.

being taken into custody that he was convinced that his mission must end in death or imprisonment. When entering his plea, Reid's request to remove references to his training and involvement with Al-Qaida from the indictment was denied, at which time he pleaded guilty, stating that:

"I don't care. I'm a follower of Osama bin Laden. I'm an enemy of your country and I don't care."

225. Chapter IV, section C, Terrorism and organized crime, describes how the tactics of organized crime can become almost indistinguishable from those of terrorist groups. This happens when organized crime uses violence in an effort to coerce the State, which is one of the characteristic definitions of a terrorist intent. Italy was successful in combating ideological groups using terrorist tactics in the 1970s and 1980s, and with applying the tools developed in those struggles to combat the Mafia in the 1990s. A lesson to be learned from that experience is that the Mafia's fabled *omertà*, or code of silence, was effective only until the State confronted it with measures that were effective and consistent with human rights guarantees. Legal incentives for cooperation, witness security measures, adoption of modern evidence gathering techniques, such as electronic surveillance, and more severe substantive and custodial laws forced Mafia members to choose between a precarious existence, lengthy incarceration or cooperation. In that situation even the feared killers and heads of Mafia clans, particularly those threatened by internal rivals, became government witnesses and revealed the secrets of their organizations. Some people expect terrorists to have a strong sense of discipline and an unwillingness to respond to questioning because of their ideological or religious fanaticism. Experience in the terrorism cases cited above has shown that without illegal pressures, many terrorists are proud to confess, or perhaps to boast of, their terrorist acts. Moreover, a significant number have become cooperative witnesses, like many organized crime members who have become collaborators of justice. The expert from Algeria noted that person who surrender pursuant to the terms of that country's reconciliation programme often denounce former colleagues who would otherwise threaten them and their families.

226. Every legal system differs in its rules for custodial interrogation and for the time limits and procedures that protect the person in custody from abuse. An experienced practitioner in the French system describes how the arrests of suspects normally take place when an investigation is well advanced, often in combination with a search. The *garde a vue*, or custodial interrogation by the police, is highly important. The interrogation permits an initial verification of the significance of the documents and objects seized, such as computer discs. This can be done without the person arrested having the opportunity to warn others or to coordinate an explanation with them. When the investigative file is well constructed with solid elements of proof against the person arrested, that person is inclined to talk. Those statements are reduced to a formal police summary and have probative value. French courts may draw adverse inferences from a failure to answer in certain circumstances. That is true even if the suspect subsequently attempts to retract or explain the silence.

227. Other countries recognize that initial limits upon an arrested person's ability to communicate with others help to protect the integrity of an investigation. Terrorism is normally a group crime. There is often a risk that one suspect will, directly or through intermediaries, warn other suspects to flee, to conceal or destroy evidence, or simply to

coordinate false explanations for their conduct. Countries with considerable experience in confronting organizations that use terrorist means tend to have detailed legislation spelling out the permissible limits of detention, the involvement of the judiciary, and the right to communicate with counsel and others. In France, as described by the expert submissions, the initial period of *garde a vue* is 24 hours, and was subject to judicial extension up to 96 hours until 2005. After the Madrid and London bombings of that year, the maximum period allowed for police custodial interrogation was raised from four to six days. This limit applies in emergency situations with the authorization of a judge of liberty and detention or the investigating judge, after having observed the person held in custody. Access to a lawyer is allowed after the first 72 hours in the presence of a judge.

228. Articles 509 and 520 of Spain's Code of Criminal Procedure allow judicial authorization of *incomunicado* detention in any investigation of a criminal offence. The *incomunicado* detention, for any crime, lasts only for the time strictly necessary to carry out urgent steps to avoid that the person evade prosecution; injure the rights of the victim; hide, alter or destroy evidence, or commit new crimes. This *incomunicado* period cannot last more than five days, and in the cases of terrorism and of organized crime can be judicially extended for another period not exceeding five days. Only in cases of terrorism can the judge or tribunal order that the suspect be returned to *incomunicado* detention for no more than three days when the development of the investigation makes it advisable. This possible *incomunicado* period of 13 days includes five days in police custody, which had been ten days until the Spanish Constitutional Court ruled that five days was the maximum period allowable under police, rather than judicial control. To guard against the possibility of abuse, article 520 guarantees a medical examination. In Morocco, a suspect may be held *incomunicado* for 96 hours, then in custody with access to an attorney for up to 12 days with the approval of the magistrate. The initial time period of police detention in Algeria is 48 hours, with the possibility of that period being extended five times with prosecutorial approval.

229. Human rights groups have criticized the allowable length of detention under French, Spanish and United Kingdom law. Their criticisms are based upon fears of abuse, upon decisions of the European Court of Human Rights, such as the landmark case of *Brogan v. UK*,⁴¹ and upon article 9.3 of the International Covenant on Civil and Political Rights, which provides that

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

The Human Rights Committee established pursuant to the ICCPR has issued a General Comment on this article, stating that in its opinion the delay before presentation to a judge should not exceed a few days. Article 5.3 of the European Convention on Human Rights similarly provides that:

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this article shall be brought promptly before a judge or other officer authorized

⁴¹*Brogan v. United Kingdom*, No. A-145, decided 29 November 1988, 11 E. Ct. H.R. 117 (1989).

by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

230. The Brogan decision by the European Court of Human Rights dealt with four individuals who were detained without having been brought before a judge for periods ranging from four days and six hours to six days and 16 hours. The Court found that even the shortest period of detention without presentation to a judge was per se a violation of the European Human Rights Convention, while stating:

“There is no call to determine in the present judgment whether in an ordinary criminal case any given period, such as four days, in police or administrative custody would as a general rule be capable of being compatible with the first part of article 5 para. 3.”

231. In view of the provisions of the ICCPR, the European Convention on Human Rights, and decisions similar in effect to that in *Brogan v. United Kingdom*, it seems logical to ask whether legislation that allows custodial detention for periods of six, thirteen, or 28 days or more automatically violates any standard of international human rights law. The answer of many national legislatures is that it does not if appropriate guarantees of judicial supervision and protection against abuse are provided. The ICCPR, the European Convention on Human Rights and the Brogan case all deal with the period before presentation to a judge, whereas the statutes in question deal with the period of custodial detention for investigation before a person is either charged or released. Within that custodial period, all of the national laws mentioned provide for presentation of the person in custody to a judicial officer within a few days.

232. French law requires that detention beyond the first two days be authorized by a judge after hearing the detainee. The prosecutor and investigating judge also have a responsibility to ensure that the detainee has access to a doctor and to a lawyer after the first 72 hours of detention; although an obligation not to reveal the meeting can be imposed on the attorney. Article 520 and 520 bis of the Spanish Law of Criminal Adjudication requires the detainee to be released or made available to the judge within 72 hours of arrest. In cases of armed bands, terrorist groups or rebels the detention can be extended for the time necessary for investigative purposes, up to a maximum limit of another 48 hours, provided that this delay has been requested by a motivated police request made within the first 48 hours of the detention and authorized by the judge in the following 48 hours. Article 527 allows a terrorism detainee whose incommunicado detention has been ordered by a judge to consult only with an appointed lawyer, not one of his choice, and does not allow communication with other persons during the initial period of custody. During this detention, access to counsel is controlled, and that counsel is appointed rather than a private counsel chosen by the person in custody. A publication by the non-governmental organization Human Rights Watch acknowledged that the prohibition on private counsel during the initial detention period in Spain may have justification in the long history of members of the organization ETA using lawyers associated with ETA to prejudice investigations. In Morocco, a suspect may be held incommunicado for 96 hours, then in custody with access to an attorney for up to 12 days with the approval of the magistrate. The initial time period of police

detention in Algeria is 48 hours, with the possibility of that period being extended five times with prosecutorial approval.

233. The United Kingdom Terrorism Act 2000, as amended in 2006, allows a maximum of 28 days detention. However, police have authority to detain a person only up to 48 hours, with custody reviewed every 12 hours by a superior officer who must meet with the detainee and prepare a written report on the reasons for continued detention. After 48 hours, any application for continued custody requires authorization by a High Court Judge. In order to establish grounds for continued custody, the Judge will require an explanation of the necessity for continued detention, including what enquiries are outstanding, what it is anticipated will result from those enquiries during the continued detention, and what will be the subject of interview during the extended period. Access to a lawyer chosen by the person in custody may be refused for good reason, but an appointed lawyer should promptly be provided in those circumstances. The United Kingdom Contribution indicates that since the detention period was extended to 28 days in 2006, extensions beyond 14 days had been used in only three cases as of the time of the last Expert Working Group meeting in Rome in June 2009.

234. The contribution of the Egyptian expert explains that public prosecutors are granted the powers of an investigatory judge. As such, the prosecutor can order the preventive detention of an accused for 15 days, which can be extended to a total of 60 days, and in certain circumstances up to six months. The preconditions for such detention are that the prosecutor or investigatory judge has found incriminating evidence, and orders detention only after interrogating the suspect, except in case of his escape. A further provision of Egyptian law, added in Law No. 145 of 2006, guarantees the right of an accused by requiring the investigating authority to have an attorney appointed to accompany the accused in all procedures should he fail to have an attorney of his own. The Attorney General published a circular in July 2006 instructing prosecutors to summon an attorney before interrogating the accused or confronting him with other accused persons or witnesses, and to have an attorney appointed if the accused does not have one or that attorney does not appear. An exception applies if the person is caught in the act or there is danger of evidence being lost by inaction. However, the role of the attorney is limited in the sense that any information that the attorney wishes to elicit from the client for the record is subject to control by the prosecutor. If the prosecutor refuses to address a question, it shall be mentioned in writing in the record and not addressed to the accused.

235. In France, the *juge d'instruction* is the authority that normally authorizes certain investigative techniques and with the *juge des libertés et de la détention* can decide to extend the normal 48 hour period of pre-charge detention up to six days in terrorism cases. In countries that have ratified the European Convention on Human Rights, and conforming to the case law of the European Court of Human Rights, the extension of the *garde à vue* must be validated by a judge. As a consequence, whatever may be the status of the prosecutor and the greatly variable relationship of that position to the Executive, the Court has the responsibility of managing the proceedings and it is advisable that a judge review the length of pre-charge detention.

236. Many national laws contain a protection against arbitrariness that requires that after an arrest, the person be promptly advised of the nature of the offence for which

they are being detained. That same guarantee appears in article 9.2 of the ICCPR, which provides:

“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.”

The contribution of the Russian expert advises that the European Court of Human Rights interpreted section 5.2 of the European Convention, which contains the same guarantee as the ICCPR, in *Fox, Campbell and Hartley v. U.K.*, (Applications no. 12244/86; 12245/86; 12383/86), decided 30 August 1990; and in *Murray v. U.K.*, Application No. 1431/88, decided 28 October 1994. In both cases the Human Rights Commission had found a violation of the obligation to promptly inform arrested persons of the reasons for their detention and determined that telling a person they were being held for being a terrorist was too vague to satisfy the requirement. In reviewing the Commission's decisions, the Court found that the questioning of the suspects within a few hours of their arrest about specific facts and circumstances allowed the suspects to understand their situation and satisfied the obligation to promptly inform of the reasons for arrest.

237. Other limits to interrogation are set by the International Convention against Torture. That treaty requires its 145 Parties to criminalize torture, to refrain from expelling or extraditing anyone to face torture, and also prohibits admission of any evidence secured by torture. It further requires that:

“Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual to any form of arrest, detention or imprisonment.”

238. Section A of this chapter, dealing with Characteristic investigative obstacles, mentioned the Irish Criminal Justice Act 2007. A provision of that law permits a court to draw “such inferences as seem proper” from a person's failure or refusal, prior to the filing of charges, to mention particular facts when questioned by the police or when charged with an arrestable offence. The drawing of such inferences is allowed only if the circumstances call for an explanation and if certain safeguards are observed, for example, if the person detained was warned what the consequences of such refusal might be and had a reasonable opportunity to consult a solicitor. This permissible inference is a rule of evidence that should be distinguished from the criminal offence created by the Offences Against the State Act, 1939 and involved in the case of *Heaney and McGuinness v. Ireland and the Attorney General* [1996] 1 I.R. 580. Section 52 of the Offences Against the State Act, 1939, makes it an offence, when asked by the police, to fail to provide details of one's movements during a specific period. The Supreme Court of Ireland upheld the constitutional validity of the law as a proportionate intrusion upon the right of silence. In the *Heaney and McGinnis* case the European Court of Human Rights found that the measure caused a denial of the right to fair trial guaranteed by article 6 of the European Convention on Human Rights.

C. Fair and effective trial procedures

239. Use of intelligence information for evidentiary purposes; accomplices testifying with expectations of sentence leniency, protection and financial support; testimony by anonymous witnesses; and limitations on cross-examination all must be accompanied by judicially-supervised measures to ensure equality of arms between the prosecution and defence and a fair trial.

The jurisprudence of a number of countries suggests that measures to achieve the right to a fair trial while permitting effective prosecution should include:

- That evidence exists to warrant conviction independently of information whose origin and means of collection is kept secret;
- That accomplice testimony be regarded with suspicion; and
- That equality of arms is ensured by adequate disclosure of material useful for testing the credibility of prosecution witnesses.

241. Section A, Characteristic investigative obstacles, of this chapter described the evidentiary advantages of testimony from a cooperating witness who infiltrates a criminal group at government direction, or from an accomplice. Accompanying precautions should be taken because accomplices may consider it in their self-interest to falsely or carelessly incriminate a person in the hope of making their testimony more valuable to the prosecution and more likely to result in a lenient sentence, protection and financial support. The Irish expert described the Court of Criminal Appeal ruling in *People (DPP) v. Paul Ward* (Unreported, Court of Criminal Appeal, 22nd March 2002). A witness who was involved in the murder of journalist Veronica Guerin received immunity and furnished evidence implicating others in the murder. The trial court convicted, while acknowledging the witness was a “self-serving, deeply avaricious and potentially vicious criminal” who would “lie without hesitation”. The Court of Criminal Appeal allowed the appeal against conviction, finding that:

“The law has always recognized that the evidence of an accomplice—even an accomplice who appears to be a credible witness—must be corroborated from independent sources or alternatively that the jury should be warned, or a tribunal of fact reminded, of the dangers of convicting without such corroboration.”

242. In *People (DPP) v. Gilligan* [2006] 1 I.R. 107 the Supreme Court of Ireland dealt with an attack on the testimony of witnesses in a protection programme. The claim was that such programmes lacked transparency and accountability and that the testimony of protected witnesses should be excluded because of their self-interest. As described by the Irish expert, the Court analogized the testimony of a person in a witness protection programme to that of other accomplices, as to which there is no rule of automatic rejection. The proper standard is that the judge or jury must clearly bear in mind and be warned that it is dangerous to convict on the evidence of such a witness unless it is persuasively corroborated. If duly warned and convinced beyond a reasonable doubt, despite the fact that the evidence comes from an accomplice, then the judge or jury may properly convict.

243. Careful trial preparation will always stress corroboration to independently support the accuracy and credibility of an accomplice's testimony. The contribution of the United Kingdom expert described the complex issues in the trial of Regina v. Omar Khyam. In his opening statement in that trial, the prosecutor emphasized that the testimony of the cooperating witness Babar would be corroborated by extensive documentation and other evidence, much of which had been kept secret from Babar. That degree of foresight in witness handling and trial presentation minimizes the effectiveness of any suggestion that the witness has tailored his testimony to conform to other evidence.

244. The resort to terrorism by organized crime in its struggle with the Italian State in the 1990s has already been mentioned. The judgments in the relevant cases show that the responsible judicial authorities took care to ensure that the accused in those cases were not unfairly prejudiced by the testimony of accomplices who had self-interested motives for cooperating. The Aglieri sentence in connection with the murder of Dr. Giovanni Falcone and others killed with him begins with a chapter on the general principles applied in evaluating the twenty "pentiti" or collaborators of justice whose evidence was considered in the trial. Among the legal and psychological factors mentioned are the capacity of the witness to observe and recall events, the logical coherence of the account, its spontaneity and details, its consistency and verifiability, and the interest and motivation of the witness. The next chapter considers the background and motivation of each collaborator. The overall evidence is then reviewed and the credibility of each collaborator's testimony is then evaluated in the context to which it is relevant.

245. Each legal system will have its own rules on the timing and detail of what information must be disclosed to ensure a fair trial. It is common that information usable to contradict the prosecution's evidence or cast doubt on the State's case must be disclosed in sufficient time for its effective for use by the defence. The expert submission from the United Kingdom concerning the prosecution of Omar Khyam shows that in preparation for trial there was a need to review investigative materials and intelligence for information that would be helpful to the defence. In that case there was a dispute over the disclosure surrounding the evidence of the accomplice Babar. The United Kingdom expert submission described trial preparation difficulties as including the "vast quantities of unused materials that need to be read and assessed for possible disclosure if it undermined the prosecution case or assisted the defence". The witness Babar had entered into an agreement in the United States to cooperate in exchange for a prosecution promise to recommend leniency to the sentencing judge and for financial and security assistance under the Witness Security Program. Disclosure of the prior statements of the witness, of promises made to him, and of his expectations of leniency and financial support were all matters that a defence counsel would insist were essential to a fair trial. A solution was found which allowed an American prosecutor who was familiar with the facts and issues to facilitate disclosure for the United Kingdom prosecutor.

246. The initial conviction by a German court of Mounir el-Motassadeq, an associate of the Hamburg cell involved in the attacks of September 2001, was vacated because the United States government refused to make captive Al-Qaida leader Ramzi Binalshibh available as a witness, which the defendant claimed denied him favorable evidence. In subsequent proceedings a number of interrogation summaries were provided which included a denial by Binalshibh that el-Motassadeq had any knowledge that the

defendant knew of the plot to fly aircraft into buildings. Independent evidence established that the defendant had known of the plot to hijack aircraft. As a result, el-Motassadeq was found responsible for the deaths of the airline passengers, but not of the victims killed on the ground on 11 September 2001.

247. In *People (DPP) v. McKeivitt* (Unreported, Court of Criminal Appeal, 9 December 2005) the defendant was accused of being a member of and directing the activities of an unlawful organization. At issue was the credibility of a cooperating witness, David Rupert, an American who had infiltrated the IRA at the direction of the American Federal Bureau of Investigation and the British Security Service. Derogatory information concerning Rupert and his past history was in the possession of the FBI. The Irish Court of Criminal Appeal concluded that so much derogatory information was provided for use by the defence “in the huge volume of material disclosed and the oral testimony of representatives of the foreign agencies, that there existed no real risk of an unavoidably unfair trial”. The Court of Criminal Appeal granted an application to have points of law in the case determined by the Supreme Court, effectively allowing a fresh appeal to that court. Among the grounds of appeal was that the defence case had been undermined through prosecution failure to disclose all material relating to the credibility of David Rupert. The Supreme Court held that the pivotal issue was determining the credibility of a witness when there was documentary evidence relevant to his credibility in the possession of parties out of the jurisdiction. In such a case, the prosecution’s disclosure obligations were fulfilled when the Court was satisfied that all reasonable good faith efforts had been made to secure such documentation and that a high level of cooperation had been given by the foreign parties in response to such efforts.

248. The nature of an offence may also create a need for the exercise of special care to achieve a fair trial. The criminalization of conduct done with the intention of committing acts of terrorism was examined in chapter III, section E, Individual preparation for terrorist act. Even otherwise innocent acts, such as buying maps or photographing a famous building, can be punished under such a law. The criminality of the act depends upon the intent with which it is done. A court should therefore pay particular attention to the persuasiveness of the proof of that mental element. A person’s mental state of knowledge or intention can rarely be known directly except by that person’s words. In a prosecution for preparing an act of violent terrorism, electronic interception of a suspect’s communication furnishes highly persuasive evidence. Covertly recording a subject’s conversations provides one of the few ways to directly prove a person’s intent. Testimony of co-conspirators can also furnish proof of a defendant’s intent. This accomplice testimony requires rigorous adherence to the precautions mentioned above about evaluating such testimony with great caution, with the accompanying disclosure of material potentially relevant to the defence.

249. At the same time, the value of circumstantial evidence as a means of demonstrating the true facts should not be undervalued. In most legal systems circumstantial evidence is regarded as no less valid than direct evidence from an observer. However, circumstantial evidence depends upon drawing inferences based upon logic and experience from proven facts, which may be subject to more than one interpretation. A terrorist who is careful not to make damaging admissions to potential witnesses or to the police can ensure that no direct evidence exists of his mental state. Nevertheless, legal systems

throughout the world recognize that proof of what a person does, such as living under a false identity and acquiring ingredients usable in construction of a bomb, is a reliable indicator of that person's intent. The Spanish expert and others mentioned the indisputable probative value of circumstantial evidence, such as the transmission through the Internet of violent messages and videos of executions, beheadings, praise of suicide attacks and of a holy war, the possession of manuals or instructions on fabrication of arms and explosives, or participation in training camps. Reference is also made to the discussion of indirect, or circumstantial, evidence in chapter II, section C, Criminal responsibility for directing or organizing terrorist acts. That discussion provided an example of how the leaders of the organization ETA were found responsible for terrorist attacks. The circumstantial evidence relied upon included proof of their contact with the material executors of the attack at critical times and proof that such violent attacks were only carried out with the authorization of those leaders.

250. If a defendant does not confess upon interrogation and there are no witnesses or surreptitious recordings to testify to his words, some judges are reluctant to find that the accused acted with a criminal intent. In that situation, the value of circumstantial evidence as a means of demonstrating the true facts should be recognized. Indeed, the value of circumstantial evidence is explicitly emphasized in a number of global conventions, such as the 1988 Vienna Drug Convention, the 2000 United Nations Convention Against Transnational Organized Crime and the 2002 United Nations Convention Against Corruption. The language of article 28 of the Corruption Convention is representative:

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

251. This ability to draw evidentiary inferences may be based upon customary practice in a legal system or may be expressly stated in legislation. The Irish Criminal Justice Act 2007 permits a court to draw “such inferences as seem proper” from a person's failure or refusal, prior to the filing of charges, to mention particular facts when questioned by the police or when charged with an arrestable offence when the circumstances call for an explanation. The drawing of such inferences is allowed only if certain safeguards are observed, for example, the person detained is warned what the consequences of such refusal might be and has a reasonable opportunity to consult a solicitor. Judges may feel more secure drawing other common sense conclusions of this nature if a country's laws contain a general rule of evidentiary interpretation such as that found in Section 119 of the Kenya Evidence Act:

“Presumption of likely facts

The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

252. A useful discussion on the inferences to be drawn and the factors to be considered in the sentencing of defendants is found in the Reasons for Sentence issued on 12 March 2009 in the case of *The Queen against Mohammed Momin Khawaja*, No. 4-G30282 in the Ontario Superior Court of Canada. The sentencing judge reviewed the statutory purposes of sentencing under section 718 of the Canadian Criminal Code, which states that:

“The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community;
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.”

253. The court applied this analysis in sentencing Khawaja, a Canadian citizen who was constructing 30 bomb detonators for the defendants prosecuted in the United Kingdom case of *Regina v. Khyam*. At sentencing he and his parents refused to address issues relating to his responsibility for the crimes for which he was convicted. The Court inferred from this absence of information concerning his potential for rehabilitation that there were no mitigating factors to be considered other than his relative youth (mid-20s at the time of the offence), interest in education and good work record. The court reviewed applicable authorities with the following observations:

“In terrorism sentencing particular emphasis is placed on the elements of denunciation, deterrence, and protection of the public by separating the offender from it. Moreover, where acts of terrorism are pursued for religious or ideological cause, it may be considered that even personal deterrence may be of less significance than protection of the public. In *R. v. Martin* (1999) 1 Cr AppR (S) 477 at 480, Lord Bingham C.J. said at p. 480 ‘In passing sentence for the most serious terrorist offences, the object of the Court will be to punish, deter and incapacitate: rehabilitation is likely to play a minor [if any] part’. In *Lodhi v. Regina*, [2007], NSWCCA 360 the New South Wales Court of Criminal Appeals said, ‘Rehabilitation and personal circumstances should often be given very little weight in the case of an offender who is charged with a terrorism offence. A terrorism offence is an outrageous offence and greater weight is to be given to the protection of society, personal and general deterrence and retribution.’”

254. A similar sentencing analysis is described in the publication *Compendium of Terrorism Cases Decided by Ethiopian Courts* (2007). The Trial Court reasoned that the objective of punishment is primarily to educate and rehabilitate. As to defendants who had killed multiple victims with bombs in hotels and buses and had made an assassination attempt on a Government Minister, it was found necessary to impose penalties that forewarn others and redress those that were directly affected by the criminal acts. The Supreme Court of Ethiopia upheld these severe penalties in order to deter potential terrorists.⁴²

⁴²Description of the case of *Public Prosecutor v. Mohammed Mahemud Farah and others* in *Compendium of Terrorism Cases Decided by Ethiopian Courts* (2007) of the Capacity Building Programme Against Terrorism of the InterGovernmental Authority on Development.

VII. International cooperation

A. The obligation to extradite or prosecute

255. The obligation to either extradite a fugitive or to refer that purpose for prosecution under the domestic law of the country where the person is found was a key provision of the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism. Since 1970 it has been the fundamental mechanism for international cooperation in all of the universal terrorism-related conventions and protocols that create criminal offences.

256. Many bilateral treaties and every one of the universal terrorism-related conventions that creates a criminal offence contain an article containing the above obligation. Typical phraseology is found in article 7 of the Convention for the Suppression of Unlawful Seizure of Aircraft (1970).

“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. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”⁴³

257. The application of the “extradite or prosecute” principle and how it can help resolve sensitive political situations is demonstrated by the case involving Mohammed Hamadei. In 1985 a Trans World Airlines flight left Athens for Rome. During the flight armed hijackers seized control of the flight and diverted it to Beirut. On the ground, American citizen Robert Stetham was shot in the head and thrown out of the plane. In 1987 Hamadei was arrested at the Frankfurt, Germany airport carrying liquid explosives. He had already been charged in the United States in connection with the aircraft hijacking, and his extradition was immediately requested. Under the terms of the Germany-United States bilateral extradition treaty and the 1970 Convention for the Unlawful Seizure of Aircraft, Germany was obligated to either extradite Hamadei or submit the case for prosecution in the same manner as a serious domestic offence. Two West German citizens were kidnapped in Lebanon about this time, and Hamadei’s brother was subsequently convicted in Germany for complicity in that act. German authorities declined the American request for the extradition of Mohammed Hamadei and elected to prosecute

⁴³See article 7, Convention for the Suppression of Unlawful Seizure of Aircraft (1970); article 7, Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971) and its 1988 Airport Protocol; article 7, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973); article 8, International Convention against the Taking of Hostages; article 10, Convention on the Physical Protection of Nuclear Material (1979) and its 2005 Amendment; article 10-1, Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) and its Fixed Platform Protocol and the 2005 Protocols to those two instruments; article 8-1, International Convention for the Suppression of Terrorist Bombings (1997); article 10-1, International Convention for the Suppression of the Financing of Terrorism (1999); and article 11-1, International Convention for the Suppression of Acts of Nuclear Terrorism (2005). So-called “extradite or prosecute” articles appear only in the terrorism-related conventions, but not in the protocols thereto. The reason is the legal status of the protocols. A State cannot adopt a protocol unless it is a Party to the original convention, as the protocol merely supplements the relevant convention. Thus the supplemental agreements do not contain a separate article on the obligation to extradite or prosecute because that obligation is found in the convention being supplemented by the protocol.

the aircraft seizure, hostage taking and murder offences. The hostages in Lebanon were released. Mohammed Hamadei was convicted and sentenced to life imprisonment. American authorities, while expressing a preference to have prosecuted the case in the United States, publicly expressed understanding for the German position, cooperated with the German prosecution by supplying necessary witnesses, and complimented German authorities for the resolution of the case.

258. An interesting question of the enforceability of the extradite or prosecute obligation was raised by the Libyan Arab Jamahiriya before the International Court of Justice (ICJ) in connection with the bombing of Pan-American Airlines Flight 103 over Lockerbie, Scotland in 1988. Two Libyan nationals were charged in Scotland and the United States with the attack and their extradition from the Libyan Arab Jamahiriya was publicly demanded. When extradition was not forthcoming, sanctions against the Libyan Arab Jamahiriya were sought in the United Nations Security Council. The Libyan Arab Jamahiriya sought relief in the ICJ, asserting that under the International Convention for the Suppression of Unlawful Acts Against Civil Aviation (1971) its obligation was to extradite or prosecute. Pursuant to that obligation the Libyan Arab Jamahiriya advised the ICJ it had arrested the suspects and submitted the case for prosecution, and therefore was in compliance with its treaty obligations. It consequently asked the court to take provisional measures to prevent the United Kingdom and the United States from seeking sanctions against the Libyan Arab Jamahiriya or taking other adverse measures. The Security Council passed several sanctions resolutions and in 1992 the ICJ declined to impose preliminary measures restraining the United Kingdom and the United States from taking actions adverse to the Libyan Arab Jamahiriya. In 1998 the Court ruled on preliminary objections to its jurisdiction and found that a dispute existed under the 1971 Convention which it had competence to adjudicate.⁴⁴ No decision on the merits was ever announced, as the case was withdrawn by the parties in 2003.

B. Political offence exception

259. The political offence exception to extradition historically created a dilemma in terrorism cases. Acts of terrorism are almost always political in nature, as they are committed to expressing ideological and religious opposition to governments and their policies. There is a current trend to limit this exception and to replace it with more precise mechanisms that do not immunize terrorist violence, but do protect against discriminatory prosecution.

260. The Republic of Ireland expert explained that Ireland, like other common law countries, at one time followed the precedent of *In re Castioni*, [1891], 1 Q.B. 149 (England). That decision used a three-part test to determine if a common crime could be regarded as a political offence. The elements were whether a political revolt or disturbance existed, whether the act charged was a part of or incidental to the disturbance, and whether

⁴⁴Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom, Libyan Arab Jamahiriya v. United States of America (judgments of 27 February 1998).

the act was motivated by an ideological or political motive. This test focused upon opposition to a Government rather than upon the effect of activities upon the civilian population. Persons whose acts were clearly intended to intimidate and coerce the Unionist population in Northern Ireland were able to rely on the proposition that their offences were political in nature in order to avail themselves of the political offence exception and thereby escape extradition. The political offender status of these offenders was eliminated when Ireland adopted the European Convention on the Suppression of Terrorism in its domestic law in 1987. France at one time observed the so-called Mitterrand doctrine, which prevented the extradition of members of violent revolutionary groups in Italy who relocated to France. However in 2002, Paolo Persichetti, convicted of complicity in murder and other offences, was ordered to be extradited to Italy. Marina Petrella, convicted in the 1980s of murder and kidnapping, was ordered to be extradited in 2008. The extradition order was later revoked, with the stated grounds being a humanitarian exception based upon ill health, rather than a political exception. Cesare Battisti, convicted in 1979 for assassinations and robberies, was ordered to be extradited to Italy from France but fled and found refuge in Brazil. He was granted political asylum in 2009, but that decision has been appealed to Brazil's Supreme Court. The 1996 terrorist murders for which Fehriye Erdal was charged in Turkey were not committed with one of the weapons specified in the European Convention for the Suppression of Terrorism, allowing application of the political offence exception. The Belgian Government declined to extradite her, and a Belgian court found that it lacked jurisdiction to try her for murders committed in Turkey. She is now a fugitive, having fled Belgium in 2006 before being imprisoned pursuant to a sentence for weapons and false document offences committed in Belgium.

261. A contribution by the Japanese expert describes an effort by a Chinese national to avoid extradition by invoking the political offence exception. This person hijacked a China Air flight with 223 passengers on board in December 1989 by threatening to destroy the aircraft with explosives. The hijacker claimed that his motive for forcing the plane to land at a Japanese airport was to seek political asylum due to his involvement with the Tiananmen Square incident of June 1989. He therefore claimed protection under the political offence exception contained in the Japanese Extradition Act. The subject was surrendered to the Chinese Government in February 1990 after a ruling by the Tokyo High Court that the hijacking was not a political offence. The court reasoned that the unlawful seizure had no direct relevance to a political purpose and was an effort to avoid prosecution for bribery. Moreover, any political connection with the Tiananmen Square incident did not outweigh the victimization to which he subjected the passengers and crew of the commercial aircraft.

262. Cases in which the United States failed to extradite fugitives accused of involvement in violence in Northern Ireland were formerly a source of diplomatic tension. The degree of tension contributed to a revision of the United States–United Kingdom extradition treaty in 1985. That revision limited the scope of the political offence exception, particularly with regard to murder and other serious acts of violence. The contribution of the INTERPOL member of the Expert Working Group describes how that organization initially refrained from undertaking any activity in the field of counter-terrorism. That policy was based on its constitutional prohibition against undertaking “any intervention or activities of a political, military, religious or racial character”. In

1984 the INTERPOL General Assembly concluded that the Constitution was not an a priori prohibition of cooperation in cases of international terrorism. It adopted a resolution allowing the organization to become active in this field. INTERPOL's General Secretariat examines each request for international police cooperation on a case-by-case basis. It is now generally accepted in INTERPOL practice that the political offence exception does not apply to offences of terrorism. Since this resolution was adopted, the organization has carried out numerous counter-terrorism initiatives and it now considers this field to be one of its priority crime areas. As an example, the Fusion Task Force was created in 2002 and conducts six regional meetings each year. These meetings bring together members working in the area of counter-terrorism to exchange information, examine current trends and issues in the region and discuss case studies. As of June 2009, 141 countries participate in the activities of the Fusion Task Force.

263. The universal terrorism-related agreements negotiated since 1997⁴⁵ abolish the political offence exception for crimes defined in those agreements and include a non-discrimination article that protects against discriminatory treatment based on a wide range of impermissible considerations, not just political activity. The standard language for these articles was first used in the International Convention for the Suppression of Terrorist Bombings (1997):

“Article 11. None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 12. Nothing in this convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.”

264. Attempts to invoke the political offence exception as a justification for domestic offences have also been rejected. Two examples from Sudan are of interest. In February 1973 the Black September organization seized hostages at the Saudi Arabian Embassy in Khartoum. They demanded the release of Sirhan Sirhan, who had been convicted in 1969 of the assassination of United States Senator Robert Kennedy, and of numerous prisoners incarcerated in Jordan, Israel and Germany. When their demands were not met the hostage takers killed one Belgian and two American diplomats. The Supreme Court

⁴⁵Articles 14, 15 International Convention for the Suppression of Terrorist Bombings (1997); articles 14, 15. International Convention for the Suppression of Terrorist Financing (1999); articles 15, 16 International Convention for the Suppression of Acts of Nuclear Terrorism (2005); articles 11A and 11B of the Amendment to the convention on the Physical Protection of Nuclear Material (2005); articles 11 *bis* and 11 *ter* of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation .

of Sudan rejected claims that under international humanitarian law the crimes should be considered political offences in support of the Palestinian Resistance. The Court's found that the Geneva Conventions did not apply to violence committed in Sudan against diplomats of countries with which Sudan was at peace. The political purpose of the defendants' acts was taken into account in determining their sentence, but was not considered a justification that would prevent a prosecution.⁴⁶

265. A similar result was reached in a decision involving attacks in Khartoum in 1988. Five Palestinians belonging to an organization calling itself the Arab Revolutionary Cells entered Sudan for the purpose of attacking Western interests. Machine gun and pistol fire and hand grenades were directed at the Sudanese Club, wounding one Sudanese national. At the Acropolis dining room a bomb killed a British United Nations employee, his wife and two children, and caused three other foreign and Sudanese fatalities and seven wounded victims. In response to the defence that the acts were a political offence, the Sudanese court found that the asserted political nature of an offence may be relevant for the purpose of extradition or for sentencing, but not with respect to culpability for a domestic criminal offence.⁴⁷

C. Lures and expulsions

266. There is no international law rule that prohibits extradition of a person lured from their home country by trickery. Even when extradition would be possible, accused persons frequently have been expelled on national security or immigration grounds, sometimes without any judicial procedure. Depending upon its domestic law, such removals may not prevent the country to which the person is expelled from exercising criminal jurisdiction. Many countries follow the principle that courts do not normally inquire into how personal jurisdiction was acquired over a person. Such cases will, however, encounter rigorous scrutiny if there is any issue with respect to torture, discriminatory treatment or imposition of the death penalty.

267. The Federal Constitutional Court of Germany has examined the international authorities and determined that no rule of international law prevents extradition when persons have been lured from their home country by subterfuge. An official of a country that does not extradite its nationals and his secretary were lured to Germany by an informant. While there Germany received a request for their extradition, to which the Government of their country of nationality objected. The German Constitutional Court was asked by the fugitives to decide that there was a rule of international law prohibiting the extradition of a person who was lured by trickery to leave his own country. The court found that there was no such rule and that the majority of courts allow extradition in cases in which a person was lured to leave his country by trickery. The Court took no position with respect to cases in which the subject of extradition might have been forcibly abducted.⁴⁸

⁴⁶Description of the case of Rizik Salim Abou Ghassan and others in *Judicial Precedents in Combating Terrorism in Sudan (2007)* of the Capacity Building Programme Against Terrorism of the Inter-Governmental Authority on Development.

⁴⁷Description of the case of Sharif Izzat Atwy and others in *Judicial Precedents in Combating Terrorism in Sudan (2007)* of the Capacity Building Programme Against Terrorism of the Inter-Governmental Authority on Development.

⁴⁸Decision in BverfG, 2BvR 1506/03 of 5/11/2003.

268. In discussing the prevalence of passport and visa violations in chapter IV, section E, False identity and immigration violations, numerous cases of Japanese Red Army members being returned to Japan were mentioned, including four individuals expelled from Lebanon, sent to Jordan, refused entry there, and turned over to Japanese authorities and flown to that country. None of the convictions of these persons were found improper because of the fact they were expelled rather than extradited.

269. The American Supreme Court case of *Alvarez Machain v. United States* (1992) did not involve an expulsion by a cooperating government. In fact the case was the subject of vigorous protests by the Mexican Government. A doctor had been abducted from Mexico by Mexican citizens acting on behalf of American authorities. The fugitive was delivered to the United States for trial on a charge that he was involved in the torture of an American Drug Enforcement Agent. Citing precedents that courts may properly exercise jurisdiction over someone forcibly brought within the jurisdiction, the Supreme Court refused to dismiss the charges or order the accused to be repatriated to Mexico. Despite political and diplomatic protests, the prosecution went forward. It ultimately resulted in an acquittal.⁴⁹ Although not involving terrorism, the legal rule confirmed in the opinion has been relied upon in subsequent prosecutions involving expulsions of accused terrorists. The *Alvarez Machain* decision concluded that the existence of an extradition treaty did not preclude the acquisition of personal jurisdiction by other means unless expressly prohibited by the treaty. It also concluded that the means by which a person has been brought before a court do not normally affect its jurisdiction so long as torture or other inhumane means were not involved.

270. Consistently with that opinion, Egypt Air hijacker Ali Rezaq was convicted in the United States of aircraft piracy after being expelled from Nigeria.⁵⁰ Ramzi Youssef was expelled from Pakistan and convicted in New York for complicity in the first bombing attempt to destroy the World Trade Center in 1992 with a truck bomb in its parking garage. Since the expulsion happened a day after his arrest, as described in the appellate court opinion, one can assume no lengthy judicial extradition proceedings were involved.⁵¹ The Nairobi and Dar es Salaam Embassy bombers, M. Sadeek Odeh, Mohamed Al-Owhali and Khalfan Mohamed were expelled by Kenya (Odeh and Al-Owhali) and deported by South Africa (Mohamed). The European Court of Human Rights, and a predecessor screening body, the European Commission on Human Rights, have on occasion invoked interim measures to delay expulsions. However, the Court has upheld a number of controversial expulsions, including the cases of *Freda v. Italy*, (1980), 21 DR 20; *Klaus Altmann (Barbie) v. France* (1984) 10689/83; and *Sanchez Ramírez v. France* ((1996), 95 DR 86-B. The opinion by the Grand Chamber of the Court in *Öcalan v. Turkey*, No. 46221/99 (3 December 2005) examined the arrest in Kenya and the return to Turkey for trial of Abdullah Öcalan. Öcalan is well known as the leader of the PKK, or Kurdish Workers' Party. He was the subject of an INTERPOL Red Notice based upon charges of having instigated multiple murders and of rebellion against the Turkish Government.

⁴⁹As a result of the controversy over the abduction, a treaty was subsequently negotiated between Mexico and the United States prohibiting cross-border abductions. It has not yet entered into force. In addition *Alvarez Machain* sued the American government and those who carried out his abduction. He secured a favorable ruling in lower courts, but in 2004 the case reached the United States Supreme Court, which ruled that the applicable statutes did not allow a suit for an arrest made outside the United States.

⁵⁰*United States v. Rezaq*, 134 F. 3rd 1121 (D.C. Cir. 1998), West Publishing Company.

⁵¹*Youssef v. United States*, 327 F. 3d 56 (2nd Cir. 2003), West Publishing Company.

271. Öcalan was expelled from Syria in 1998 and unsuccessfully sought political asylum in several countries. He eventually entered Kenya, where personnel of a foreign Embassy escorted him through the airport to the Ambassador's residence. Kenya subsequently complained that Öcalan had entered Kenya without declaring his identity or going through passport control, and that the concerned Ambassador initially denied the person was Öcalan. After meeting with the Kenyan Foreign Minister, the Ambassador informed Öcalan that he was free to leave. Kenyan authorities took Öcalan to the airport and delivered him to waiting Turkish authorities, who immediately transported him to Turkey for trial. The Court found that the Turkish charges were authorized by law. It then examined whether acts by Turkish officials violated Kenyan sovereignty and international law. Having found that there was voluntary informal cooperation between the Turkish and Kenyan authorities, the Court determined that the arrest and transportation were in accordance with "a procedure authorized by law" for the purposes of article 5.1 of the European Convention on Human Rights.

272. Of the predecessor cases to Öcalan, those of Klaus Altmann (Barbie) v. France, No.10689/83 and Ilich Ramírez Sanchez v. France, No. 8780/95, are particularly instructive. This is because France has a statute providing that "Extradition obtained by the French Government shall be null and void in cases other than those specified in this Act."⁵² In the course of finding no violation of the European Convention on Human Rights, the Commission reviewed the findings of the French national courts that had ruled on the defendant's objections. Those findings included a determination that extradition was not involved in the transfers and "that in the absence of any extradition procedure" the execution of an arrest warrant in France on a person who had fled abroad "is in no way conditional on the latter's voluntary return to France nor on the use of an extradition procedure". As stated in the Commission opinion in the Altmann (Barbie) case:

"On the question of the measures applied to the applicant before he was handed over to the French authorities, i.e. his arrest in Bolivia and his detention in that country and during the flight to Cayenne, the Commission finds that these were measures taken by the Bolivian authorities, who bear sole responsibility for them in international law.

However, it is still necessary to examine the question of a violation of the Convention by France after the applicant was handed over to the French authorities on 5 February 1983.

On this point, the Commission finds, first, that the Convention contains no provisions either on the conditions under which extradition may be granted or on the procedure to be applied before the extradition may be granted. It follows that, even if the applicant's expulsion could be described as a disguised extradition, this would not, as such constitute a breach of the Convention."

⁵²Loi du 10 Mars 1927. "L'extradition obtenue par le Gouvernement francais est nulle, si elle est intervenue en dehors des cas prevus par le presente loi".

273. In the case of *Ramírez-Sánchez v. France*, Sudanese authorities delivered the fugitive, commonly known as the terrorist Carlos, to French authorities who returned him to France. On arrival an outstanding arrest warrant was served on the defendant for a car bombing that killed one person and wounded seventy in Paris in 1982. The Commission's ruling was that:

“To the extent that the applicant complains about the fact that France did not bring extradition proceedings, the Commission recalls that, in any event the Convention contains no provisions either concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. It follows that even assuming that the circumstances in which the applicant arrived in France could be described as a disguised extradition, this could not, as such, constitute a breach of the Convention.”

The Commission opinion notes that the French domestic court had previously ruled that:

“In the instant case, the applicant cannot argue that there has been any violation of a provision of the Law of 10 March 1927 since no extradition proceedings were taken against him ...

* * *

Moreover, case-law also provides that the circumstances in which someone, against whom proceedings are lawfully being taken and against whom a valid arrest warrant has been issued, has been apprehended and handed over to the French legal authorities are not in themselves sufficient to render the proceedings void, provided that they have not vitiated the search for and process of establishing the truth, nor made it impossible for the defence to exercise its rights before the investigating authorities and the trial courts.”

274. The South African Constitutional Court has found a deportation to be in violation of domestic law in the case of *Mohammed v. South Africa*.⁵³ A Tanzanian had applied for a visitor's visa to South Africa the day before the bombing of the American Embassy in Dar es Salaam and arrived in South Africa the day after the bombing, where he sought asylum under a false name. He was subsequently determined to be a person accused of the bombing, and was deported from South Africa to the United States. A death sentence was a possible penalty for the offences charged. The South African Supreme Court found that the deportation was procedurally irregular, and that in view of the possible death penalty, Mohammed's waiver of deportation was invalid. Its rationale was based on South Africa's opposition to the death penalty. The opinion of the South African court was ordered to be forwarded to the judge of the United States court conducting the trial of Mr. Mohamed. At the time of sentencing the jury was advised of the South African Court's communication. The jury did not impose the death penalty, resulting in the imposition of a life sentence for the bombing deaths.

⁵³*Khalfan Khamis Mohammed v. President of the Republic of South Africa and Six Others*, No. 17/01 CCT, decided 28 May 2001.

D. Diplomatic assurances

275. In extradition, deportation and refugee situations, allegations of a risk of torture or political persecution are increasingly unlikely to be overcome by diplomatic assurances of fair treatment without effective verification mechanisms.

276. In the Mohamed case cited above, the South African Constitutional Court referred to its assumption that if an extradition request had been made for the fugitive Mohamed, it could have been granted. The basis for allowing extradition would have been a diplomatic representation by the United States that the death penalty would not result. Such representations are promises by a State's executive authorities, conveyed through diplomatic channels, that certain protections will be observed or certain practices avoided. Assurances that the death penalty will not be imposed, or if imposed will not be carried out, have become common in extraditions between countries that prohibit the death penalty and certain countries that impose it. Diplomatic representations that torture, discriminatory prosecution or unfair treatment will not result are also possible, but are more controversial. There are a number of multilateral and bilateral agreements that permit refusal of international cooperation when there is a risk of torture, including the 1984 Convention against Torture and the 1951 Convention relating to the Status of Refugees. Moreover, many instruments prohibit or permit refusal of cooperation if there is reason to fear prejudice because of political opinion, race, religion or other discriminatory reasons, or simple unfairness in the prosecution for which international cooperation is requested.

277. The United Nations terrorism-related conventions negotiated since 1997 have included a standard article permitting the refusal of extradition and mutual assistance requests in the following language:

“Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in (the convention) or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.”⁵⁴

278. The language of the 1951 Convention relating to the Status of Refugees prohibits expulsion to a place where the applicant's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. That instrument does not refer to any standard for determining what constitutes a threat. The standard in the later Convention against Torture and in the universal terrorism-related instruments is stated as “substantial ground for believing”. Forecasting

⁵⁴Virtually identical language is found in the 1997 International Convention for the Suppression of Terrorist Bombings, the 1999 International Convention for the Suppression of the Financing of Terrorism, the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, the 2005 Amendment to the Convention for the Physical Protection of Nuclear Material, and the 2005 Protocol to the International Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation..

how that standard will be applied in practice requires examination of a number of factors, including the sources of proof considered by courts, the way credibility issues are dealt with, and the attention being given the issue by the human rights community.

279. Under article 22 of the Convention against Torture, a consenting State may agree that the Committee against Torture created by that instrument can consider communications from a person alleging a breach of the Convention by that State. The Committee is given the power to forward its views to the State Party and to the individual. In the matter of *Agiza v. Sweden*, No. 233/2003, decided 20 May 2005, the Committee found a risk of torture in the country to which the individual was expelled, citing its own prior reports. It then stated that a breach of the Convention had occurred because “The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk”. Sweden’s Fifth Periodic Report of December 2005 to the Committee against Torture described a legislative reform effective in 2006. The new Alien Act provides that in the event an international body with competence to examine individual complaints concludes that an alien should not be refused entry or expelled or deported, the person would automatically receive a residence permit. In cases where there are extraordinary reasons not to issue such a permit, the alien will remain in Sweden pending further developments.

280. In *Tantoush v. Refugee Appeal Board*, a South African High Court reversed a denial of asylum.⁵⁵ The asylum seeker had entered South Africa with a fraudulent passport and had been living in various countries for approximately 20 years with fraudulent identities. In granting asylum, the court relied upon affidavits and letters from Libyan exiles, including the Crown Prince of the former royal family, and reports from Human Rights Watch Libya, Human Rights Solidarity and Amnesty International. These documents supported Tantoush’s claim that he had a well-founded fear of persecution. The court also relied upon its finding of a date discrepancy in the investigative materials offered in support of an extradition request, and upon media reports of a highly publicized prosecution of foreigners in Libya. In *Saadi v. Italy*, No. 37201/06, decided 28 February 2008, the European Court of Human Rights based its decision that the applicant would be subjected to a risk of torture if deported largely upon published reports, citing three Amnesty International reports, a Human Rights Watch report and a resolution of the European Parliament.

281. The contribution of the Russian expert describes the European Court of Human Rights decision in *Ismoilov and Others v. Russia*, Application 2947/06, decided 24 April 2008. The Court there held that:

“127. Finally, the Court will examine the Government’s argument that the assurances of humane treatment ... provided the applicants with an adequate guarantee of safety. In its judgment in the *Chahal* case the Court cautioned against reliance on diplomatic assurances against torture from a State where torture is endemic or persistent (see *Chahal*, cited above, § 105). In the recent case of *Saadi v. Italy* the Court also found that diplomatic assurances were not in themselves sufficient to

⁵⁵No. 13182/06, S. Africa High Court, 14 August 2007 (Transvaal Provincial Division).

ensure adequate protection against the risk of ill-treatment where reliable sources had reported practices resorted to or tolerated by the authorities which were manifestly contrary to the principles of the Convention (see Saadi, cited above, §§ 147 and 148). Given that the practice of torture ... is described by reputable international experts as systematic (see paragraph above), the Court is not persuaded that the assurances ... offered a reliable guarantee against the risk of ill-treatment

128. Accordingly, the applicants' forcible return would give rise to a violation of Article 3 as they would face a serious risk of being subjected to torture or inhuman or degrading treatment there."

282. The contribution by the Russian expert calls attention to the statement in the partially dissenting opinion that:

"... the finding of a potential violation of Article 3 of the convention 'in the event of the extradition orders against the applicants being enforced' constitutes a radical reading of the recent judgment in *Saadi v. Italy*, (no. 37201/06) [GC], judgment of 28 February 2008) and especially of the following conclusion: 'The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time' (see Saadi, cited above, par. 148). It will be recalled that in the Grand Chamber's judgment in the case of *Mamatkulov and Askarov v. Turkey* concerning extradition to the same country—...—the Court concluded as follows, taking into account an assurance obtained from the ... Government before the extradition date: 'In the light of the material before it, the Court is not able to conclude that substantial grounds existed at the aforementioned date for believing that the applicants faced a real risk of treatment proscribed by Article 3', (see *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, decided 4 February 2005, par. 77, ECHR 2005-1)."

The dissenting opinion suggests that the Court has radically expanded its legal position in the Saadi case. Whether the difference in results between the Mamatkulov and Adkarov cases and the Ismoilov case was influenced by events in the three years between the decisions is uncertain. What is certain is that in the Saadi and Ismoilov cases the European Court's Grand Chamber either accepted or gave great evidentiary weight to the reports of United Nations organs and non-governmental human rights organizations and was not inclined to accept assurances that were contradicted by those bodies.

283. In the case of *Suresh v. Canada* (2002), the Canadian Supreme Court reversed a deportation order of a person affiliated with a violent separatist organization and required a new hearing, relying upon:

"Human rights reporting ... that the use of torture is widespread, particularly against persons suspected of membership in the (separatist movement). In a report dated 2001, Amnesty International cites frequent incidents of torture by the police and army, including a report that five laborers arrested on suspicion of involvement with the (movement) were tortured by police. One of them died apparently as a result of the torture."

284. In August 2006 the Division of International Protective Services of the Office of the United Nations High Commission on Refugees issued a Note on Diplomatic Assurances and International Refugee Protection. That publication repeated the findings of the United Nations' Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and of the High Commissioner for Human Rights. The substance of those findings was that diplomatic assurances should not be sought or relied upon when there was a consistent pattern of gross, flagrant or mass violations of human rights, or of systematic practice of torture. The Special Rapporteur subsequently expressed the view that post-return mechanisms do little to mitigate the risk of torture, have proven ineffective, and should not be used. The High Commissioner for Human Rights has stated that the only allowable assurances would have to involve very intrusive and sophisticated oversight, such as around-the-clock video surveillance.

285. When States consider that the assurances provided are sufficient to protect the person being transferred, they continue to rely upon them in what are considered to be appropriate cases. Germany relied upon assurances in extraditing Metin Kaplan, leader of the self-styled Caliphate of Cologne to Turkey in 2004 for offences against the constitutional order of Turkey. This continued reliance is consistent with the approach taken by the Tokyo High Court in the extradition to China of the hijacker mentioned in chapter VII, section B in connection with the political offence exception. The subject of the extradition request asserted that the principle of non-*refoulement* prevented his extradition because he might be subjected to the death penalty or other inhumane treatment. The Tokyo High Court rejected that claim. As described in the contribution of the Japanese expert, its reasoning was that the offence charged was not punishable by the death penalty. The Chinese Government had given assurance that it would observe the principle of specialty. In the absence of any special reason to believe otherwise, the formal assurance made by a State is to be trusted under international custom. In addition, the Convention on the Status of Refugees expressly does not apply to an offender when there are serious reasons to believe he has committed a serious offence outside the country of refuge prior to seeking refuge. The case of *United States v. Zaccarias Moussaoui*⁵⁶ was a prosecution of a French national for preparing and conspiring to engage in an attack of the type similar to those committed on 11 September 2001. France and Germany agreed to provide information and cooperation. However, those countries received and relied upon assurances that the materials provided would not be used in the death penalty phase of the trial, because of their national policies against that form of punishment.

286. Increasingly, however, authorities must recognize that a high burden of persuasion may be required by the authorities of another country or by regional courts to overcome a claim of a risk of torture, discriminatory treatment or lack of a fair trial. The views expressed by human right organs of the United Nations against use of diplomatic assurances have considerable moral weight and have been highly publicized. Hearsay reports by non-governmental organizations as to a consistent pattern of gross, flagrant or mass violations of human rights are much more difficult to refute than is specific testimony or other evidence of a risk to a particular individual. Reliance upon such reports allows

⁵⁶See Motion for Discovery of Agreement between Germany, France and the United States and Evidence Subject and/or Relevant to that Agreement, filed 13 December 2002 in *U.S. v. Zacarias Moussaoui*, No. 01-455-A, Eastern District of Virginia.

virtually unlimited judicial discretion. Once a country becomes the subject of adverse reporting by the human rights community it is likely to encounter great difficulties in securing international cooperation. The growing criticism of reliance upon diplomatic assurances is simply one more reason, among many, to eradicate any vestiges of improper or uncontrolled treatment by public officials and to ensure humane and fair treatment of all accused and convicted persons.

287. Government officials should also be aware that it is an error to assume that since the burden of proof is theoretically on the person who claims a fear of persecution, that person's lack of credibility should justify rejection of his or her claim. In the South African Tantoush case, the High Court referred to what it characterized as the applicant's 20 year history of lying, bribery and deception, particularly with regard to immigration matters. Nevertheless, it found that the Refugee Appeal Board had given undue weight to that evidence and not enough to the evidence suggesting a risk of unfair treatment if returned to his home country.

E. Other aspects of international criminal justice cooperation

288. The experts reported that the success of international cooperation varied widely. At the investigative stage the variations were influenced both by the capacity and the political will of the country from which assistance is requested. At the evidentiary stage, many countries have not adequately addressed procedural issues relating to the collection and use of evidence between different legal systems. Imagination, communication and flexibility are needed in order to overcome the resulting obstacles to effective international criminal justice cooperation. Extradition issues are often difficult if the proper treaties are not in place, as many countries are reluctant to rely upon general principles of comity and reciprocity.

289. The contributions of the experts revealed a variety of experiences in international cooperation. Many productive instances of police cooperation, mutual legal assistance and extradition practice were described. INTERPOL'S representative described the availability on request of Incident Response Teams (IRTs) to assist in the investigation of a terrorist act and to facilitate international cooperation. A Team was dispatched to Bali following a 2005 bombing and assisted in sharing information with other countries' police agencies. In other cases IRTs have provided technical expertise in matters such as the identification of corpses. A Colombian contribution mentioned investigative cooperation with Paraguay in connection with the kidnapping and murder of Cecilia Cubas, daughter of a former Paraguayan President, and with Spain in the case of Remedios Garcia Albert, accused of providing financing for the FARC through a Spanish non-governmental organization. The Algerian expert cited the extradition from Spain of Abdelkrim Hammad to face charges of formation of a terrorist group and voluntary homicide with premeditation. Disappointing experiences were mentioned wherein developed countries responded very slowly or not at all to request for cooperation. Less developed countries may have limited capacity to investigate terrorist attacks and organizations. Nevertheless, those countries have often worked in effective partnerships with investigators from countries targeted by terrorists. Kenyan citizens were the principal victims of the bombing of the American Embassy in Nairobi, with hundreds of them

killed and thousands wounded. Immense material and other resources were required for the wide-ranging international investigation into the simultaneous bombing of targets in Nairobi, Kenya and Dar es Salaam, Tanzania in 1998. The contribution of the Kenyan expert identified significant evidentiary limitations and deficiencies in that country's laws and resources. In view of those difficulties, Kenya's decision to cooperate very openly with foreign investigators and prosecutors appears to have been both unselfish and far-sighted. That cooperation included permitting American forensic experts to collect evidence at the bombsite in Nairobi and to interview bombing suspects. In addition, the suspects Mohamed Al-Owhali and Mohamed Sadeek Odeh were transferred into American custody. The public trials in the United States confirmed the success of this approach, resulting in convictions and lengthy sentences for the defendants that might not have been possible had they been tried in Kenya.

290. Another defendant in the same case was transferred from South Africa in what the South African Constitutional Court subsequently held was an improper manner.⁵⁷ The South African Court ruled that the fugitive from the Dar es Salaam bombing could not be considered to have waived his right against deportation to the United States because he faced the death penalty there. The Court directed that its judgment be sent to the American court conducting the trial. The American court followed established precedent in holding that the illegality of expulsion did not deprive it of jurisdiction, but advised the jury of the South African court opinion. The jury imposed a life sentence, rather than the death penalty, indicating that international communication between systems is always worth attempting.

291. Some national legislation allows for innovative forms of international cooperation. Section 10 of the Prevention of Terrorism Act 2002 of Mauritius allows a competent Minister to designate a person as a suspected international terrorist subject to a procedure that may result in freezing of his assets, denial of entry into Mauritius, and other restrictions. Among the grounds for such a designation is that the person "... is listed as a person involved in terrorist acts in any Resolution of the United Nations Security Council or in any instrument of the Council of the European Union". Another basis is that the person is considered to be involved in terrorist acts "by such State or other organizations as the Minister may approve". In other countries domestic legislation has not been adjusted to the needs of international cooperation. United States law, for example, permits coercive physical searches in aid of a request for mutual legal assistance, but not electronic surveillance, which under United States constitutional law is also considered a search but is governed by different provisions of law than those applicable to physical searches.

292. Merely assembling and forwarding tangible evidence or testimony collected according to the routine procedures of the requested state may result in evidence that will not be admissible under the procedural law of the requesting state. The need for foreign counterparts to help satisfy evidentiary formalities under the law of the requesting state was mentioned in the contributions of the Irish and United Kingdom experts in section VI-C, Fair and effective trial procedures. Both described how authorities in

⁵⁷See *Mohammed v. President of the Republic of South Africa and Six Others*, footnote 53

another country provided materials in a way that satisfied domestic courts that the rights of the defence were adequately protected. The member of the Expert Working Group from Japan described the violent history of the JRA and the importance of evidentiary assistance in prosecuting one of its leaders.

293. In the 1970s the JRA had faced a shortage of finances and so planned to abduct executives of Japanese companies in Europe for ransom. Yoshiaki Yamada attempted to enter France pursuant to the plan but was arrested in July 1974 for possession of a fake passport. The “instructing documents” for the plan, written by JRA leader Fusako Shigenobu, were seized from Yamada. In September 1974 three JRA members seized the French Embassy in The Hague, Netherlands, seriously wounding two police officers and taking 11 hostages. They demanded the release of Yamada, the return of the “instructing documents”, a ransom of US\$1,000,000 and an aircraft for escape. They fled to a Middle Eastern country when provided with the plane, Yamada and 300,000 dollars. Ms. Shigenobu was not physically present at the Embassy seizure in The Hague, and did not return to Japan until 1997. She was arrested in November 2000 and indicted for the crimes of unlawful capture and confinement of hostages and attempted murder. In February 2006 she was convicted and sentenced to imprisonment for twenty years. The conviction has been upheld on appeal and is now being considered by the Supreme Court. Among the legal issues are challenges to the admissibility of documents and to tangible evidentiary articles obtained through mutual legal assistance.

294. Because of the location of the crime, the investigation and evidence collection were done by Dutch authorities. Documentary evidence was collected, including statements from hostages, pictures of the crime scene and medical certificates of the injured persons and made available to Japanese authorities through mutual legal assistance procedures. Nevertheless, admission of these documents into evidence faced the obstacle of the hearsay rule, meaning that the content of a document should be presented at trial through the testimony of the person producing it, facing cross-examination in court in Japan. Some exceptions are permitted by article 321 (3) of the Code of Criminal Procedure, which provides that:

“As regards written statements other than those provided in the preceding two items, where the person who has given the statements cannot testify on the date either for the preparation for public trial or for the public trial, because of his or her death or unsoundness of mental or physical condition or because he or she is missing or staying outside of Japan, and his or her previous statements are essential for proof of the offence being prosecuted; however, this shall apply in cases where the statements were under special circumstances which lend to them a special credibility.”

295. Regarding the documentary evidence of The Hague incident, Dutch authorities provided information that the persons who made statements or produced documents had no intention of coming to Japan to testify, which satisfied the first criterion of the Code article. These documents were indeed essential for proof, satisfying the second criterion. Regarding the third criterion all the documents were created in a manner compatible not only with Dutch but also Japanese criminal procedure law. If the documents had been created in a way incompatible with the Japanese legal system, such documents could

never have been used as evidence in Japan. Since the documents were recorded by Dutch investigative authorities or produced by experts, the Japanese court recognized that the documents were very credible, thus meeting the third criterion.

296. Shigenobu was not present at and denied responsibility for the seizure of the French Embassy to the Netherlands. Her denial made the “instructing documents”, in which she provided Yamada with a hostage-taking strategy, crucial evidence. The set of instructing documents provided for trial was a copy, so it was necessary to prove that the copy was identical to the original. This required proof to the court concerning: who made the copy; when, where, why and how the copy came to be in the hands of the Japanese investigator; and evidence that there was no possibility that the contents of the document were altered. In order to provide that information it was necessary to seek supplemental legal assistance from France, the country where the document was seized. The Japanese expert’s contribution noted how Dutch and French authorities provided detailed assistance that was not limited simply to gathering evidence, but included the execution of procedures specified by the requesting country and supplying information in order to make the evidence admissible in Japan. This assistance had to be provided without confusion or misunderstanding, requiring extensive consultations. Several experts mentioned that criminal justice liaison experts stationed in foreign countries as police or prosecutorial liaison officials are very useful both in expediting the making of proper requests and in supporting and following-up the execution of a request.

297. An example of successful use in a domestic trial of another country’s investigative efforts is the Café de Paris case in Djibouti. In 1990 four individuals threw hand grenades on the terrace of the cafe, an establishment frequented by French nationals. A six-year-old child was killed, and five other persons seriously wounded. Criminal investigations were opened in Djibouti where the crime occurred, and also in Paris based upon the nationality of the French victims. Rogatory commissions were carried out by French authorities in Ethiopia and Djibouti and information was provided to the French examining magistrate by his Djiboutian colleague. Some defendants were arrested in Djibouti and others were extradited to Djibouti from Ethiopia. The trial proceedings in Djibouti made extensive use of the evidence collected by French authorities, as well as the results of the investigation by local police authorities. As a result, five defendants were sentenced to terms between six years and life imprisonment.⁵⁸

298. Accused persons may assert that to present an effective defence and to satisfy the principle of equality of arms between the prosecution and defence, they need the ability to secure assistance from foreign governments on an equal basis with the prosecution. An independent request by the defence to a foreign government is likely to have no legal standing under treaty or foreign law. A request by the prosecution on behalf of the defence involves an inherent conflict of interest and may later be attacked on that basis. Even if the defence request is addressed to or referred to the Court, there may be no available remedy except sending a traditional rogatory letter from the domestic judge to the foreign judge, without reliance upon any treaty. The letters rogatory procedure may

⁵⁸Judgment No. 03/01 of 9 April 2001, Prosecution v. Awaleh Assoweh, Aden Robleh Awaleh, Mohamed ali Arreitheh, Modamed Hassan Farah and Abdi Bouh Aden, alias “Bouraneh”, translated in the Report on Terrorism Cases where Djiboutian Courts Passed Verdicts (2007), a publication of the Capacity Building Programme Against Terrorism of the InterGovernmental Authority on Development.

not provide the ease of communication found in a mutual assistance treaty procedure, but it may offer the best available compromise solution.

299. The Philippine expert mentioned the utility of a mutual legal assistance treaty in securing the return of Americans for the trials of *People v. Abu Salayuddin* and *People v. Khadaffy Janjalani*. The kidnapping victims in both cases were made available, as well as investigative and scientific witnesses in one case. The United Kingdom expert contribution also mentioned the fact that in almost every terrorism investigation there are Letters of Request pursuant to mutual legal assistance legislation. In the case involving the financing of a violent Libyan group, mentioned in chapter III, section D, Financing and other forms of support for terrorism, over 50 letter requests were made to more than 15 countries. Appropriate domestic legislation on introduction of foreign evidence and, ideally, a network of mutual assistance arrangements will greatly facilitate international cooperation. Another necessary element for securing foreign assistance is an effective partnership between the investigating police or security agency and the prosecutor, who is the competent authority to make a request under many legal assistance treaties. Both under a mutual assistance request and a rogatory request, the prosecutor may have to travel with police officers to collect evidence abroad to ensure its admissibility under applicable legislation and evidentiary rules.

300. Effective mutual legal assistance and extradition both depend upon compatible definitions of offences to satisfy the requirement of dual criminality. With some exceptions, that principle requires that the conduct charged be an offence not only in the State requesting assistance or extradition, but also in the State whose cooperation is requested. As pointed out by the Moroccan expert, if the State from which cooperation is requested defines acts of terrorism as requiring proof not only of a criminal intent, but also of a particular motivation, countries that do not require such an element may face difficulty in securing cooperation. A number of the experts mentioned cases in which their country's requests for extradition for terrorist offences had been denied, leading them to the conclusion that a universal legal definition of terrorism as a criminal offence would reduce the number of extradition denials. Extradition difficulties also arise with regard to the type and quantum of evidence required by countries that conduct a mini-trial requiring a high level of persuasion before transferring a person to face trial in the State requesting extradition.

301. It is advisable in considering issues of international cooperation to analyze all possible complications and to prepare for a worst-case scenario. A requested witness may demand immunity from both the requested and requesting state for his or her own criminal conduct before agreeing to testify. Immigration authorities need to be consulted in any case involving the transfer of a witness, particularly one in custody for criminal conduct. The witness may request asylum in the requesting state or in a transit state. He or she may claim that prior admissions of criminal knowledge were secured by torture. Such a claim, even if unfounded, is at a minimum likely to produce delay in securing the return of the custodial witness and to generate publicity. That possibility dictates that alternate possibilities to the physical transfer of a witness always be considered. Those alternatives include use of testimony by video-link; a deposition taken in the requested state conforming as closely as possible to the procedures of the requesting state; or the provision to the court in the requesting state of summaries or transcripts of the statements or testimony of the witness taken in the requested state.

302. Some national laws and constitutions permit extradition only on the basis of a treaty relationship. Membership in the United Nations terrorism-related conventions and protocols can in many circumstances provide a treaty basis for extradition for terrorist acts. However, there are situations wherein no extradition treaty exists and the conduct would not fall under any of the United Nations instruments. International criminal law recognizes the possibility of extradition based upon the principles of reciprocity and comity, but even when that is possible under national law, many Governments are reluctant to grant extradition except within a treaty framework that establishes agreed procedures and explicit protections for the person to be transferred.

VIII. Innovations and proposals

303. A number of the experts provided proposals for improving counter-terrorism efforts. As a series of expert indications for the future, they provide a forward-looking, pragmatic conclusion to this Digest. As emphasized by the Turkish expert, neither terrorism nor the means to control it are novel issues. A terrorist act in 1914 precipitated a global conflict. The League of Nations which resulted from that conflict negotiated a Convention for the Prevention and Punishment of Terrorism in 1937. Although that instrument never came into force, its provisions anticipated many mechanisms found in modern terrorism-related conventions, such as a definition of terrorism as acts intended to create a state of terror in the minds of a segment of the public, the obligation to extradite or prosecute, and automatic inclusion of terrorist offences as extraditable offences in existing or future extradition agreement between States Parties. The convention also required criminalization of conspiracy and other forms of participation in or culpability for terrorism offences and incitement without regard to its success. A series of universal terrorism-related conventions and protocols developed since 1963 now require their Parties to criminalize almost every imaginable form of terrorist violence and financing. What is still needed is greater political will to cooperate against terrorists and the recognition that while terrorism as a historical phenomenon may be impossible to eradicate, it can be marginalized by efforts to achieve long-term peaceful compromises. Those compromises require the recognition that while each country's legal culture is a legitimate and valuable expression of its history and sovereignty, that particular set of laws and practices cannot be the only permissible way to achieve internationally recognized standards of human rights.

304. Several experts observed that the dual criminality and political offence obstacles to international cooperation would be greatly reduced by the adoption of universal legal definitions of the offences of terrorism, the support or financing of terrorism, and incitement to terrorism. A comprehensive definition of what constitutes the financing of terrorism now exists in the International Convention for the Suppression of the Financing of Terrorism (1999). That definition lists the terrorist acts for which it is illegal to provide or collect funds. Those listed acts are the offences specified in the United Nations terrorism-related conventions and protocols adopted between 1970 and 1997, and any attack upon civilians intended to cause death or serious bodily injury and done for the purpose of intimidating a population or compelling a government or an international organization to do or abstain from doing an act.⁵⁹ The Financing Convention thus provides precise legal definitions of terrorist acts and makes it explicit that such acts cannot be considered as political in nature by Parties to the agreement. That comprehensive model has been in existence since the Convention was negotiated in 1999. However, not

⁵⁹Article 2.1 (a) and (b) describes the conduct for which a person may not knowingly provide or collect funds as:

- (a) An act which constitutes an offence with the scope of and as defined in one of the treaties listed in the annex;
- or
- (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

all of the 167 countries that are States Parties to the Financing Convention have fully incorporated the Convention's financing offence definition in domestic law or adopted the offences listed in its article 2.1 (a) and (b) as a way to define terrorist acts.

305. For years an Ad Hoc Committee of the United Nations General Assembly has been negotiating a comprehensive convention that would provide a universal offence definition and denunciation of terrorism. As of 2009, no consensus had been achieved on a draft instrument. But even if the Committee were to achieve an immediate breakthrough and secure adoption of a final convention text by the General Assembly, in the normal course of events it would take years to achieve its widespread adoption. Moreover, additional years would pass before domestic criminal offences and procedures implementing the new offence or offences and procedures could be drafted, approved by legislatures and become effective. It must therefore be recognized that even a comprehensive convention defining offences of terrorism will not immediately cure the obstacles to international cooperation.

306. Consequently, attention must be paid to pragmatic interim measures. Among those is application of the principle of dual criminality in the way that will best favor international cooperation. That principle of international law normally allows cooperation only when the act in question is punishable in both the requesting and requested country. However, it is important that the principle be applied in a realistic fashion based upon whether the conduct is an offence under the laws of both countries. It should be immaterial whether the offence is placed within the same category or is denominated by the same terminology in both States.⁶⁰ Flexibility is particularly important with respect to: the application of different national laws and theories of intent and criminal responsibility (culpability as a principal, as an accomplice, an intellectual author, or an inciter); for support offences (financing of terrorism, material support, aiding and abetting); and for offences based upon relationships with an unlawful purpose (membership in an illegal organization, criminal or terrorist association, conspiracy). Acts constituting an offence in the requesting country may be characterized completely differently in the laws of the requested country, but so long as the underlying conduct is punishable there, international cooperation should be possible. It is essential that there be no impunity, either within a system or between systems, because of gaps in the offences imposing liability on those who conceive, plan and organize terrorist acts and those who materially execute them. Consideration should also be given to exceptions to dual criminality when voluntary cooperation with a foreign request would not endanger fundamental values or interests of the requested country. Dual criminality is a customary practice based upon protection of a country's criminal justice policies and its sovereignty. A country may not yet have had the occasion or available legislative opportunity to criminalize a particular misuse of computer technology or to regulate terrorist financing when it receives an obviously meritorious request from another country that has criminalized that conduct and has experienced a terrorist offence. There is no international law impediment to a country revising its domestic legislation so that it can waive that customary requirement and provide cooperation when in its sovereign discretion it finds such cooperation to be in the broader interests of international justice and security.

⁶⁰See article 43.2 of the United Nations Convention Against Corruption.

307. The Kenyan expert described how even simple administrative measures, such as a dedicated corps of counter-terrorism investigators to guarantee continuity and expertise, would greatly improve the quality of domestic prosecutions. Even a simple personnel measure, like using the same officers who conducted the investigation to assist at trial, would simplify the chain of custody for the admission of evidence and remove unnecessary obstacles. The contribution of the Algerian expert suggested how the tactic of infiltrating a terrorist group could be made even more effective. Algerian legislation permits a member of the police to commit certain relatively minor infractions to accomplish an infiltration and provides protection at every stage of the proceeding against revealing the true identity of the agent. That tactic of infiltration could be made even more effective and efficient if some of the legal protections relating to acts done at official direction were to be extended to persons other than the police acting under official direction. The most realistic scenario would involve an accomplice or participant in crime when the inquiring authority considered it appropriate to use such a person. The perceptiveness and utility of this suggestion is demonstrated by the case description from the Spanish expert concerning the plan to commit bombings on public means of transportation in Barcelona in January 2008. Information was received from a cooperating witness about a meeting of bomb plotters on the day of the planned meeting. As a result of this timely warning, the forces of order were able to mobilize on that same day and arrest the plot participants for membership in a terrorist organization and possession of explosives for terrorist purposes.

308. The use of a private citizen as an infiltrator is also described in the United States contribution concerning a money transmitter mentioned in chapter III, section C, Financing of terrorism. The advantages of using persons from the same environment as the individuals under investigation is their ability to achieve the desired acceptance and infiltration much more rapidly and in greater depth than can a member of the police or security services. A police or intelligence service agent must be furnished with a legend, meaning a fictitious identity and life history to conceal his true background and time spent in government service and to establish his reason for wishing to associate with the terrorists. A defective legend will result in danger for the undercover agent and failure for the infiltration operation. Even with a plausible legend, a stranger can never present the same indicia of reliability to a terrorist group as someone who has been known for years to the group either personally or through common acquaintances. Use of collaborators from the criminal or terrorist environment would therefore facilitate penetration of terrorist groups. It may be possible to monitor the truthfulness of the collaborator using electronic and physical surveillance, thus ensuring the integrity of the investigation and exposing the full scope and membership of an illegal group. When confronted with a successful infiltration, each member of the organization must assess their own individual vulnerability and decide whether to risk prosecution and lengthy incarceration or to cooperate and incriminate others, further destabilizing the terrorist group.

309. A number of experts emphasized the need for all countries to recognize that the Internet is both a potential target for terrorist attack and a vehicle for fraud by individual terrorists. An even greater current danger is its use as an instrument for radicalization, recruitment, training, fund-raising and communication for terrorists and terrorist groups. As pointed out by an Italian expert, the Web is well suited to the communication needs of the cell-like structure characteristic of many terrorist groups. This threat requires both

the training of qualified personnel to monitor the typologies involved, but also legal tools applicable to crimes of dangerousness, that is inciting and preparatory offences that do not depend upon perpetration of a violent act of terrorism. A key obstacle is the anonymity of communication on the Web, which can be overcome only by development of investigative expertise and mechanisms for immediate international cooperation, including legal instruments dealing specifically with access to Internet and website data. The expert from Italy proposed that legal procedures be adopted whereby an entity responsible for a website (content provider, content aggregator, hosting Internet service provider, webmaster or moderator) could be notified that a site was being used for terrorist incitement, communication or other illegal purposes. If the responsible entity did not eliminate or modify the content to eliminate the criminal material, they could be considered criminally responsible for its unlawful publication. Section 320.1 of the Canadian Criminal Code allows a court, based upon a showing under oath of reasonable grounds that hate propaganda or data that makes hate propaganda accessible is stored on and available to the public on a computer system, to order the custodian to provide a copy of the material, ensure that it is no longer stored or made available through the system, and to provide the information necessary to identify and locate the person who posted the material. Provision is made for a challenge to the order and for an appeal. It would be extremely helpful to other countries if the United States could find a solution to its limited ability to furnish judicial cooperation concerning foreign incitement offences resulting from its jurisprudence concerning freedom of speech and expression.

310. The demonstrated gravity of the threat of terrorism and transnational crime has begun to break down national barriers to exchange of police intelligence and information. The Council of the European Union issued Framework Decision 2006/960/JHA on 18 December 2006 prohibits an EU Member State from requiring a judicial procedure for the disclosure of information to the police authority of another EU state if such a procedure would not be required for disclosure to domestic authorities. The Decision establishes forms, procedures and timetables for the provision of intelligence and information. States are not to refuse to provide information unless its release would harm essential national security interests, jeopardize the success of a current criminal investigation or criminal intelligence operation or the safety of individuals, or be clearly disproportionate or irrelevant to the purpose for which it is requested. Of course, national and regional legal standards must be met with respect to formal agreements for the exchange of intelligence and information. The European Court of Justice invalidated the first agreement between the European Union and the United States for advance provision of airline Passenger Name Records because it was improperly based on regulation of the internal Community market rather than upon security concerns. The Union then approved a second agreement by Council Decision 2007/551/CFSP/JHA of 23 July 2007.

311. The INTERPOL expert contribution described that Organization's Project TAR. This was envisioned as a yearly listing on INTERPOL's website of Terrorism Arrest Reports, by country and nationality, of individuals arrested for suspected involvement in terrorist activities. At the moment the INTERPOL Project TAR proposes nothing other than this compilation and publication. However, if all countries were conscientious about submission of this data on a continuing basis with proper nominals, that is identifying data including biometric identifiers, the possibility of capturing that information in an ongoing INTERPOL database could be worthy of exploration.

312. Accordingly, consideration could be given to identifying legal modalities and operational protocols that would enable checking information such as prior criminal records of asylum-seekers, while guaranteeing the rights of such individuals and their families. In practical terms, this would involve collection of unique biometric identifiers in the databases to be checked and submission of the corresponding categories of biometric identification data by the persons whose identity is to be established or verified. Providing the necessary legal and operational protections could be a demanding task, but some response to the prevalence of false documentation and identity claims is obviously desirable.

313. Chapter IV, section E, False identity and immigration offences, described the means used by “shoe bomber” Richard Reid and his associate Saajid Badatan to conceal suspicious travel. They simply reported their passports missing in order to secure valid replacements. This means of terrorist tradecraft suggests that multiple requests for replacement passports are worthy of tracking as a suspicious indicator. Securing replacement documents not only conceals suspicious travel, but also is a source of genuine passports, which can be misused or altered. Moreover, increased use should be made of INTERPOL’s database of Stolen and Lost Travel Documents. That database has proved to be an immensely valuable tool both in operational use and as a means of raising the awareness of the enormity of the false documentation problem. INTERPOL’s Fixed Integrated Network Databases (FIND) and Mobile Integrated Network Databases (MIND) are noteworthy examples of effective applications of information technology that poses little or no threat to personal liberty interests.

314. The INTERPOL expert also examined the phenomenon of bio-terrorism. Although such weapons have been used in warfare in recent decades and by the Aum Shinrykio for attacks in the Tokyo subway system, the world is largely unprepared for bio-terrorist attacks. Bio-weapons are relatively easy to use by terrorists. Pathogens are virtually undetectable and can be brought into a country reasonably easily by an individual and in some cases (e.g. anthrax) can then be propagated in large quantities. Moreover, in many countries, criminal justice systems are constrained by inadequate legal frameworks governing the detection and repression of bio-weapons. Frequently, no law is violated until the disease or biological agent is actually deployed. Law enforcement officers therefore are not well equipped to conduct preliminary investigations into the development of such weapons. Without laws that criminalize preparatory activity relating to bio-weapons, there is no basis for legal assistance or cooperation to prevent their production and transportation. There is therefore an urgent need to ensure that countries are adequately prepared for, protected from, and able to respond to bio-terrorist attacks. INTERPOL has developed and published a landmark reference manual titled Bio-terrorism Incident Pre-Planning and Response Guide for police and other professionals to use in bio-terrorism prevention and preparedness efforts. The organization has also undertaken numerous bio-terrorism-related activities, such as conferences, training workshops and exercises, and is developing a Bio-Incidents Database. This database will contain information not in the public domain about detection devices, crime scene investigation, laboratory analysis, stolen or missing biological agents or toxins, and equipment and procedures to manage a bio-related crime scene. The data will be available by INTERPOL’s secure global police communication system I-24/7.

315. The Colombian contribution to the Expert Working Group made eleven specific proposals for reinforcing the international counter-terrorism strategy;

1. Integrating the efforts that have been made through the approval of the Global Strategy against Terrorism adopted by the United Nations General Assembly⁶¹ to combat acts of terrorism in all its forms and manifestations regardless of their motivation, and by whomever or wherever committed;
2. Maintaining a common strategic focus;
3. Developing a concrete action plan to confront the conditions favorable to the spread of terrorism;
4. Strengthening and supporting the counter-terrorism activities of the United Nations;
5. Condemning terrorism at the international level in all its forms and manifestations, including listing Colombian organizations that engage in terrorist practices;
6. Stimulating the construction of alliances between security organizations in each country for the purpose of identifying international supply and transit corridors and sharing sensitive information that will assist in their neutralization;
7. Generating bulletins identifying the most wanted ringleaders known to travel to other countries;
8. Demonstrate at the international level the impact caused by terrorism in Colombia, which by way of its financing through narco-trafficking affects the international community;
9. Establish a communication space in Latin-America for the purpose of timely and direct access to information related to terrorist activities, so as to gain an objective picture of the characteristics and nature of organizations like the FARC and the Ejército de Liberación Nacional;
10. Study the establishment of an Internet portal, which will be dedicated to show the effect of the scourge of terrorism and the profile of the organizations involved in practicing it. The site would be updated with information on the activities of terrorist organizations and the actions of the Global Community to neutralize them. It would be the appropriate space to show commitment to the framework of measures like mutual assistance;
11. Another aspect to be considered is the creation of an office to monitor and track terrorist organizations, which could issue annual reports to multilateral bodies, that will help form the standard according to which entities are included and maintained on lists of terrorists.

⁶¹General Assembly Resolution 60/288 of 8 September 2006.

316. The Spanish expert described how from a legal perspective the struggle against terrorism has focused on the essential objective of preventing and avoiding the brutal and indiscriminate attacks of terrorist organizations, based upon four operational lines:

1. The criminal justice response is based on the application of criminal offences that do not require the commission of physical terrorist attacks, such as the crimes of participation in or collaboration with a terrorist group, financing of terrorism, and the punishment of preparatory acts, especially conspiracy to commit terrorist acts.
2. The use of circumstantial evidence and of special investigative techniques. These tools, that produce such good results in the investigation of criminal phenomena like narco-trafficking, money-laundering and organized crime, acquire an extraordinary importance given the difficulties that preventive operations cause from the evidentiary perspective.⁶²
3. The investigation of preliminary and instrumental acts that constitute the support, the logistics, the infrastructure and the concealment of these groups, and that are inseparable from their criminal goals (falsification of documents, credits cards and other means of payment, crimes against property, drug trafficking, money-laundering, etc). has become a basic element to assure an additional and complementary enforcement response against the members of these cells and groups.
4. Reinforcement of international cooperation in the field of intelligence and at the judicial level. In the area of cooperation there have been created legal spaces with expanded judicial cooperation (for example, between France and Spain) with a variety of instruments and mechanisms such as the temporary surrender of detainees, the exchange of operational intelligence and the creation of joint investigative teams.

317. A policy of preventively anticipating terrorist activities operates at the national level in countries with a degree of experience in confronting terrorism. The Experts counseled that the same approach must be adopted at the international level. International cooperation benefits greatly from networks of investigative contacts, which include INTERPOL, assignment of liaison officers in embassies, and specialized group meetings. Cooperation at the prosecutorial level is less advanced than police cooperation, and lacks a culture of anticipation, of centralization and of teamwork. To remedy this lack the concerned prosecutors and judges need to be provided support and assistance so they can interact effectively with their foreign interlocutors. That is one of the missions of the European Union's Eurojust, which provides a permanent institutional structure for cooperation. An institutional structure is necessary to supplement cooperation based upon personal acquaintances because personnel assignments are constantly changing. The value of Eurojust is illustrated by a case in which a judge from a continental law country urgently needed and quickly secured testimony taken in another matter in a common law country. Without the mutual confidence of judges accustomed to working together on questions of terrorism that simple task might not have been accomplished without

⁶²This necessity to use special investigative techniques to combat terrorist offences was a point repeatedly emphasized by virtually all of the experts throughout the three Expert Working Groups meetings.

months of delay. A key feature of the success within the European Union, cited often by the experts familiar with cooperation between France and Spain, was the effectiveness of the European Arrest Warrant for its speedy delivery of fugitives to the charging court, without the delay or interference of political processes.

318. A number of submissions from members of the Expert Working Group dealt with mechanisms for enhancing and regularizing information exchange and cooperation among prosecutors. The Eurojust expert noted that by its very nature international terrorism not only involves dual criminality problems, but also conflicts of jurisdiction. With regard to such conflicts, it was suggested that an agreed set of guidelines on such factors as location of the crime, location of the suspects, possession of evidence, nationality of suspects and victims and similar factors could help resolve many disputes. Eurojust's contribution describes that body's creation in February 2002 to facilitate judicial communication and cooperation among the European Union Member States. By Council Decision 2009/426/JHA of 16 December 2008 steps were taken to enhance the operational effectiveness of Eurojust. The status and powers of the national members located at the seat of Eurojust were harmonized, as were those of the national correspondents for terrorism and other matters. The organization does not yet have an independent investigative capacity for crimes against European Union financial interests. A European Public Prosecutor's Office to investigate and prosecute offences against those interests may be created by the Council pursuant to article 69E of the Treaty of Lisbon, whenever that instrument becomes effective. Eurojust has already been involved in assuring good coordination and cooperation in terrorism cases whenever requested by a Member State. For that purpose and to assure an exchange of information it maintains a Case Management System reflecting the judicial proceedings in terrorism matters in which it is involved, including the charges and convictions, together with a list of national correspondents in terrorism-related matters. In 2007-2008 24 operational cases were opened, five of which involved the financing of terrorism, including cases for Sweden and Italy. The Swedish case was described in chapter III, section D, Financing and other forms of support for terrorism. In the Italian case the Eurojust representatives and the Milan prosecutor were able to coordinate the contemporaneous execution of 20 European arrest warrants in France, Portugal, Romania, the United Kingdom and Italy and the transfer of the persons arrested to the Italian prosecutor. Moreover, coordinated searches of the accused persons' residences were arranged over one weekend, an approach that was absolutely necessary to avoid the disappearance of possible evidence. All of the arrested individuals and the evidence collected are now in the investigative phase of the court in Milan. The Spanish expert made reference to the execution of an accord in January 2007 for counter-terrorism cooperation between prosecutors of Paris, of Rabat and of the Audiencia Nacional in Spain.

319. The International Association of Prosecutors (IAP) is a professional association formed in 1995, which enjoys consultative status with the Economic and Social Council of the United Nations General Assembly. It includes prosecutors from 130 countries on six continents. The expert representing the Association stressed the fundamental importance of prosecution authorities achieving the same degree of exchange of information and intelligence interaction that prevails among police services. Equally important is the necessity of a conscious strategy of anticipation that focuses upon the acts of preparation that precede terrorist attacks and uses the offence of criminal association to permit timely

intervention. The Association's contribution mentioned the rapid identification of the terrorist group that was organizing a wave of attacks in Paris and Lyon in 1995. Use of the criminal association offence permitted authorities to dismantle the group before commission of the attacks. The principal question then became the management of the judicial dossier so as not to create problems by bringing too extensive a network to trial. The IAP Expert, a member of the French judiciary, described the benefit of centralizing the investigation and trial of terrorism cases in the Tribunal of Paris since 1986. This centralization requires sensitivity by authorities to the importance of treating terrorist cases in the appropriate venue, together with a means for promptly resolving conflicts of competence. An example would be a series of armed bank robberies that might be regarded as acts of an organized crime group, whereas in fact they serve as a means of financing of terrorism and should be investigated by the authorities competent for terrorist acts.

320. Another issue emphasized in the IAP contribution was the importance of protocols established in advance of emergencies to ensure an organized and efficient response. The 1994 seizure and diversion of an Algerian Airbus to the Marseilles airport illustrated the need for operational agreements between the different administrative and judicial authorities involved in responding to an act of aircraft piracy. For example, immediately after the liberation of the hostages, it was necessary to organize the procedures for the hearing of dozens of passengers as witnesses, whose personal interest was in being reunited with their families as soon as possible. A contribution by a United Kingdom expert describes how in joint investigations it may be beneficial to draw up a Memorandum of Understanding with counterpart agencies in a cooperating foreign jurisdiction. This agreement would cover matters such as the aims of investigation, strategy, respective roles and responsibilities, lines of communication, access to and review of material in each other's jurisdiction and classification of material. Such a prior understanding can avoid potential difficulties later in the investigation and prosecution of the case.

321. The coordination of arrests and searches over the space of one weekend mentioned in the contribution of Eurojust shows how promptly action can be organized with the proper contacts and spirit of cooperation at the regional level. The expert of the IAP considers that it will be necessary in time to establish a comparable level of judicial cooperation against terrorism at the global level. To accomplish this goal, the IAP expert proposed the formation of a global Interjust organization of specialized prosecutors to act as a prosecutor's organization complementary to INTERPOL and to Eurojust outside its network. Interjust would have the additional mandate to improve the professional capacity of prosecutors. There would be no obligation to utilize the services of this organization if more suitable means exist. However, as one would expect as is the case of Eurojust, the ability to cooperate regularly will encourage communication on the causes of blockage and delays in the execution of mutual assistance request. The first step toward establishing such an organization would be the creation of a secretariat to construct the most extensive list of contact points possible. As is the case with Eurojust, creation of this list would be accompanied by the organization of files containing the rules to be followed for assistance requests, including searches, telephone interceptions, microphone surveillance, seizure, controlled delivery, and undercover infiltration. Each anti-terrorism judge or prosecutor would thus be informed before drafting a request of what information is required by the destination country. The Secretariat could organize

regional or global conferences of the points of contact. While these goals may appear ambitious, it can be expected that support will be available from the points of contact. The IAP would also be available to the extent of its means to share its experience and to assist in capacity building. In the context of this initiative that structure could foster exchanges of good practices and to the updating of this Digest.

322. The competence of Eurojust representatives extends to matters of serious trans-border organized criminality. Liaison magistrates deployed in the service of an Interjust platform could in a spirit of cost-effectiveness have a mandate including organized criminality, while maintaining terrorism as their priority. A dedicated venue could be found for coordination meetings, while video- and teleconferences conferences might require cooperation with INTERPOL for security of communications. Unlike Eurojust, no data bank containing confidential information is initially envisioned. Eventually a partnership with INTERPOL might permit data to be collected on all prosecutions of particular criminal groups. The European Union development of police cooperation in the 1980s and of judicial cooperation in the 1990s has produced undeniably positive results. This successful example of progression from bilateral to regional criminal justice cooperation can now be replicated both within and among other regions, always subject to universally binding human rights standards.

323. A Colombian contribution mentioned the Camden Interagency Network for the Recovery of Assets as an example of a voluntary association of authorities dealing with a particular criminal justice problem that did not require a major mobilization of resources. The network is described as the assignment of legal teams in each concerned country. These teams integrate the mechanisms of cooperation in asset recovery and develop procedures and activities of coordination in their home countries. The representatives meet yearly to coordinate and consolidate their personal acquaintanceships and trust relationships and for substantive discussions, resulting in an effective and dynamic mechanism. The Colombian contribution notes the need for this same kind of international cooperation in order to neutralize and dismantle the international support structures for organizations that engage in terrorist acts. Those structures use their ideological expressions and political activities to distract the attention of foreign authorities from their logistical support for the planning and accomplishment of terrorist acts. Nevertheless, the Colombian authorities emphasized the need to recognize them as part of the global threat of terrorism.

324. Other proposals in the area of prosecution included advance planning and adoption of a legal rule for handling requests for mutual legal assistance by the defence. The Irish expert noted that defendants being prosecuted for terrorism offences must have the opportunity for an effective defence and may wish to present evidence that requires the cooperation of foreign governments. If no procedure exists for evaluating the necessity for such evidence or relaying the request to the foreign government, an appellate court may find that the prosecuting government has obstructed the right to a fair trial or that the lack of a procedure has violated the principle of equality of arms. Obviously, the prosecutors would have a conflict of interest in handling such a request on behalf of the defence. A foreign government might simply ignore a request from the defence, as it would not be within the scope of a mutual assistance treaty. Placing the responsibility upon the court in the country where the trial is to take place to make the request for

the defence would seem to be the best solution. That approach would function most effectively if it established by explicit criminal procedure laws or rules. Uniform legal criteria and procedures expressing national policy would be more likely to be recognized and responded to by a requested state than an ad hoc exercise of a court's discretion.

325. Anti-terrorism public security measures that are not criminal prosecutions are being developed in some countries. The judgment in *A. and Others v. the United Kingdom*,⁶³ issued on 19 February 2009 by the European Court of Human Rights, dealt with preventive detention of foreigners under a state's power to control immigration. This detention was based upon immigration powers exercised pursuant to a derogation in time of emergency declared under article 15 of the European Convention on Human Rights. The court's opinion decided a number of important issues. The derogation was found to have been lawfully issued, as it had a rational basis in the terrorist attacks of September 2001, as confirmed by the London transportation system attacks of July 2005. The statutory procedure for challenging the detention involved some open disclosure of the grounds of detention and some closed disclosure. The closed evidence was made known only to a special advocate appointed to represent the detainee's interests. The procedure itself was found not to prevent an effective challenge to detention when allegations in the open material were specific in nature. With respect to five detainees, the open allegations concerned purchase of specific telecommunications equipment, possession of identified documents and meetings with named terrorist suspects at specified times and places. Considering that the special advocate for the detainees had access to the closed evidence and could question State witnesses and make arguments to the judge, the rights of those five detainees were considered to be adequately protected. However, with respect to certain detainees the open allegations were general in nature. Open evidence related to the movement of large sums of money through a bank account or fund-raising through fraud. However, no open evidence provided a link between the money raised and terrorism. In the judgment of the court this lack of specificity was not cured by the availability of the special advocate and prevented the subjects from effectively challenging the allegations against them.

326. Perhaps the aspect of the decision with the broadest consequence was the holding, which had already been reached by the national court, that a detention measure applicable only to alien 'international terrorists' discriminated unjustifiably against foreign nationals. A regime of "control orders" was adopted after the national decision by the House of Lords finding discrimination in the detention only of foreign nationals. Since 2005 any person reasonably suspected of involvement in terrorism, regardless of nationality, may be judicially subjected to certain restrictions on their freedom of movement and activities.

327. Of particular interest to those involved in the investigation and prosecution of criminal offences is the process of radicalization that causes persons to cross the line from radical beliefs and expressions to violence, together with legal means to prevent that progression. One factor mentioned by several experts as resulting in radicalization was incarceration in an environment with committed adherents of ideological or religious causes. Excessive state violence can be counter-productive, as it is seen as the moral

⁶³Application 3455/05.

equivalent of and a justification for terrorist violence. Marginalization, material deprivation and disappointed expectations were mentioned as resulting in frustration. That frustration can be exploited by provocative community leaders inciting violence or can lead to self-radicalization. Internet propaganda with vivid scenes of violence, including beheadings, was seen as a particularly prevalent and dangerous instrument for self-radicalization that needs to be carefully monitored and controlled.

328. A perspective from the North African region was contributed by the Algerian expert. This concerns a new legal provision called “Charter for Peace and National Reconciliation” adopted in 2005 by referendum. This permits the extinction of prosecution for the benefit of terrorists implicated in acts of terrorism other than collective massacres and bomb attacks, and who execute an act of repentance and surrender to the judicial authority. The Charter seeks to reinforce the struggle against terrorism through the motivation to repent, mobilization of citizens against terrorism, assumption of responsibility by the State for the social problems of the repentant terrorists and of missing persons and their legal beneficiaries. This proposal was only one of the various expressions of the prevailing view among the experts that insofar as terrorism is a social phenomenon, it can be reduced only with a comprehensive and global response. The United Nations Global Counter-Terrorism Strategy was adopted by General Assembly resolution A/RES/60/288 on 8 September 2006. Its four pillars include measures to address the conditions conducive to the spread of terrorism, measures to prevent and combat terrorism, measures to build States’ capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in this regard, and measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism. Annexed to the resolution was a detailed Plan of Action. That Plan is now being implemented by a Counter-Terrorism Implementation Task Force. That body, chaired by a high level United Nations Secretariat official, brings together nearly two dozen United Nations entities concerned with all aspects of terrorism issues, plus the International Criminal Police Organization, in an effort to provide the kind of comprehensive response recommended by the experts.

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