UNODC
United Nations Office on Drugs and Crime


# 6 The International Legal Framework against Chemical, Biological, Radiological and Nuclear Terrorism

**COUNTER-TERRORISM**
LEGAL TRAINING CURRICULUM

Cover images istockphoto.com:
Background: StockFinland
Left to right: HAYKIRDI, Olena_T, Bliznetsov, Sjo

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Counter-Terrorism Legal Training Curriculum

MODULE 6

# The International Legal Framework against Chemical, Biological, Radiological and Nuclear (CBRN) Terrorism

UNITED NATIONS
New York, 2016

This publication has not been formally edited.

Publishing production: English, Publishing and Library Section, United Nations Office at Vienna.

# Contents

# INTRODUCTION

## Background and purpose of the Counter-Terrorism Legal Curriculum and the present module on CBRN terrorism

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

The Counter-Terrorism Legal Training Curriculum is one of the tools developed by the Branch for transferring the knowledge and expertise needed to strengthen the capacity of States to implement their international legal obligations in the area of counter-terrorism.

This knowledge transfer is pursued through:

- Direct training of criminal justice officials
- Train-the-trainer activities
- Supporting national training institutions of criminal justice officials (schools of judges and prosecutors, law enforcement academies and other relevant institutions) to develop and incorporate counter-terrorism elements in to their curricula

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

- *Module 1. Counter-Terrorism in the International Legal Context (under preparation)*
- *Module 2. The Universal Legal Framework Against Terrorism (issued)*
- *Module 3. International Cooperation in Criminal Matters: Counter-Terrorism (issued)*
- *Module 4. Human Rights and Criminal Justice Responses to Terrorism (issued)*
- *Module 5. Transport-related (civil aviation and maritime) Terrorism Offences (issued)*
- *Module 6. The International Legal Framework against Chemical, Biological, Radiological and Nuclear Terrorism (this issue)*

The present module on offences related to chemical, biological, radiological and nuclear (CBRN) terrorism is tailored for use in capacity-building initiatives addressing policymakers, legislators, judges and prosecutors. Nevertheless, it may also be used successfully in capacity-building activities for other broader target audiences, such as law enforcement officials.

# 1. THE INTERNATIONAL LEGAL INSTRUMENTS AGAINST CHEMICAL, BIOLOGICAL, RADIOLOGICAL AND NUCLEAR (CBRN) TERRORISM

## Convention on the Physical Protection of Nuclear Material

The Convention on the Physical Protection of Nuclear Material (CPPNM) provides for the physical protection of nuclear material used for peaceful purposes while in international nuclear transport. It also requires States parties to make punishable under domestic law certain offences relating to unlawful and intentional acts involving nuclear material such as the theft of nuclear material and includes provisions aimed at facilitating cooperation among States parties, including on mutual legal assistance.

## Amendment to the Convention on the Physical Protection of Nuclear Material

The Amendment to the CPPNM requires States parties to establish, implement and maintain an appropriate physical protection regime applicable to nuclear material and nuclear facilities under their jurisdiction. It also provides for expanded cooperation between and among States parties regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences of sabotage, and prevent and combat related offences.

## International Convention for the Suppression of Acts of Nuclear Terrorism

The International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT) opened for signature in 2005 and entered into force in 2007. It requires each State party to adopt such measures as may be necessary to establish as criminal offences under its national law certain specified offences relating to the possession, use, or threat of use of nuclear or other radioactive material or a device, damage to nuclear facilities in a manner which releases or risks the release of radioactive material, with the intent to cause death or serious bodily injury, substantial damage to property or to the environment. It also requires each State party to adopt such measures as may be necessary to establish as criminal offences under its national law certain specified offences relating to threats of use or unlawful demands for access to nuclear and other radioactive material or nuclear facilities. It obligates States parties to establish jurisdiction over the offences under certain circumstances. ICSANT also requires States parties to afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set out in ICSANT. Cooperation under ICSANT includes exchanging information in accordance with national law related to the detection, prevention, suppression and investigation of offences set out in the Convention. It also requires States parties to undertake certain measures related to handling radioactive material, devices and facilities when seized following the commission of an offence set forth in the Convention.

## International Convention for the Suppression of Terrorist Bombings

The International Convention for the Suppression of Terrorist Bombings requires States parties to criminalize the unlawful and intentional use of explosives and other lethal devices in, into, or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with intent to cause death or serious bodily injury, or with intent to cause extensive destruction of such a place, facility or system, where the destruction results in or is likely to result in major economic loss.

## Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Convention)

The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Convention) strengthens the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and provides an international legal framework for the criminalization of certain terrorist acts and cooperation in the prevention, investigation, and prosecution of suspected offences.

## Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005 SUA Protocol)

The Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005 SUA Protocol) contains similar provisions as the 2005 SUA Convention, relating to unlawful acts against fixed platforms located on the continental shelf.

## Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation

The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention, 2010) establishes offences to address attacks against international civil aviation, including certain acts involving the use of an aircraft as well as the unlawful transport by air of any biological, chemical or nuclear weapon or related material and technology. The Convention expands the grounds of jurisdiction under the earlier international aviation security instruments by requiring each State party to establish jurisdiction when the offence is committed by its national, and by providing that each State party may establish jurisdiction when the victim of the offence is its national.

In addition to the international legal instruments against chemical, biological, radiological and nuclear (CBRN) terrorism identified above, there are other international legal instruments which are of paramount importance when addressing weapons of mass destruction. Namely, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (Biological Weapons Convention), the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), and the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[a]

In addition, in 2004, the United Nations Security Council adopted resolution 1540, which obligates States to take certain actions, as specified in the resolution, that are intended to reduce the risk

of proliferation and to prevent non-State actors from having access to weapons of mass destruction (WMD), especially for terrorist purposes (see section 2.2). This module does not examine the Biological Weapons Convention or Chemical Weapons Convention, but there are some similarities between their provisions and those of the CBRN instruments. As a consequence, States may wish to take them also into account when developing their CBRN-relevant legislation.

[a]It is worth noting that for example, article VII of the Chemical Weapons Convention requires States parties to criminalize in their national legislation acts prohibited under the Convention. It thus contributes to the prevention and suppression of the proliferation of chemical weapons. Article IV of the Biological Weapons Convention also requires that States take measures to "prohibit and prevent" certain acts, which is understood to include legislative, administrative and regulatory measures.

## 1.1 Overview of the international legal instruments against CBRN terrorism

### Common elements

Most of the existing international legal instruments against chemical, biological, radiological and nuclear (CBRN) terrorism identified above have common features. Generally, they:

- Establish particular acts as offences
- Require States parties to criminalize such acts under their domestic law
- Establish jurisdictional grounds for States parties to prosecute the described offences
- Include an obligation to "extradite or prosecute", known under the Latin formula *aut dedere, aut judicare*
- Provide legal grounds for cooperation between States parties for extradition and mutual legal assistance purposes regarding the offences they establish

## 1.2 Criminalization

A key feature in many of the international legal instruments against CBRN terrorism is an obligation that generally requires States parties to establish certain offences identified in the instruments as criminal offences in their national law. The offence-creating provisions of the instruments contain a number of common features, which can be summarized as follows:

1. Each criminal conduct is defined according to its objective and material elements (*actus reus*, e.g., causing destruction, placing explosives, seizing aircraft or ships, etc.). In some cases, a further constituent element of a crime is the creation of a danger, regardless of whether the causation of such danger was intentional (for example, not all acts of violence committed on board an aircraft are covered by the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the relevant offence only includes those which are likely to endanger the safety of the aircraft in flight). The international legal instruments against CBRN terrorism do not define "terrorist acts" and do not make terrorist motivation a condition sine qua non for certain conducts that they establish as offences. Only in certain cases is the terrorist motivation an element of the offence. In those cases, the terrorist motivation is introduced as the intent "to compel a natural or

legal person, international organization or State to do or to refrain from doing any act"[1] or "to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".[2]

2. The subjective and intentional element (*mens rea*) included within the offence-creating provisions generally requires that the offence be committed "intentionally". This "general" intention is often accompanied by a "special" one, which is the additional intention of the perpetrator to cause death or serious bodily injuries, for example.

3. The instruments further obligate States parties to establish such offences (those defined by the relevant instrument) as criminal offences under their domestic law, including attempt and complicity (aiding and abetting) offences.

4. The International Convention for the Suppression of Terrorist Bombings, International Convention for the Suppression of Acts of Nuclear Terrorism, the Amendment to the Convention on the Physical Protection of Nuclear Material, and the civil aviation and maritime security instruments mentioned in this module contain additional criminalization requirements related to the contribution to the commission of offences by a group of persons acting with a common purpose.

5. The instruments do not establish specific penalties, but instead require that the offences are made punishable by appropriate penalties which take into account the grave nature of the offences.

## 1.3 The armed forces/military forces of a State exclusion

The international legal instruments against CBRN terrorism do not apply to the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law.[3] Nor do they apply to the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law.

## 1.4 Jurisdiction

One of the main aims of the international legal instruments against CBRN terrorism is to ensure that as many States parties as possible have jurisdiction to prosecute the offences defined by those instruments, in order to avoid the creation of safe havens.

These instruments advance this goal through provisions that obligate States parties to establish jurisdiction over the offences they establish in a variety of circumstances. Generally, under these instruments, States parties are required to establish jurisdiction when the offence is

[1] E.g., article 2, paragraph 1.b (iii), of the International Convention for the Suppression of Acts of Nuclear Terrorism.

[2] Article 3 bis of the 2005 SUA Convention.

[3] In the case of armed conflict, as a matter of principle, the relevant norms of international humanitarian law prevail as lex specialis. Under article 19, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings, "the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention". Similar provisions are included in instruments discussed in this module that were concluded subsequently.

committed in the territory of the State, the offence is committed on board of a vessel flying the flag of that State or an aircraft registered in that State, or the offence is committed by a national of that State. These are often referred to as mandatory bases for jurisdiction, which means that States parties are obliged to incorporate them into their national laws. These instruments also include an obligation to establish jurisdiction over the offences when the alleged offender is present in a State's territory which does not grant extradition pursuant to a request by another State party that has jurisdiction. Additionally, the instruments also offer a number of optional jurisdictional grounds, such as the passive nationality principle, whereby States parties could establish jurisdiction over offences committed abroad against one of their nationals.[4]

## 1.5 Obligation to extradite or prosecute

All the international legal instruments against CBRN terrorism include an obligation to extradite or prosecute, also known by the Latin term *aut dedere aut judicare*. The relevant provisions state that, whenever the extradition of an individual present in a State's territory is requested, that State must either hand over the person concerned to the requesting State or submit the case to the competent domestic authorities for the purpose of prosecution.

For example, the International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention) (along with other instruments that use identical or very similar language) provides in paragraph 1 of its article 8 that a State party that does not extradite a person to a requesting State party shall "be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State."

## 1.6 International cooperation

Given the global dimension of the CBRN terrorist threat, the international legal instruments against CBRN terrorism provide essential judicial tools and mechanisms so that national authorities can effectively conduct cross-border investigations and ensure there are no safe havens for alleged terrorists. Such instruments provide all States parties with a series of legal bases for cooperation that are not limited by geographical concerns. It is worth noting that the international legal instruments against CBRN terrorism focus on international cooperation from the criminal justice point of view, i.e., they aim to facilitate the conduct of criminal proceedings in cases containing transnational elements. Of the various forms of international cooperation in criminal matters, the international legal instruments against CBRN terrorism focus on extradition and mutual legal assistance. In some cases they also include other forms of cooperation.

[4] The international legal instruments against CBRN terrorism do not address which State agency will have the responsibility to prosecute a case. This aspect is left for each State to address individually. For example, States may wish to centralize the prosecution of terrorism-related offences through specialized units, or may prefer to distribute the workload in different ways. Such decisions are based entirely on domestic considerations and criminal policies.

The added value of the international legal instruments against CBRN terrorism in the field of extradition is the following:

- The offences set forth in the international counter-terrorism instruments are deemed to be included as extraditable offences in any existing extradition treaty between States parties.
- States parties undertake to include the offences described therein as extraditable offences in any future extradition treaty concluded between them.
- States parties that do not make extradition conditional on the existence of a treaty are required to consider the offences set forth in the international legal instruments against CBRN terrorism as extraditable offences between themselves.
- States parties that normally require a treaty as a condition for extradition may, at their discretion, use the international instrument as a legal basis for extradition when a request is made by another State party.
- All extradition treaties and arrangements between States parties to the same international instrument with regard to the relevant offences are "deemed to be modified" if they are incompatible with that international instrument.
- States parties are prohibited from rejecting another State party's extradition request (concerning any convention-based offence) on the grounds that it concerns a political offence, an offence connected with a political offence, or an offence with political motives (see discussion below) because none of the offences defined are to be regarded as such for purposes of extradition.
- Nothing in the instruments imposes an obligation on States parties to extradite (concerning any offence established by the instruments) if the requested party has substantial grounds for believing that the request was made for the purpose of prosecuting or punishing a person because of his or her race, religion, nationality, ethnic origin or political opinion, or if his or her position would be prejudiced for that reason (see discussion below).

With regard to mutual legal assistance:

- States parties are obligated to afford each other the greatest measure of legal assistance in connection with investigations or criminal or extradition proceedings brought with respect to the offences defined by the relevant instrument, including assistance in obtaining the necessary evidence for such proceedings.
- States parties are prohibited from rejecting another State party's request for legal assistance concerning any offence established by the instruments on the grounds that it concerns a political offence, an offence connected with a political offence, or an offence with political motives (see below) because none of the offences defined are to be regarded as such for purposes of mutual legal assistance.
- Nothing in the instruments imposes an obligation on States parties to afford mutual legal assistance concerning any offence established by the instruments if the requested party has substantial grounds for believing that the request was made for the purpose of prosecuting or punishing a person because of his or her race, religion, nationality, ethnic origin or political opinion, or if his or her position would be prejudiced for that reason (see discussion below).

## 1.7 The political offence exception and non-discrimination clause

The exception for the political nature of an offence is a standard clause found in the majority of extradition treaties and in many States' national laws. Traditionally, extradition requests were rejected if the requested State maintained that the offence in question was of a political nature. This principle originates from the nineteenth century and is based on the idea that resistance to political oppression and dictatorship must be supported. The Terrorist Bombings Convention explicitly rejects the political offence exception in the case of offences set out therein. All subsequent international legal instruments against CBRN terrorism contain the same provision in order to ensure that, in the case of serious offences, requests for extradition and mutual legal assistance are not stymied by unfounded representations that a political offence exception applies.

Article 11 of the Terrorist Bombings Convention contains comprehensive language, which was clearly designed to apply to all the various permutations of the exception:

> 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.

The purpose of the seemingly repetitive rephrasing of the basis for the political offence exception in article 11, "as a political offence or as an offence connected with a political offence or as an offence inspired by political motives", is to expressly and comprehensively negate all of the justifications that have been advanced for such an exception, thereby ensuring it will not be recognized in any formulation under conventions in which this article appears. That formulation has become standard in subsequent international instruments focused on combating terrorism and was also included in all the international legal instruments against CBRN terrorism adopted after the Terrorist Bombings Convention.[5]

### *Non-discrimination clause*

Under the international legal instruments against CBRN terrorism, alleged offenders whose extradition has been requested (or in relation to whom a request for legal assistance has been made), are protected by a robust anti-discrimination clause. If the State that receives a request for extradition or mutual legal assistance has substantial grounds to believe that the request was made for the purpose of prosecuting or punishing a person because of his or her race, religion, nationality, ethnic origin or political opinion, or if complying the request would prejudice his or her position for any of these reasons, the non-discrimination articles allow the refusal of an extradition or mutual legal assistance request.

[5] See article 10, paragraph 2, of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; article 2 of the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; article 13 of the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation; and article 12 of the Protocol Supplementary to the Convention for Suppression of Unlawful Seizure of Aircraft.

For example, article 12 of the Terrorist Bombings Convention provides that:

> 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.

Similar provisions can be found in other instruments discussed in this module.

For a comparison table of all the common elements contained in the international legal instruments against CBRN terrorism, see the annex to this module.

# 2. CBRN COUNTER-TERRORISM-RELATED SECURITY COUNCIL RESOLUTIONS

## 2.1 United Nations Security Council resolution 1373 (2001)

Security Council resolution 1373 (2001) was adopted shortly after the terrorist attacks of 11 September 2001 in the United States of America, under chapter VII of the Charter of the United Nations. Resolution 1373 is not limited to condemning specific manifestations of terrorism in certain parts of the world, but addresses terrorism as a general phenomenon. It establishes a framework for improved international cooperation against terrorism.

The resolution notes with concern the close connection between international terrorism and illegal movement of nuclear, chemical, biological and other potentially deadly materials, and in this regard emphasizes the need to enhance coordination of efforts on national, subregional, regional and international levels in order to strengthen a global response to this serious challenge and threat to international security.

Operative paragraph 1 focuses on the prevention and suppression of the financing of terrorist acts and, among other things, mandates all States to:

- Prevent and suppress the financing of terrorist acts (paragraph 1 *(a)*).
- Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts (paragraph 1 *(b)*).
- Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities (paragraph 1 *(c)*).
- Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons (paragraph 1 *(d)*).

Operative paragraph 2 contains requirements aimed at preventing terrorist acts and bringing terrorists to justice, notably requiring States to:

- Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists (paragraph 2 *(a)*).
- Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens (paragraph 2 *(c)*).
- Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts (paragraph 2 *(e)*).
- Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings (paragraph 2 *(f)*).
- Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents (paragraph 2 *(g)*).

Operative paragraph 3 deals extensively with international cooperation measures and calls upon States to, inter alia:

- Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist persons or networks; forged or falsified travel documents; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups (paragraph 3 *(a)*).
- Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts (paragraph 3 *(c)*).
- Become parties as soon as possible to the relevant international conventions and protocols related to terrorism […] (paragraph 3 *(d)*).
- Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not planned, facilitated or participated in the commission of terrorist acts (paragraph 3 *(f)*).
- Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists (paragraph 3 *(g)*).

### *The Counter-Terrorism Committee*

The Counter-Terrorism Committee (CTC) monitors the implementation of resolution 1373, and is assisted by a Counter-Terrorism Committee Executive Directorate (CTED).

Established by resolution 1373, the CTC is a subsidiary body of the Security Council. Its goal is to facilitate the provision of assistance to States to build capacity to counter terrorism on a national, regional and global level.

The Security Council established CTED to assist the work of the CTC and coordinate the process of monitoring the implementation of resolution 1373. Since 2006, a key monitoring tool that has been used by CTED is the detailed implementation survey (DIS). Prepared for all 193 United Nations Member States, DISs provide a snapshot of the counter-terrorism situation in each country, based on information received from the country itself, international organizations and other public sources.

1. What steps has your country taken to give effect to Security Council resolution 1373?
2. What steps is it planning to take in this regard? Consult, if necessary, the reports that your country has sent to the Counter-Terrorism Committee.
3. Security Council resolution 1373 does not explicitly define "terrorist acts". Why do you think this is? Discuss the advantages and disadvantages of this approach.
4. Highlight the parts of Security Council resolution 1373 that demonstrate, in your opinion, a preventive approach to addressing terrorism.
5. Is the scope of application of Security Council resolution 1373 limited to countering acts of terrorism committed in specific regions of the world, or specific types or manifestations of terrorism?
6. According to the Charter of the United Nations, what are the legal consequences if States violate Security Council resolution 1373?
7. What is the role of the Counter-Terrorism Committee with regard to Security Council resolution 1373?

## 2.2 United Nations Security Council resolution 1540 (2004)

The United Nations Security Council adopted resolution 1540 unanimously on 28 April 2004 under chapter VII of the United Nations Charter. It is the first Security Council resolution to focus on the potential acquisition of weapons of mass destruction by non-State actors. It affirms that "proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security."

Resolution 1540 (2004) purposely attempts to address threats not covered by the existing non-proliferation instruments, particularly those associated with illicit trafficking in nuclear, chemical and biological weapons, their means of delivery, and related materials, which the resolution identifies as a new dimension in proliferation.

The resolution requires States to, inter alia:

- […] refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery (operative paragraph 1).
- […] adopt and enforce appropriate effective laws that prohibit non-State actors to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as

well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them (operative paragraph 2).

- […] take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials […] (operative paragraph 3).

Resolution 1540 also calls upon States to promote cooperation on non-proliferation. The resolution affirms support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of weapons of mass destruction (WMD) and the importance for all States to implement them fully; it decides that none of the obligations in resolution 1540 shall be interpreted so as to conflict with or alter the rights and obligations of States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, the Chemical Weapons Convention, and the Biological Weapons Convention or alter the responsibilities of the International Atomic Energy Agency (IAEA) and Organization for the Prohibition of Chemical Weapons (OPCW).

It is worth noting that implementing the criminalization provisions of the seven international legal instruments against CBRN terrorism is one step that States may take towards fulfilling their obligations under operative paragraph 2 of United Nations Security Council resolution 1540 (2004). That paragraph requires all States, "in accordance with their national procedures, to adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them." Resolution 1540 is, thus, directly related to the seven international legal instruments addressed in this module of the Counter-Terrorism Legal Training Curriculum.

### *The 1540 Committee*

Resolution 1540 (2004) established a Committee consisting of all members of the Security Council, tasked with monitoring implementation of the resolution. The Security Council has extended the mandate of the Committee, a subsidiary body of the Council, several times, most recently with United Nations Security Council resolution 1977 (2011), which gave the Committee a ten-year mandate. With each extension, the Security Council also expanded the mandate of the Committee, such as in assistance matchmaking and collecting effective practices. The Committee has four working groups, dealing with monitoring and national implementation; assistance; cooperation with international organizations, including the Security Council committees established pursuant to resolutions 1267 (1999) and 1373 (2001); and transparency and media outreach.

The 1540 Committee produces a wide range of materials to help monitor and facilitate implementation. Among others, these products include annual reports on the status of implementation, matrices for each United Nations Member State on their national implementation measures taken, a compilation of effective international and national implementation practices, as well as offers and requests for assistance, national reports, national implementation action plans and outreach activities. All of these items appear on its website (http://www.un.org/en/sc/1540/). As of 2015, the reports indicate that many States have taken a wide range of actions to implement the resolution since 2004, although many gaps remain.

The Committee is assisted by a Group of Experts. Together with its Group of Experts, it works with Member States in a cooperative manner, particularly through engaging in dialogues with States and international, regional and subregional bodies.

What steps has your country taken to give effect to Security Council resolution 1540 (2004)? Consult, if necessary, the matrix for your country prepared by the 1540 Committee.

What steps is it planning to take in this regard? Consult, if necessary, the reports or national action plan that your country has sent to the 1540 Committee.

Highlight the impact that in your view, the Resolution has already had to contribute to international peace and security.

How did resolution 1540 address gaps existing in international law prior to its adoption?

Does the Resolution establish any sanctions?

# 3. INTERNATIONAL LEGAL INSTRUMENTS AGAINST CBRN TERRORISM

## 3.1 Convention on the Physical Protection of Nuclear Material

*Key features*

- It is the first international convention that requires States parties to take appropriate steps to ensure as far as practicable that, nuclear material is protected during international transport.
- It requires States parties to make punishable under their national laws certain offences including those involving theft of nuclear material and threat thereof, and to establish jurisdiction over the covered offences in certain cases.
- It provides for cooperation and information exchange mechanisms.

*Benefits*

- It establishes minimum protection levels for nuclear material during international nuclear transport, thereby contributing to nuclear security.
- It facilitates international cooperation and information exchange.
- It creates a network of national central authorities and points of contact, which facilitates coordination.

The Convention on the Physical Protection of Nuclear Material (CPPNM) was adopted in 1979 after two years of negotiations, based on a draft prepared by the United States of America.[6] It entered into force on 8 February 1987. Its Depositary is the Director General of the International Atomic Energy Agency.

The CPPNM has a threefold scope of application: the physical protection of nuclear material used for peaceful purposes during international nuclear transport and storage incidental to that transport; the criminalization of offences; and international cooperation.

International nuclear transport is defined as "the carriage of a consignment of nuclear material by any means of transportation intended to go beyond the territory of the State where the shipment originates beginning with the departure from a facility of the shipper in that State and ending with the arrival at a facility of the receiver within the State of ultimate destination".

[6] Maria de Lourdes Vez Carmona, "The International Regime on the Physical Protection of Nuclear Material and the Amendment to the Convention on the Physical Protection of Nuclear Material", OECD Nuclear Energy Bulletin, January 2005. Available from http://www.oecd-ilibrary.org/nuclear-energy/the-international-regime-on-the-physical-protection-of-nuclear-material-and-the-amendment-to-the-convention-on-the-physical-protection-of-nuclear-material_nuclear_law-2005-5k9czgt8tfth?crawler=true

### 3.1.1 Physical protection provisions

Article 3 requires that each State party takes appropriate steps within the framework of its national law and consistent with international law to ensure as far as practicable that, during international nuclear transport, nuclear material within its territory, or on board a ship or aircraft under its jurisdiction insofar as such aircraft or ship is engaged in transport to or from that State, be protected at certain levels.

The levels of required protection by category of nuclear material are described in annex I of the CPPNM. Annex II divides the nuclear material into different categories.

Pursuant to its article 2, the physical protection-related measures of the CPPNM (articles 3, 4 and article 5, paragraph 3) apply only to nuclear material used for peaceful purposes while in international nuclear transport. The rest of the provisions of the CPPNM also apply to nuclear material used for peaceful purposes while in domestic use, storage and transport.

Article 4 prohibits the export of nuclear material by a State party unless the State party has received assurances that such material will, during the international nuclear transport, be protected at the levels described in annex I. Article 4 also prohibits the import of nuclear material by a State party from a State not party to the CPPNM unless the State party has received the same assurances. In addition, article 4 provides that a State party shall not allow the transit of its territory of nuclear material between States that are not parties to the CPPNM unless the State party has received assurances as far as practicable that the nuclear material will be protected during international nuclear transport at the levels described in annex I.

Paragraph 3 of article 5 requires States parties to cooperate and consult, as appropriate, with each other with a view to obtaining guidance on the design, maintenance and improvement of systems of physical protection of nuclear material in international transport.

### 3.1.2 Confidentiality

Pursuant to article 6, States parties are required to take appropriate measures consistent with their national law to protect the confidentiality of information they receive in confidence by virtue of the provisions of the CPPNM from another State party or through participation in an activity carried out for the implementation of the CPPNM. The article further establishes that States parties are not required to provide information that States parties are not permitted to communicate pursuant to national law or which would jeopardize the security of the State concerned or the physical protection of nuclear material.

### 3.1.3 Criminalization

Article 7 requires States parties to make the following offences punishable under national law:

The intentional commission of:

*(a)* An act without lawful authority which constitutes the receipt, possession, use, transfer, alteration, disposal or dispersal of nuclear material and which causes or is likely to cause death or serious injury to any person or substantial damage to property;

*(b)* A theft or robbery of nuclear material;

*(c)* An embezzlement or fraudulent obtaining of nuclear material;

*(d)* An act constituting a demand for nuclear material by threat or use of force or by any other form of intimidation;

*(e)* A threat:

(i) To use nuclear material to cause death or serious injury to any person or substantial property damage, or

(ii) To commit an offence described in subparagraph *(b)* in order to compel a natural or legal person, international organization or State to do or to refrain from doing any act;

*(f)* An attempt to commit any offence described in subparagraphs *(a)*, *(b)* or *(c)*; and

*(g)* An act which constitutes participation in any offence described in subparagraphs *(a)* to *(f)*.

### 3.1.4 Jurisdictional provisions

Article 8 requires each State party to take such measures as may be necessary to establish its jurisdiction over the offenses set forth in article 7 in the following cases:

*(a)* When the offence is committed in the territory of that State or on board a ship or aircraft registered in that State;

*(b)* When the alleged offender is a national of that State.

Additionally, when the alleged offender is present in the territory of a State party and it does not extradite him/her to any of the States falling under *(a)* and *(b)*, it shall take such measures as may be necessary to establish its jurisdiction over the relevant offences.

Article 8 further provides for the possibility that a State party establish its jurisdiction over the offences of the CPPNM when it is involved in international nuclear transport as the exporting or importing State.

### 3.1.5 International cooperation

Article 5, paragraph 1, of the CPPNM provides that:

> States Parties shall identify and make known to each other their central authority and point of contact with responsibility for physical protection of nuclear material and for coordinating recovery and response operations in the event of any unauthorized removal, use or alteration of nuclear material or in the event of credible threat thereof.

In the case of theft, robbery or any other unlawful taking of nuclear material or of credible threat thereof, States parties shall, in accordance with their national law, provide cooperation and assistance to the maximum feasible extent in the recovery and protection of such material to any requesting State. In those cases, States parties shall take appropriate steps to inform as soon as possible other States, which appear to be concerned, and, where appropriate, international organizations. In addition, the States parties concerned shall, as appropriate, exchange information with each other or with international organizations, with a view to protecting threatened nuclear material, verifying the integrity of the shipping container, or recovering unlawfully taken nuclear material. In doing so, they shall, as appropriate, coordinate their efforts through diplomatic and other agreed channels; render assistance, if requested;

and ensure the return of nuclear material stolen or missing as a consequence of the above-mentioned events.

1. Is becoming party to the CPPNM relevant for States with no nuclear material? If so, why?
2. Can a State party to the CPPNM transport nuclear material to a non-State party?
3. Are the offences set forth in the CPPNM incorporated into your national legislation?
4. Can a State party to the CPPNM request the extradition of an alleged offender to a non-State party if there is no extradition treaty between them?
5. Is the theft of a radioactive source criminalized by the CPPNM?

## 3.2 Amendment to the Convention on the Physical Protection of Nuclear Material

### *Key features*

- The Amendment to the Convention on the Physical Protection of Nuclear Material (CPPNM) extends the scope of the CPPNM and makes it legally binding for a State party to it to also protect nuclear facilities and nuclear material used for peaceful purposes in use, storage, as well as transport.
- It requires any such State to establish, implement and maintain an appropriate physical protection regime applicable to nuclear material and to nuclear facilities under its jurisdiction, including establishing and maintaining a legislative and regulatory framework for physical protection.
- States parties to the Amendment to the CPPNM must take such measures as may be necessary to establish their jurisdiction and make punishable under their national laws certain offences concerning smuggling of nuclear material and certain deliberate acts against nuclear facilities, as well as acts related to directing and contributing to the commission of such offences.
- Finally, the Amendment introduces new arrangements for cooperation, assistance and coordination among States and the International Atomic Energy Agency, including points of contact, exchange of information with a view to, among other things, protecting or recovering unlawfully taken nuclear material, addressing credible threats of sabotage of nuclear material or a nuclear facility or in the case of sabotage thereof.

### *Benefits*

- The Amendment to the CPPNM strengthens nuclear security.
- The Amendment complements the International Convention for the Suppression of Acts of Nuclear Terrorism.

Some 20 years after its adoption, several States parties to the CPPNM started to raise concerns about the limited scope of application of the CPPNM, since, for example, it only establishes obligations to protect nuclear material during international transport, and does not cover nuclear facilities.

After several years of negotiations, States parties to the CPPNM unanimously adopted, on 8 July 2005, an Amendment to the CPPNM. It entered into force on 8 May 2016.

### 3.2.1 Physical protection provisions

The Amendment to the CPPNM extends the scope of the CPPNM to the protection of nuclear material that is used for peaceful purposes in domestic use, storage and transport, and to nuclear facilities used for peaceful purposes, except as specified in article 2.

Article 2A requires that each State party shall establish, implement and maintain an appropriate physical protection regime applicable to nuclear material and nuclear facilities under its jurisdiction.

Additionally, article 2A introduces 12 Fundamental Principles of Physical Protection of Nuclear Material and Nuclear Facilities, that States parties shall apply "insofar as is reasonable and practicable".

### 3.2.2. Confidentiality

Article 6 requires States parties to take appropriate measures consistent with their national law to protect the confidentiality of any information which they receive in confidence by virtue of the provisions of the amended CPPNM from another State party or through participation in an activity carried out for the purposes of the amended CPPNM. Article 6 also provides that information received in confidence from another State party may only be provided to third parties with the consent of the State party that provided the information.

### 3.2.3 Criminalization

The Amendment to the CPPNM amends some of the offences under the CPPNM and establishes new ones, including:

- The intentional commission of "an act which constitutes the carrying, sending, or moving of nuclear material into or out of a State without lawful authority." The Amendment to the CPPNM becomes the first instrument to establish nuclear smuggling as an offence. By making it a stand-alone offence, separate from the mere unlawful carrying of nuclear material, the Amendment to the CPPNM conveys the seriousness of the offence and the need for States to criminalize the smuggling of nuclear material separately and with appropriate penalties.
- The intentional commission of "an act directed against a nuclear facility, or an act interfering with the operation of a nuclear facility, where the offender intentionally causes, or where he knows that the act is likely to cause, death or serious injury to any person or substantial damage to property or to the environment by exposure to radiation or release of radioactive substances, unless the act is undertaken in conformity with the national law of the State Party in the territory of which the nuclear facility is situated".

With respect to the ancillary offences, in addition to those included in the CPPNM, and in line with modern counter-terrorism instruments, the Amendment to the CPPNM also provides that it is an offence to intentionally organize and direct others to commit certain offences and to contribute to the commission of the offences.

### 3.2.4 Jurisdictional provisions

The Amendment to the CPPNM does not change the jurisdictional provisions contained in the CPPNM.

### 3.2.5 International cooperation

The Amendment to the CPPNM requires cooperation by States parties and prescribes the manner in which cooperation shall take place in the case of a credible threat of sabotage of nuclear material or a nuclear facility or in the case of sabotage thereof:

> 3. In the case of a credible threat of sabotage of nuclear material or a nuclear facility or in the case of sabotage thereof, State Parties shall, to the maximum feasible extent, in accordance with their national law and consistent with their relevant obligations under international law, co-operate as follows:
>
> > *(a)* If a State Party has knowledge of a credible threat of sabotage of nuclear material or a nuclear facility in another State, the former shall decide on appropriate steps to be taken in order to inform that State as soon as possible and, where appropriate, the International Atomic Energy Agency and other relevant international organizations of that threat, with a view to preventing the sabotage;
> >
> > *(b)* In the case of sabotage of nuclear material or a nuclear facility in a State Party and if in its view other States are likely to be radiologically affected, the former, without prejudice to its other obligations under international law, shall take appropriate steps to inform as soon as possible the State or the States which are likely to be radiologically affected and to inform, where appropriate, the International Atomic Energy Agency and other relevant international organizations, with a view to minimizing or mitigating the radiological consequences thereof;

In line with other modern counter-terrorism instruments, article 11A of the Amendment provides that none of the offences set forth in article 7 shall be regarded for the purposes of extradition or mutual legal assistance, as a political offence. Article 11B establishes that nothing in the Amendment shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested State party has substantial grounds for believing that the request for extradition or for mutual legal assistance has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Is the CPPNM Amendment relevant for States with no nuclear facilities? If so, why?

Is the theft of nuclear material from a nuclear facility covered by the CPPNM Amendment?

Is the theft of a radioactive source covered by the CPPNM Amendment?

Has your country criminalized the smuggling of nuclear material?

### Other relevant International Atomic Energy Agency instruments

There are a number of other legally binding and non-binding international instruments relevant to nuclear security adopted by and under the auspices of the International Atomic Energy Agency (IAEA). In particular, there is the legally binding Convention on Early Notification in the Event of a Nuclear Accident of 1986 (INFCIRC/335) and the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency of 1986 (INFCIRC/336), which establish the international emergency preparedness and response system. Non-binding legal instruments promulgated under IAEA auspices, include the Nuclear Security Recommendations on Physical Protection of Nuclear Material and Nuclear Facilities (INFCIRC/225/Revision 5 (IAEA Nuclear Security Series No. 13)) and the Code of Conduct on the Safety and Security of Radioactive Sources of 2003 (IAEA/CODEOC/2004), as well as its supplementary Guidance on the Import and Export of Radioactive Sources ((2012 EDITION) IAEA/CODEOC/IMO-EXP/2012).

## 3.3 International Convention for the Suppression of Acts of Nuclear Terrorism

### *Overview*

Negotiations for the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT) were called to address gaps in the international legal framework for preventing and responding to acts of nuclear terrorism. ICSANT was adopted by the General Assembly in April 2005 and opened for signature in September 2005. It entered into force on 7 July 2007. Its Depositary is the United Nations Secretary-General.

### *Key features*

- Establishes offences related to the possession, use, or threat of use of nuclear and radioactive materials, or damage to nuclear facilities, with the intent to cause death or serious bodily injury or substantial damage to property or the environment.
- Establishes offences related to threats of use or unlawful demands for access to nuclear and radiological materials or facilities.
- Requires domestic criminalization of the covered offences and obligates States parties to take such measures as may be necessary to establish jurisdiction over the offences under certain circumstances.
- Requires States parties to make the covered offences punishable by appropriate penalties which take into account the grave nature of the offences.
- Requires States parties to cooperate by taking all practicable measures to prevent and counter preparations for offences to take place inside or outside of their territories.
- Requires States parties to cooperate by taking all practicable measures to prevent the offences set forth in the Convention, including, if necessary, adapting their national law.
- Requires States parties to cooperate by exchanging information in accordance with their national law to detect, prevent, suppress and investigate offences set forth in the Convention, and specifies steps for returning any nuclear material or devices that have been seized following the commission of an offence set forth in the Convention to the State to which the material or devices belongs.

- Deems the offences under the Convention as extraditable offences in any extradition treaty existing between any of the States parties before the entry into force of the Convention, and provides that States parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.
- Provides that States parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in the Convention as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.
- Provides that none of the offences set forth in the Convention shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence.

*Benefits*

- Addresses previous gaps in the international legal framework with respect to acts of terrorism involving nuclear and other radioactive material.
- Creates obligations for States parties to take all practicable measures to prevent the offences set forth in the Convention and to punish the acts of nuclear terrorism covered by the Convention, while recognizing the right of all States to develop and apply nuclear energy for peaceful purposes and their legitimate interests in the potential benefits to be derived from the peaceful application of nuclear energy.

### 3.3.1 Confidentiality

Pursuant to paragraph 2 of article 7, States parties shall take appropriate measures consistent with their national law to protect the confidentiality of the information received in confidence by virtue of the provisions of ICSANT. Paragraph 3 of article 7 establishes that ICSANT does not require the provision of information that States parties are not permitted to communicate pursuant to national law or which would jeopardize national security or physical protection of nuclear material.

### 3.3.2 Criminalization

ICSANT requires States parties to adopt such measures as may be necessary to establish as offences under national law the offences set forth in article 2, which are reproduced below:

> 1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
>
> *(a)* Possesses radioactive material or makes or possesses a device:
>
> (i) With the intent to cause death or serious bodily injury; or
>
> (ii) With the intent to cause substantial damage to property or to the environment;
>
> *(b)* Uses in any way radioactive material or a device, or uses or damages a nuclear facility in a manner which releases or risks the release of radioactive material:
>
> (i) With the intent to cause death or serious bodily injury; or
>
> (ii) With the intent to cause substantial damage to property or to the environment; or
>
> (iii) With the intent to compel a natural or legal person, an international organization or a State to do or refrain from doing an act.

Article 2 of ICSANT also states:

2. Any person also commits an offence if that person:

*(a)* Threatens, under circumstances which indicate the credibility of the threat, to commit an offence as set forth in paragraph 1 *(b)* of the present article; or

*(b)* Demands unlawfully and intentionally radioactive material, a device or a nuclear facility by threat, under circumstances which indicate the credibility of the threat, or by use of force.

For example, in 1992, thieves stole a box containing radioactive material in Pridniestroviye. The thieves threatened to blow up the material if fighting in the Republic of Moldova was not stopped.[a] Which provision(s) of ICSANT under art. 2 *(1) b*, if any, could capture this fact scenario?

[a] "Radioactive Material Stolen from Transdniestr", *JPRS-Proliferation Issues,* April 3, 1992. Available from http://www.nti.org/analysis/articles/radioactive-material-stolen-transdniestr/

3. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of the present article.

4. Any person also commits an offence if that person:

*(a)* Participates as an accomplice in an offence as set forth in paragraph 1, 2 or 3 of the present article; or

*(b)* Organizes or directs others to commit an offence as set forth in paragraph 1, 2 or 3 of the present article; or

*(c)* In any other way contributes to the commission of one or more offences as set forth in paragraph 1, 2 or 3 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

In 1974, Vienna police received a call from a man claiming to be a member of a group known as the Justice Guerrillas. He claimed that radioactive material had been placed on a train bound for Rome. Police found a substantial but non-lethal amount of radioactive material, Iodine 131, under the seat of a first-class compartment of the Vienna-Rome Express. There were no threats made to life or property. The contamination was suspected to be the result of an unattended shipment of medical Iodine 131 by a Vienna drug company, which was intended for a hospital in Linz for use in medical diagnosis. This incident attracted widespread publicity and triggered a rash of hoaxes, which caused numerous train delays. A man with a history of mental illness, arrested in connection with the attack, claimed that his actions were intended to draw attention to the ill treatment of mentally ill patients in Austrian hospitals.[a]

1. Assume this was an offence of an international character because the arrested man was not an Austrian national or because the radioactive material was found once the train was on Italian soil. Would the actions of the arrested man amount to a "credible threat" under article 2, paragraph 2 *(a)*, to commit an offence as set forth in article 2, paragraph 1 *(b)*, of ICSANT?

2. If so, does it meet the definition of "radioactive material" under article 1, paragraph 1, of ICSANT?

On January 18, 1982, five stolen French Army rockets were launched at the nuclear power station of Creys-Malville that was being built near Lyon.[b] The rockets smashed into the 80 metre-high concrete walls which were to hold the reactor's core. Two rockets hit and caused minor damage to the reinforced concrete outer shell, missing the reactor's empty core. No one was hurt. A short time after the attack, a man claimed responsibility for the attack in the name of a "pacifist and ecological committee." On May 8, 2003, Chaïm Nissim, who in 1985 was elected to the Geneva cantonal government for the Swiss Green Party, eventually admitted carrying out the attack. He claimed that the weapons were obtained from Carlos the Jackal via the Cellules Communistes Combattantes (Communist Combatant Cells) of Belgium.

1. Do the acts meet the definition of "damages a nuclear facility in a manner which releases or risks the release of radioactive material" under article 2, paragraph 1 *(b)*, of ICSANT?

Assume the answer the question above is positive. Nissim declared that his group "took every imaginable precaution … to be certain that no worker was at risk of being hit, therefore we committed a non-violent attack."[c]

1. What type of intent under article 2, paragraph 1 *(b)*, if any, would apply to the acts committed by Mr. Nissim and his group?

2. Would the acts committed by Carlos the Jackal and the Cellules Communistes Combattantes be covered by ICSANT?

[a] The account of this incident is based on a description provided in Brian Michael Jenkins, "Protecting Surface Transportation Systems and Patrons from Terrorist Activities: Case Studies of Best Security Practices and a Chronology of Attacks," IISTPS Report 97-4. Available from http://transweb.sjsu.edu/project/9704.html and Robert K. Mullen, "Nuclear Violence", in *Preventing Nuclear Terrorism: The Report and Papers of the International Task Force on Prevention of Nuclear Terrorism*, Paul Leventhal and Yonah Alexander, eds. (Lexington, MA: Lexington Books, 1987), pp. 242 and 246.

[b] Eliot Marshall, "Super Phénix Unscathed in Rocket Attack", *Science*, vol. 215, No. 4533 (February 1982), p. 64.

[c] http://nissim.blog.tdg.ch/about.html

### 3.3.3 Jurisdictional provisions

Article 9, paragraph 1, of ICSANT obligates each State party to take such measures as may be necessary to establish its jurisdiction over the offences set forth in the Convention when an offence is committed in the territory of that State; or when it is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or when it is committed by a national of that State.

Article 9, paragraph 2, gives a State party the option to establish its jurisdiction over an offence when it is committed against a national of that State; or when it is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or when it is committed by a stateless person who has his or her habitual residence in the territory of that State; or when it is committed in an attempt to compel that State to do or abstain from doing any act; or when it is committed on board an aircraft which is operated by the Government of that State.

One of the crucial issues that had to be addressed during the negotiations was whether ICSANT should address activities of States, including their armed forces. The preamble to ICSANT states:

> Noting that the activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecutions under other laws.[7]

This preambular provision should be read together with article 4, which reads as follows:

> 1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.
>
> 2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.
>
> 3. The provisions of paragraph 2 of the present article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.
>
> 4. This Convention does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States.

### 3.3.4 International cooperation

States parties are obligated to afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in article 2, pursuant to article 14. States parties are also obliged to take appropriate measures in order to inform, where appropriate, international organizations with respect to the commission of offences set forth in article 2 as well as the preparations to commit such offences about which they have learned.

Article 8 provides that States parties shall make every effort to adopt appropriate measures to ensure the protection of radioactive material, taking into account relevant IAEA recommendations and functions.

Article 18 states that upon seizing or otherwise taking control of radioactive material, devices or nuclear facilities, following the commission of an offence set forth in article 2, the State party in possession of such items shall: *(a)* take steps to render harmless the radioactive material, device or nuclear facility; *(b)* ensure that any nuclear material is held in accordance with applicable IAEA safeguards; and *(c)* have regard to physical protection recommendations and health and safety standards published by the IAEA.

The article further goes on to detail, inter alia, the modalities of return and storage, upon the completion of any proceedings connected with an offence under ICSANT. Thus, a State

[7]This provision was based on a similar provision in the the International Convention for the Suppression of Terrorist Bombings, which had been formulated in the context of excluding from the scope of that Convention the activities of military forces of States.

party is required to return any radioactive material, device or nuclear facility, after consultations with the States parties concerned, in particular regarding modalities of return and storage, to the State party to which it belongs, or to the State party of which the national or legal person owning such radioactive material or device or facility is a national or resident or to the State party from whose territory it was stolen or otherwise unlawfully obtained.

The article also addresses the special regimes that apply with regard to the possession of nuclear or other radioactive material. Thus, for instance, article 18, paragraph 3 *(b)*, addresses a situation where it is not lawful for the State party in possession of the radioactive material, devices or nuclear facilities to possess them. In such instances, that State is obliged to ensure that such material, devices or facilities are placed, as soon as possible, in the possession of a State for which such possession is lawful, and which has provided the necessary assurances, consistent with the requirements of paragraph 1 of the article (relating to rendering harmless, safety and physical protection).

In instances where the radioactive material, devices or nuclear material do not belong to any of the States parties or to a national or a resident of a State party or was not stolen or otherwise unlawfully obtained from the territory of a State party, or if no State is willing to receive such item, a separate decision is required to be taken in consultation with the States concerned and any relevant international organization.

These detailed provisions which take cognisance of the special regimes which apply to the possession of radioactive material, devices or nuclear facilities and of their specific requirements relating to rendering harmless such material, their physical protection, etc., also underline the special role of States having the requisite capacity to render assistance in post-crisis situations and the centrality in such situations of the role of international organizations with a specialized mandate, such as the IAEA.

Finally, article 7, paragraph 4, mandates States parties to inform the Secretary-General of the United Nations of their competent authorities and liaison points responsible for sending and receiving the information referred to in article 7. This includes information in respect of the commission of the offences set forth in article 2 as well as preparations to commit such offences about which it has learned. The Secretary-General of the United Nations must communicate such information regarding competent authorities and liaison points to all States parties and the International Atomic Energy Agency. Such authorities and liaison points must be accessible on a continuous basis.

Is the theft of a radioactive source criminalized under ICSANT?

Does ICSANT prescribe how States parties to it should protect radioactive material?

Would a van transporting a radioactive source be considered a nuclear facility under ICSANT?

Has your country, pursuant to article 7, paragraph 4, designated competent authorities and liaison points?

Are hoaxes referring to nuclear material criminalized under ICSANT?

### 3.3.5 Difference in the scope and definitions between the International Convention for the Suppression of Acts of Nuclear Terrorism and the Convention on the Physical Protection of Nuclear Material and its Amendment

*Scope: "radioactive material" and nuclear material and facilities used or retained for military purposes*

With regard to criminalization, the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT) is broader in scope than the Convention on the Physical Protection of Nuclear Material (CPPNM) and its Amendment insofar as it criminalizes acts involving "radioactive material", which includes not only nuclear material, but also other radioactive material, as defined by ICSANT. It also brings under its scope nuclear material and facilities used or retained for military purposes, which are explicitly excluded from the scope of the CPPNM and its 2005 Amendment.

*Definitions: the concept of "nuclear facility"*

ICSANT and the CPPNM Amendment protect nuclear facilities, but the terminology is defined differently in the two instruments.

Under ICSANT, article 1, paragraph 3, defines "nuclear facility" as:

> *(a)* Any nuclear reactor, including reactors installed on vessels, vehicles, aircraft or space objects for use as an energy source in order to propel such vessels, vehicles, aircraft or space objects or for any other purpose;
>
> *(b)* Any plant or conveyance being used for the production, storage, processing or transport of radioactive material.

The Amendment to the CPPNM defines "nuclear facility" as follows:

> *(d)* "Nuclear facility" means a facility (including associated buildings and equipment) in which nuclear material is produced, processed, used, handled, stored or disposed of, if damage to or interference with such facility could lead to the release of significant amounts of radiation or radioactive material.

Unlike the Amendment, ICSANT covers also nuclear facilities used for military purposes, and defines nuclear facilities in a broader way. On the other hand, the CPPNM Amendment includes under nuclear facilities "associated buildings and equipment".

## 3.4 International Convention for the Suppression of Terrorist Bombings

*Key features*

- Requires States parties to criminalize the unlawful and intentional use of explosives and other lethal devices in, into, or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility with intent to cause death or serious bodily injury, or with intent to cause extensive destruction of such a place, facility or system, where the destruction results in or is likely to result in major economic loss.

- Imposes an obligation on States parties to cooperate by taking all practicable measures to prevent the preparation in their territories of terrorist bombings.
- Deems the offences under the Convention as extraditable offences.
- Provides for the possibility of ad hoc extradition, treating the Convention as the basis for extradition in the absence of a treaty, and the modification of provisions of existing extradition treaties to the extent that they were incompatible with the provisions of the Convention.
- Requires each State party to establish jurisdiction when the offence is committed by its national, or when it is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed.
- Enables each State party to establish its jurisdiction over an offence when it is committed against a national of that State; or when it is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or when it is committed by a stateless person who has his or her habitual residence in the territory of that State; or when it is committed in an attempt to compel that State to do or abstain from doing any act; or when it is committed on board an aircraft which is operated by the Government of that State.
- Denies the possibility of refusal to extradite an offender on the sole ground that the offence would be political in nature.
- Imposes an obligation on States to prosecute such persons or extradite them to another State with jurisdiction to try them.

*Benefits*

- Enhances international cooperation among States in devising and adopting effective and practical measures for the prevention of the acts of terrorism, and for the prosecution and punishment of their perpetrators.
- Introduces additional means of incurring criminal liability, including attempting to commit an offence, participation as an accomplice; organizing/directing others to commit an offence and contribution to the commission by a group of persons acting with a common purpose.

By the mid-1990s, different international legal instruments dealing with counter-terrorism had addressed acts such as hostage-taking, hijacking or acts against the safety of air or maritime navigation, but had not specifically addressed terrorist bombings as such. Thus, a series of bombings in 1995 and 1996 in different parts of the world led to the adoption of the Terrorist Bombings Convention in December 1997. The Convention entered into force on 23 May 2001.[8] Its Depositary is the Secretary-General of the United Nations.

### 3.4.1 Criminalization

The Terrorist Bombings Convention provides in article 2, paragraph 1:

> Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other

[8] Pierre Klein, "International Convention for the Suppression of Terrorist Bombings", available from http://legal.un.org/avl/pdf/ha/icstb/icstb_e.pdf

lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility [underline added]:

*(a)* With the intent to cause death or serious bodily injury; or

*(b)* With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss.

"Explosive or other lethal device" includes, in part, a weapon or device designed or capable to cause death, serious bodily injury or substantial material damage through release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.[9]

The Terrorist Bombings Convention also provides additional means of incurring criminal liability:

2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1.

3. Any person also commits an offence if that person:

*(a)* Participates as an accomplice in an offence as set forth in paragraph 1 or 2; or

*(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 paragraph 1 or 2 by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

Thus, the Convention requires States parties to criminalize the activity of a principal who detonates a bomb, whoever attempts to do so but does not succeed, and an accomplice who drives a bomber to a target area.

[9] See article 1, paragraph 3, of the Terrorist Bombings Convention defining "explosive or other lethal device" as: "*(a)* An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or *(b)* A weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material".

A. On January 1, 1976, United States postal authorities seized a small package that contained a small charge which was designed to explode a vial of nerve gas as the package was opened. The device was disarmed by United States Army experts. A foreign group was suspected to be involved.[a]

B. On January 6, 2002 the United States Embassy in Wellington received a letter laced with cyanide. The letter was sent from New Zealand and contained a note threatening to disrupt the New Zealand Golf Open.

C. On February 14, 2002 nine foreigners were arrested in Rome under suspicion of plotting to attack the United States Embassy with cyanide and gun powder explosives. The authorities seized 10 kilograms of gunpowder and 4.4 kilograms of potassium ferrocyanide, which upon contact with strong acid or when heated can release extremely toxic hydrogen cyanide gas, and a map detailing plans for the attack. Four of the men arrested had ties to Al-Qaeda.[b]

1. Would the jurisdictional provisions of the Terrorist Bombings Convention apply to these three cases?

2. Which one of the offences described under article 2 of the Terrorist Bombings Convention will apply to these scenarios?

[a] Hamid Mohtadi and Antu Murshid, "A Global Chronology of Incidents of Chemical, Biological, Radioactive and Nuclear Attacks: 1950-2005", July 7 2006, p. 11. Available from https://pantherfile.uwm.edu/mohtadi/www/A%20Global%20Chronology%20of%20Incidents%20of%20Chemical%20Biological%20and%20Radionuclear%20Attacks.doc.pdf

[b] Melinda Henneberger, "A Nation Challenged: Rome; Investigators Show that U.S. Embassy is Vulnerable", February 27, 2002; Eric Croddy, Matthew Osborne and Kimberly McCloud, "Chemical Terrorist Plot in Rome?", James Martin Center for Nonproliferation Studies. Available from http://cns.miis.edu/stories/020311.htm

As stated above, article 2, paragraph 3 *(c)*, requires the criminalization of unlawful and intentional conduct which "in any other way contributes to the commission of one or more offences … by a group of persons acting with a common purpose". This broad prohibition is then qualified by the explicit requirement that "such contribution shall be intentional and either made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned".

The Terrorist Bombings Convention has a serious limitation: prosecution is not foreseen unless an offence is completed or attempted. Prosecution would not even be possible based on overwhelming evidence of an agreement to commit a bombing, accompanied by proof of purchase of the components for a detonating device and nails intended to serve as shrapnel. While true, the Convention does not prevent States from criminalizing such behaviour, nor would it prevent international cooperation in such a case.[10]

It is rarely possible for authorities to control a tactical situation so completely that they can be sure of intervening precisely when the plotters have begun to attempt the offence, and so would be subject to prosecution, but before violence is accomplished. "A surveillance agent may suddenly be incapacitated by illness or a traffic accident. A torrential rainstorm may obscure visibility, or a power failure may interrupt audio-visual coverage. The inability to

[10] It should be emphasized that fulfilment of a State's obligations under resolution 1540 (2004) would provide it with authority to prosecute these activities because it would need to prohibit any non-State actor to "manufacture, acquire, possess, develop, transport, transfer or use" chemical weapons as well as "attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them. A State party to the Chemical Weapon Convention would also need to prohibit any non-State actor to "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; to use chemical weapons; or to assist, encourage or induce, in any way, anyone to engage [in any such activity]".

guarantee control of a situation threatening catastrophic consequences compels authorities to interrupt dangerous plots before they are attempted, thereby compromising the abilities to prosecute and to conduct further covert investigation. Moreover, a regime for international cooperation against terrorism is hardly satisfactory if a legal prerequisite is the actual or attempted commission of an attack intended to inflict scores or hundreds of deaths. Finally, the phenomena of fanaticism and suicide bombings make the deterrent effect of the criminal justice process virtually irrelevant. If terrorist violence is to be reduced, authorities must re-focus their attention upon proactive intervention at the planning and preparation stage."[11]

In 1975, some unconfirmed media reports reported that an unknown terrorist group stole canisters of mustard gas from a United States ammunition bunker in the then Federal Republic of Germany. The same unconfirmed media reports indicate that this was followed by threats to deploy the gas against the population of Stuttgart unless the Federal Republic of Germany's Government would release political prisoners.[a] If the reports were true, would the international element required by the Terrorist Bombings Convention be fulfilled by article 6, paragraph 2 *(b)*, which reads that the "offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State"? Assuming, a foreign military depot qualifies as a "government facility", this scenario exemplifies the difficulty in applying the Terrorist Bombings Convention because of the lack of evidence that the terrorist group in question "delivered, placed, discharged or detonated" the canisters "to or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility" pursuant to article 2, paragraph 1.

[a] Jenkins and Rubin, 1978. But see David Claridge, "The Baader-Meinhof Gang (1975)", in *Toxic Error: Assessing Terrorist Use of Chemical and Biological Weapons*, Jonathan B. Tucker, ed. (MIT Press, 2000) at pp. 95-106.

### 3.4.2 Jurisdictional provisions

As with ICSANT, article 6 of the Terrorist Bombings Convention is divided into two categories of grounds upon which jurisdiction may be established. Article 6 requires in paragraph 1 that jurisdiction be established on the basis of territoriality, registration of a vessel or aircraft and the nationality of the offender. Paragraph 2 of article 6 refers to various grounds upon which parties may choose to establish jurisdiction, such as the nationality of a victim or an attempt to compel that State to do or abstain from doing any act.

Also, similarly to ICSANT, article 3 of the Terrorist Bombings Convention does not apply to non-international offences, namely where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis under article 6, paragraph 1, or article 6, paragraph 2, of the Convention to exercise jurisdiction. Nor are activities of armed forces during an armed conflict governed by the Convention, as they are subject to the separate rules of international humanitarian law.

### 3.4.3 International cooperation

Article 9 of the Terrorist Bombings Convention replicates the provisions referred to in other international legal instruments against CBRN terrorism by deeming as extraditable offences

[11] UNODC/TPB, "Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule Of Law Standards In Implementation Of United Nations Anti-Terrorism Instruments", October 2006. Technical Assistance Working Paper, Terrorism Prevention Branch, p. 7. Available from http://www.unodc.org/documents/terrorism/Publications/Preventing_Terrorist_Acts/English.pdf,

in any extradition treaty the offences under the Terrorist Bombing Convention, by allowing the possibility of ad hoc extradition, by treating the Convention as the basis for extradition in the absence of a treaty, and by allowing for the modification of provisions of existing extradition treaties to the extent that they are incompatible with the provisions of the Convention.

Similarly, article 11 addresses the political offence issue. Accordingly, a request for extradition or for mutual legal assistance based on an offence under the Terrorist Bombings Convention 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.

1. Is the detonation of a bomb that spreads radioactive material always a crime under the Terrorist Bombings Convention?

2. Does your national legislation define "explosive or other lethal device"?

3. Are there any acts that would be a crime under both the Terrorist Bombings Convention and ICSANT?

## 3.5 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Convention)

*Key features*

- The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention) provides an international legal framework for international cooperation related to the commission of unlawful acts against the safety of maritime navigation. These acts include, for example, the seizure of ships by force, certain acts of violence against persons on board ships and the placing of devices on board which are likely to destroy or damage the ship. States parties are obliged either to extradite or to prosecute alleged offenders. Similar provisions are contained in the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988 SUA Protocol), relating to unlawful acts against the safety of fixed platforms located on the continental shelf.

  The aim of the 2005 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (2005 SUA Convention) is to strengthen the 1988 SUA Convention in order to provide an appropriate response to the increasing risks posed to maritime navigation by international terrorism.

- The 2005 SUA treaties include a substantial broadening of the range of offences: including, for example, the use of a ship in a manner that causes death or serious injury or damage, the transport of terrorists in order to evade criminal prosecution or the unauthorized maritime transport of weapons of mass destruction.

  The 2005 SUA Convention also introduces provisions on procedures for the boarding of vessels suspected of being involved in terrorist activities.

### *Benefits*

- It is the first international instrument to address certain types of terrorism at sea and the illicit transport on board of ships of weapons of mass destruction, nuclear or other radioactive material, and relevant equipment, materials and technology.

### *Background*

#### *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988 SUA Convention) and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf (1988 SUA Protocol); and adoption of the Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 SUA Convention)*

After the hijacking of the Achille Lauro[12] in 1985, consideration was given to the need for an additional international legal instrument to address unlawful acts and terrorist violence against ships and fixed platforms located on the continental shelf.

In March 1988, a conference in Rome adopted the 1988 SUA Convention and the 1988 SUA Protocol. The main purpose of the former is to ensure that appropriate action is taken against persons committing unlawful acts against ships. These include the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it. The 1988 SUA Protocol contains equivalent provisions.

The continued vulnerability of maritime transport to terrorist attacks was demonstrated by the bombing in February 2004 of the vessel Super Ferry 14. After sailing from Manila Bay on a domestic route, a bomb concealed in a television set exploded. One hundred and sixteen people among the almost 900 passengers and crew on board died as a result of the explosion, resulting fire and sinking of the vessel. Responsibility for the attack was claimed by the Abu Sayaaf separatist group. After the use of unlawfully seized aircraft as impact and incendiary weapons in terrorist attacks in September 2001 and of an explosive laden ship to attack the oil tanker Limburg in 2002, the International Maritime Organization's (IMO) Legal Committee produced draft amendments to the 1988 SUA Convention and its Fixed Platform Protocol. Amendments to both instruments were adopted in October 2005 at a Diplomatic Conference on the Revision of the SUA Treaties.

*Note:* According to article 15 of the Protocol adopted in 2005, it is to be read and interpreted between its States parties as a single instrument with the 1988 SUA Convention. The new 2005 provisions together with the revised articles of the 1988 SUA Convention shall be called the "Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention)".[13]

The 2005 IMO instruments introduce new offences relating to biological, chemical and nuclear (BCN) weapons and nuclear and other radioactive materials which were not included

[12] For information on the Achille Lauro cruise ship hijacking and subsequent events, see UNODC's *Counter-Terrorism Legal Training Curriculum, Module 5, Transport-related (civil aviation and maritime) Terrorism Offences*, section 3.2: https://www.unodc.org/documents/terrorism/Publications/Module_on_Transport/13-89032_Ebook_from_DM_9-9-2014.pdf

[13] The 2005 SUA Convention and the 2005 SUA Fixed Platforms Protocol entered into force on 28 July 2010.

in previous maritime instruments. They are also the first instruments that apply to equipment, materials and technology relevant to the design, manufacture or delivery of WMD.[14] They are therefore the first international legal instruments dealing with the prevention and suppression of maritime-related CBRN terrorism. This module focuses on the aspects of these instruments relevant to combating CBRN terrorism. For a detailed analysis of both instruments, please refer to UNODC's *Counter-Terrorism Legal Training Curriculum, Module 5, Transport-related (civil aviation and maritime) Terrorism Offences*.

### 3.5.1 The expanded strategic purpose of the 2005 SUA Convention

In comparison to the 1988 treaty, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention) significantly expands its strategic purpose. It also provides for practical enforcement measures to implement that expanded purpose, including procedures for ship-boarding (article 8 bis).

As will be described hereafter, the 2005 SUA Convention drew upon not only predecessor transportation security-related instruments but also upon non-proliferation concepts embodied in treaties dealing with biological, chemical and nuclear weapons. These concepts are preventive in nature. The additional offences introduced by the 2005 SUA Convention require the punishment of conduct such as the transport on board a ship of a BCN weapon in certain cases in order to reduce the possibility that the item being transported is used in a terrorist act. Moreover, the 2005 SUA Convention introduced detailed cooperation and enforcement mechanisms, particularly relating to inspection and boarding, designed to implement this preventive purpose.

This proactive approach is consistent with the innovation in international instruments related to terrorism introduced by the International Convention for the Suppression of the Financing of Terrorism. That Convention sought to reduce the incidence of violent terrorism by criminalizing the non-violent financial provision and collection of funds intended or known to be used for terrorist purposes. Similarly, the 2005 SUA Protocol seeks to reduce the availability of BCN weapons to terrorists and other non-State actors and the risk of their ultimate use. It does this by making it an offence to unlawfully and intentionally transport such weapons or any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of BCN weapons, and by establishing procedures for cooperative deterrence and enforcement.

### 3.5.2 Relationship of the 2005 SUA Convention to non-proliferation instruments

Paragraph 3 of article 2 bis deals with three widely accepted multilateral treaties. The paragraph makes clear that nothing in the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention) shall affect the rights, obligations and responsibilities of States parties to those instruments under those instruments. Those instruments are:

[14] This aligns the 2005 SUA with resolution 1540 (2004), which defines, for the purpose of the resolution, "related materials" as materials, equipment and technology covered by relevant multilateral treaties and arrangements or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery. Implementation of the 2005 SUA requires States to take steps that are also covered by the resolution, for example, to develop and maintain effective border controls and have effective national export and trans-shipment controls.

- The Treaty on the Non-Proliferation of Nuclear Weapons of 1968 (NPT). The NPT entered into force in 1970.
- The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC). The BWC entered into force in 1973.
- The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC). The CWC entered into force in 1997.

One reason for specifically mentioning these three multilateral instruments is that they establish obligations related to the proliferation of BCN weapons, just like the 2005 SUA Convention.

### 3.5.3 The context of efforts to control biological, chemical and nuclear weapons during development of the 2005 SUA Convention

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention) was adopted at a time when the control of biological, chemical and nuclear (BCN) weapons was the subject of attention by the Security Council and several diplomatic conferences. The Security Council took a number of actions addressing the risks of terrorist use of BCN weapons, including resolution 1540 (2004).

This background of concern and diplomatic activity helps to explain the expansion of the 1988 SUA Convention from an instrument dedicated to the protection of maritime transportation into the 2005 SUA Convention, which is a dual-purpose agreement with the additional goal of deterring proliferation of BCN weapons by non-State actors. Moreover, this expansion consists not only of the creation of criminal offences concerning the illicit transportation of BCN weapons and radioactive materials and related offences, but also provides the controls called for by Security Council resolution 1540 with rules and safeguards for boarding ships and searches at sea as well as other obligations of resolution 1540 as noted above.

The 2005 SUA Convention makes a number of significant additions to the offences established in article 3 of the 1988 SUA Convention. The 2005 SUA Convention amended article 3 of the 1988 SUA Convention by eliminating other means of participating in an offence, which are moved to new article 3 quater. The threat offence that formerly was subparagraph 2 *(c)* of 1988 SUA Convention article 3 was revised to provide that:

> 2. Any person also commits an offence if that person threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs 1 *(b)*, *(c)* and *(e)*, if that threat is likely to endanger the safe navigation of the ship in question.

Other offences added by the 2005 SUA Convention through the addition of articles 3 bis, ter and quater implement an entirely new strategic orientation not previously found in the aviation or maritime terrorism-related instruments. Article 3 bis introduces offences involving the use of BCN weapons against a ship or through discharge from a ship, as well as use of a ship to cause death serious injury or damage and the transport of BCN weapons and related material. Article 3 ter introduces a transportation offence, and article 3 quater groups

the various means by which an offence can be committed, other than by an offender personally performing the prohibited action.

The strategic focus of article 3 bis of the 2005 SUA Convention is a significant departure from the previous transport-related instruments. A number of offences were created in article 3 bis, four of which require a specific terrorist intent established in the chapeau of the first paragraph and that of, subparagraph *(a)*:

> 1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:
>
> *(a)* When the purpose of the act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act…

The specific actions which are then criminalized appear in four subparagraphs numbered (i), (ii), (iii) and (iv) under subparagraph 1 *(a)*. The offences in subparagraph 1 *(a)* are primarily but not exclusively directed toward conduct involving use of a ship as a weapon or weapons platform or delivery system and will be examined in sequence.

### *Subparagraph 1 (a) (i) of article 3 bis, attacks from or against a ship*

Subparagraph 1 *(a)* (i) establishes as an offence the act of anyone who, with the requisite intent and purpose stated in the chapeau of paragraph 1 *(a)*:

> *(a)* (i) Uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage;

The 1988 SUA Convention provisions, carried over in article 3, subparagraphs 1 *(c)* and 1 *(d)* of the 2005 SUA Convention, establish as offences acts of destruction or damage to a ship or its cargo or placing on board a ship a device or substance likely to cause destruction or damage if the safe navigation of the ship would thereby be endangered. Subparagraph 1 *(a)* of new article 3 bis of the 2005 SUA Convention specifically criminalizes the use from or against a ship, or the discharge from a ship, of an explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage.[15] This formula of criminalization in new article 3 bis does not include the requirement carried over in other subparagraphs of article 3 to the 2005 SUA Convention that the destruction or damage must endanger the safe navigation of that ship. This element of endangering safe navigation establishes a minimum level of potential harm to justify the application of an international convention.[16]

[15] References to BCN weapons and materials occur in a number of subparagraphs in article 3 bis, and that technical terminology will be discussed after this introductory description of the new offences established in article 3 bis, subparagraphs 1 *(a)* and *(b)*.

[16] For example, the 1988 SUA Convention was adopted as a response to the 1985 Achille Lauro hijacking and murder by terrorists, but as opposed to article 3 bis, all of the offences in paragraph 1 of its article 3 are general intent crimes which require no specific terrorist intent to coerce or intimidate a government or population. By avoiding the potential application of the Convention to unruly cruise ship passengers who damage an entertainment lounge or to vandals who destroy a harbour light, the "safe navigation" element ensured that the SUA Convention will not be applicable in inappropriate circumstances which lack the appropriate degree of gravity. Article 3 bis lowers the threshold of harm but raises the *mens rea* element by incorporating the element requisite intent and purpose stated in the chapeau of paragraph 1 *(a)*.

Subparagraph 1 *(a)* (iv) applies to any person who:

*(a)* (iv) Threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph *(a)* (i)…

Another threat offence was carried over from the 1988 SUA Convention, which appears as article 3, paragraph 2, of the 2005 SUA Convention. As with subparagraph 1 *(a)* (i), subparagraph 1 *(a)* (iv) of article 3 bis does not include the old threat requirement that the threat be "likely to endanger the safe navigation of the ship".

It should be noted that the specific intent established in the chapeau of subparagraph *(a)* of paragraph 1 of article 3 bis may be either to intimidate a population or "to compel a government or international organization to do or abstain from doing any act".

### *Subparagraphs 1 (b) (i) through (iv) of article 3 bis, transport of dangerous materials intended to intimidate or coerce, of biological, chemical or nuclear (BCN) weapons and of material intended for nuclear-related activity without International Atomic Energy Agency safeguards or for use in a BCN weapon*

Subparagraph 1 *(b)* of article 3 bis of the 2005 SUA Convention deals with cases of transport of certain materials on board a ship. It must be read together with the mental state required by the chapeau of paragraph 1 of article 3 bis, that a person performs a prohibited act "unlawfully and intentionally". However, the offences in subparagraph 1 *(b)* do not generally include as an element that the purpose of the act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act, which is found in subparagraph 1 *(a)*. That element only applies to the offences in subparagraphs 1 *(a)* (i) through (iv) of article 3 bis and subparagraph 1 *(b)* (i). The rest of the offences in subparagraph 1 *(b)* of article 3 bis are instead characterized by elements of knowledge and intent that vary between the offences created in subparagraphs 1 *(b)* (i) through (iv), all of which apply to a person who transports on board a ship:

*(b)* (i) Any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act.

The practices of the maritime industry and individual mariners required the inclusion of a specific criminal purpose as an element of the offence in subparagraph 1 *(b)* (i) of transporting explosives or radioactive materials which may be otherwise intended for legitimate uses.

Subparagraph 1 *(b)* (ii) criminalizes the transport of a BCN weapon:

*(b)* (ii) Any BCN weapon, knowing it to be a BCN weapon as defined in article 1;

As can be seen, the transport on board a ship of a BCN weapon with knowledge that the object transported is a BCN weapon is an offence established by the 2005 SUA Convention.

Subparagraph 1 *(b)* (iii) provides that any person commits an offence within the meaning of the Convention if that person unlawfully and intentionally transports on board a ship:

*(b)* (iii) Any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable

material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement;

Subparagraph 1 *(b)* (iv) of article 3 bis provides that any person commits an offence within the meaning of the Convention if that person unlawfully and intentionally transports on board a ship:

> (iv) Any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

### Case study. The BBC China case

In October 2003 a vessel, the BBC China, departed from a Middle Eastern port with a cargo of centrifuge tubes designed for use in uranium enrichment. The tubes had been manufactured in South-East Asia and shipped to the Middle Eastern port, where they were listed as used machinery. Western intelligence services were aware of the shipment and the German owner of the ship was requested by the German Government to allow inspection of the ship's cargo. The ship docked at Taranto, in Italy, where the centrifuges intended for a North African country were found. The discovery has been described as contributing to that country's subsequent decision to dismantle its nuclear weapons programme.[a]

In 2003, after the above-described interdiction, the destination country announced its decision "to eliminate ... materials, equipment and programmes which lead to the production of internationally proscribed weapons". In 2004 the International Atomic Energy Agency (IAEA) released a report on its January 2004 inspection visit to that country. That report described documentation which the destination country acknowledged receiving from a foreign source related to nuclear weapon design and fabrication, including a series of engineering drawings relating to nuclear weapon components, notes, handwritten and otherwise, related to the fabrication of weapon components. The report also described materials and equipment used in uranium enrichment, including a pilot scale uranium conversion facility fabricated in portable modules, centrifuge cascades and imported equipment for a precision machine shop. Any of these items, if transported with the intention that they be used to contribute to the design of a nuclear weapon, would fall within the scope of the offence in subparagraph 1 *(b)* (iv). Similarly, laboratory equipment, decontamination materials and facilities, raw materials for toxins and toxic substances, plans and specifications and similar items for the design, manufacture or delivery of biological weapons, if transported with the necessary intent would be within the scope of the offence in this paragraph.

[a] Global Security Newswire of the Nuclear Threat Initiative, December 31 (2003). Available from http://www.nti.org/gsn/

## *Article 3 ter in the 2005 SUA Convention and the offence of transporting a person to evade prosecution*

Article 3 ter provides that:

> Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in article 3, 3 bis or 3 quater or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution.

The treaties listed in the annex to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention) are nine terrorism-related instruments: the Hague Convention; the Montreal Convention; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973); the International Convention against the Taking of Hostages (1979); the Convention on the Physical Protection of Nuclear Material (1979); the Airport Protocol (1988); the Fixed Platform Protocol; the International Convention for the Suppression of Terrorist Bombings (1997); and the International Convention for the Suppression of the Financing of Terrorism (1999).

A prohibition against transporting a fugitive to assist that person in evading criminal prosecution may seem to be a novel provision in an instrument designed to protect maritime transport from various harms and to discourage proliferation of weapons of mass destruction. However, it may be helpful to consider this provision in the context of other measures that were being taken to limit the movement of terrorists and ensure their apprehension.

The specific language with which the Security Council demonstrated its concern with the mobility of terrorists is found in the following paragraphs of resolution 1373, in which the Security Council, acting under Chapter VII of the Charter, decided that all States shall:

*(c)* Deny safe haven to those who finance, plan, support, or commit terrorist acts ...

*(e)* Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice;

*(g)* 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 …

In addition, paragraph 3 of resolution 1373 calls upon all States to:

*(a)* Find ways of intensifying and accelerating the exchange of operational information, especially regarding actions or movements of terrorist person or networks; forged or falsified travel document; traffic in arms, explosives or sensitive materials; use of communications technologies by terrorist groups; and the threat posed by the possession of weapons of mass destruction by terrorist groups …

### *Article 3 quater and other means of committing or participating in a Convention offence*

Article 3 quater lists five additional ways in which a person may commit an offence. All of the subparagraphs under article 3 quater are traceable to the 1988 SUA Convention or to more recent crime or terrorism conventions. A person commits an offence within the meaning of the 2005 SUA Convention if that person:

*(a)* Unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences set forth in article 3, paragraph 1, article 3 bis, or article 3 ter; or

*(b)* Attempts to commit an offence set forth in article 3, paragraph 1, article 3 bis, paragraph 1 *(a)* (i), (ii) or (iii), or subparagraph *(a)* of this article; or

*(c)* Participates as an accomplice in an offence set forth in article 3, article 3 bis, article 3 ter, or subparagraph *(a)* or *(b)* of this article;

*(d)* Organizes or directs others to commit an offence set forth in article 3, article 3 bis, article 3 ter, or subparagraph *(a)* or *(b)* of this article; or

*(e)* Contributes to the commission of one or more offences set forth on article 3, article 3 bis, article 3 ter, or subparagraph *(a)* or *(b)* of this article, by a group of persons acting with a common purpose, intentionally and either:

(i) With the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence set forth in article 3, 3 bis or 3 ter; or

(ii) In the knowledge of the intention of the group to commit an offence set forth in article 3, 3 bis or 3 ter.

### *Subparagraphs (a), (b) and (c) of article 3 quater, attempts, injuring or killing in the commission of an offence*

Subparagraph *(a)* of article 3 quater essentially repeats subparagraph 1 *(g)* of article 3 of the 1988 SUA Convention, establishing as an offence the injuring or killing of a person in connection with the commission of a specified offence. In the 2005 SUA Convention, the specified offences are expanded from acts on board a ship to include offences in articles 3 bis and 3 quater, that is transport of an offender to evade prosecution and various auxiliary means of committing a convention offence. Subparagraph *(b)* of article 3 quater repeats the language of the 1988 Convention dealing with an attempt except for the addition of references to article 3 bis and 3 ter and subparagraph *(a)* of article 3 quater. Subparagraph *(c)* partially reproduces subparagraph 2 *(b)* of article 3 of the 1988 SUA Convention with respect to participation as an accomplice and adds references to article 3 bis, 3 ter and subparagraphs *(a)* and *(b)* of article 3 quater. Subparagraph *(c)* of article 3 quater omits the reference found in the 1988 Convention to abetting the commission of a Convention offence perpetrated by any person. That concept of abetting an offence has been replaced by subparagraphs *(d)* and *(e)* of article 3 quater.

### *Subparagraph (d) of article 3 quater, organizing and directing others to commit a Convention offence*

Subparagraph *(d)* makes it an offence to organize or direct others to commit other Convention offences, with one exception.[17] This type of offence can be found in prior counter-terrorism conventions. Article 2, subparagraph 3 *(b)* of the International Convention for the Suppression of Terrorist Bombings; subparagraph 5 *(b)* of article 2 of the International Convention for the Suppression of the Financing of Terrorism; subparagraph 4 *(b)* of article 2 of the International Convention for the Suppression of Acts of Nuclear Terrorism; and subparagraph 1 *(j)* of article 9 of the Amendment to the Convention on the Physical Protection of Nuclear Material all use similar language to punish those who organize and direct others to commit the offences established in the respective instruments.

[17] Subparagraph *(d)* of article 3 quater does not apply to subparagraph *(c)* of article 3 quater, participation as an accomplice.

### *Subparagraph (e) of article 3 quater, contributing to the commission of a Convention offence by a group of persons acting with a common purpose*

Subparagraph *(e)* of article 3 quater in the 2005 SUA Convention creates an offence not found in the 1988 SUA Convention. That new offence is contributing to the commission of an offence by a group when the contribution is done either with the aim of furthering the group's criminal purpose or with knowledge of the group's criminal intention. A predecessor to this offence was introduced in the International Convention for the Suppression of Terrorist Bombings, article 2, subparagraph 2 *(c)*. Similarly worded offences are found in the International Convention for the Suppression of the Financing of Terrorism, article 2, subparagraph 5 *(c)*; in the ICSANT, article 2, subparagraph 4 *(c)*; and in the Amendment to the Convention on the Physical Protection of Nuclear Materials in article 9, subparagraph 1 *(k)*.

The difference between an act done intentionally under the chapeau of subparagraph *(e)* of article 3 quater and an act to accomplish a criminal purpose or with knowledge of such a purpose can be illustrated by the following example. A car service might intentionally transport a group of persons and their luggage from a hotel to a ferry terminal, helping to load and unload their luggage at the commencement and end of their journey. If once on board, those persons take a chemical weapon from their luggage, unlawfully seize the ship and kill crew members and passengers, the car service driver might, as a result of their actions, come under suspicion because he or she has physically contributed to the commission of the crime by furnishing transportation. However, being unaware of the groups unlawful purpose, the absence of guilty knowledge or intent on the part of the taxi driver means they would not be criminally responsible for these actions.

However, if, instead of using a commercial vehicle, the persons who committed the criminal offence had asked a friend to drive them to the ferry terminal, and had divulged their intended criminal purpose, that friend could be criminally responsible in transporting them to the ferry terminal, even if she or he had expressed reservations about the proposed conduct or had tried without success to dissuade the hijackers from their intended course of action. Once the friend became aware of the group's intended unlawful activity or purpose, the friend's continued participation or contribution, in knowingly transporting the perpetrators to the scene of the crime, would most likely be sufficient if it has facilitated or assisted in the actual commission of a criminal offence. In order to avoid criminal liability, once the friend becomes aware of their passengers intended unlawful seizure, criminal responsibility for the offence could most likely only be avoided by refusing to transport the intended hijackers to the terminal, or otherwise withdrawing from preparatory acts contributing to its commission. National law and jurisprudence might impose an additional legal obligation on the friend to immediately inform the police so that they might prevent or interrupt the planned attack. However, where guilty knowledge or intent is required, as under the Convention, liability could be avoided by simply refusing to make any further contribution to the commission of the completed offence, once the criminal purpose of the action is known.

### *Interpretation of subparagraph (e) of article 3 quater of the 2005 SUA Convention*

In its focus on an association with "... a group of persons acting with a common purpose ... where such activity or purpose involves the commission of an offence" subparagraph *(e)* of article 3 quater is reminiscent of the civil law concept of an *association de malfaiteurs*. The language of subparagraph *(e)* of article 3 quater applies to a person who:

*(e)* Contributes to the commission of one or more offences set forth on article 3, article 3 bis, article 3 ter, or subparagraph *(a)* or *(b)* of this article, by a group of persons acting with a common purpose, internationally and either:

(i) With the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence set forth in article 3, 3 bis or 3 ter; or

(ii) In the knowledge of the intention of the group to commit an offence set forth in article 3, 3 bis or 3 ter.

At least in its English language version, the reference to the object of the contribution, that is the "commission of one or more offences" can be taken to imply the necessity of an offence or offences that is actually attempted or accomplished. The references to the "aim of furthering" or "in the knowledge of the intention of the group" clearly refer to a forward-looking mental state at the time of the contribution. An argument can be made to support the proposition that subparagraph *(e)* establishes an offence only when the intended criminal act being facilitated is actually attempted or accomplished. The contrary argument can be advanced that there is a union of criminal act and intent if a criminal intent exists at the moment of the contribution, so accomplishment of the intended offence is not an element of article 3 *(e)* quater. Clearly, which interpretation should be adopted will have to be determined at the national level, according to each State's legal tradition and policy considerations.

### *Effect on the interpretation of subparagraph (e) of article 3 quarter in light of language adopted in the 2010 Beijing Convention*

There is no doubt that the 2005 SUA Convention is a completely independent legal instrument negotiated by a different group of countries and dealing with a different subject area to the 2010 Beijing Aviation Convention. Legally, the subsequent aviation instrument has no impact upon the 2005 SUA Convention: there is no need for consistency between the two documents, and there is no space for any concept of an amendment by implication. Nevertheless, there is a significant difference in the way that contributing to the commission of an offence is described in the 2005 SUA Convention and in the Beijing Convention. That difference deserves consideration by States that ultimately must enact legislation to create the offences established in the two Conventions and must decide how their domestic legislative language should reflect the requirements of the two instruments.

The immediately preceding discussion did not resolve whether a convention offence must be accomplished or attempted for an intended contribution toward that offence to be considered an offence under subparagraph (3) of article 3 quater. That question was addressed and resolved in paragraph 5 of article 1 of the Beijing Convention. In its heading that paragraph provides that:

> Each State Party shall also establish as offences, when committed intentionally, whether or not any of the offences set forth in paragraph 1, 2 or 3 of this article is actually committed or attempted, either or both of the following ...

Relatively few countries have yet implemented either or both the 2005 SUA Convention and the Beijing Convention. Therefore the opportunity is still available for those States to choose whether to consider the ratification and implementation of the two instruments separately or jointly. Considerable overlap exists between the offences required to be established by the two sets of instruments. Inconsistent criminalization language could therefore cause legal risks

and confusion. In the interest of legislative efficiency, it also might be advantageous to combine offences directed against maritime and air transport in the same legislative provisions. However, practical considerations will vary, and it is certainly not necessary for the 2005 SUA Convention or the Beijing Convention and Protocol to be adopted at the same time.

Consequently, States may wish to unify the legislative analysis and implementation process for the 2005 maritime and the 2010 aviation instruments. If that were done, it would immediately be evident that the Beijing Convention, unlike the 2005 SUA Convention, dictates that contributing to the commission of an offence by a group be established as an offence regardless of the success or failure of the criminal group's purpose or activity. The 2005 SUA Convention lacks the crucial language "whether or not any of the offences set forth ... is actually committed or attempted" and is therefore open to interpretation. The two offences in the two instruments could be harmonized by specifying that contributing to the commission of a maritime as well as an aviation offence need not be accompanied by the attempted or successful execution of the intended offence. Clarifying that an attempted or accomplished offence is not an element of the contribution to a terrorist offence would serve a preventive purpose by permitting the punishment of acts intended to contribute to a terrorist action and possibly deterring such acts of intended contribution to a group's criminal activity or purpose. It would also harmonize these offences aimed at maritime and aviation security.

### *Liability of legal entities*

All of the aviation and maritime instruments prior to 2005 dealt with the types of offences committed primarily by individuals and groups. While it was not improbable that a legal entity could be involved through its owners or managers, the focus of the offences was on the criminal liability of individuals. With the introduction of transport offences in article 3 bis 1 *(b)* and article 3 ter of the 2005 SUA Convention, it became much more feasible that the commission of an offence might involve the knowing involvement of a corporation or other business entities with a recognized legal personality. Some legal systems make such entities criminally liable for acts done by their controlling persons in specified circumstances. Such criminal liability is in addition to the responsible executive's personal criminal responsibility. Of course, unlike a natural person, a corporation or similar legal entity cannot be imprisoned. However, financial or other sanctions, including dissolution, can be imposed. In some legal systems, a corporation or similar legal entity cannot be held criminally responsible because criminal liability is attributable only to a natural person capable of individually forming an unlawful intent, but nevertheless can be criminally liable and subjected to civil and administrative sanctions. Moreover, as a final sanction, the entity's legal existence might be cancelled by withdrawal of the corporate charter or other legal mechanisms which grant or recognize its juridical or legal personality.

None of the international instruments related to terrorism had addressed the issue of the criminal responsibility of legal entities until the adoption of the International Convention for the Suppression of the Financing of Terrorism. The Convention requires its States parties to criminalize the provision or collection of funds with the intention or in the knowledge that such funds are to be used to carry out a terrorist offence as defined in the Convention and its annex. The provision or collection of funds on a significant scale are activities that are inherently likely to involve banks, financial institutions, non-government organizations and other legal entities. Accordingly, article 5 of the Terrorism Financing Convention requires the Convention's States parties to take the measures necessary to hold a legal entity liable for acts of its representatives in specified circumstances. The type of legal liability was left to the national discretion of the individual States parties.

The 2005 SUA Convention contains new offences in articles 3 ter and 3 quater which are likely to involve shipping companies, freight forwarders, manufacturers and other legal entities, and masters of vessels or other responsible persons. Some of those persons may act with criminal intent or knowledge. Article 3 ter of the 2005 SUA Convention criminalizes transport of a person knowing that the person has committed a specified offence and intending to assist that person's escape.

Article 3 ter could apply to a shipping company which permits fugitives to escape on its vessel after a CBRN-related terrorist attack because of sympathy for their ideological or other cause. This could for example be the case if the attack involving CBRN has been committed against, on or from a ship or it is an offence set forth in any treaty listed in the annex to the Convention.

Article 3 quater lists various means by which Convention offences may be committed by persons other than the physical perpetrators. This would include the use of legal entities to facilitate commission of an offence established in the Convention, for example a freight forwarding firm that provides false packaging and documentation for a shipment of nuclear material, equipment and technology, knowing and intending that it will be used in violation of an IAEA safeguards agreement for the manufacture of a nuclear weapon.

The article on the responsibility of legal entities developed in the 1999 Financing Convention was adopted without substantial change in the 2005 SUA Convention, which adds as article 5 bis:

> 1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence set forth in this Convention. Such liability may be criminal, civil or administrative.
>
> 2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.
>
> 3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

### 3.5.4 Boarding and search provisions concerning biological, chemical and nuclear weapons and other offences in the 2005 SUA Convention

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention) added boarding and search rules and safeguards related to biological, chemical and nuclear (BCN) weapons and related materials to the 1988 SUA Convention. Article 8 bis establishes procedures for boarding and search similar to those provided in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. Article 8 bis provides detailed procedures and safeguards to be followed in cases of suspicion of violations of the offences established in article 3 of the 1988 SUA Convention or added by the 2005 SUA Convention. Most of these conditions and safeguards are basically guidelines, although some could have decisive weight in the consideration of whether

an authorization for boarding should, or not, be granted. First and foremost is the need to consider whether, on account of the dangers and difficulties involved in the boarding of ships at sea, it would not be more appropriate to take measures at the next port of call or elsewhere (paragraph 3). This preliminary guideline on how to act should be considered with some important safeguards contained in paragraph 10, according to which, when a State party takes boarding measures it should take into due account the need not to endanger the safety of life at sea, the safety and security of the ship and its cargo, and the safety of the marine environment. The grounds for and contents of a request for boarding are specified in Module 5, section 3.6.10.

## 3.6 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005 SUA Protocol)

The Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (2005 SUA Protocol) updates the original Fixed Platform Protocol, to the extent appropriate to its more limited subject matter, in some of the same ways the 2005 SUA Convention updates the 1988 SUA Convention. Editorial changes are made in a number of articles. Additional offences are created in a new article 2 bis dealing with BCN weapons:

> Any person commits an offence within the meaning of this Protocol if that person unlawfully and intentionally, when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:
>
> *(a)* Uses against or on a fixed platform or discharges from a fixed platform any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or
>
> *(b)* Discharges, from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph *(a)*, in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
>
> *(c)* Threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph *(a)* or *(b)*.

New means of committing or participating in an offence established in articles 2 and 2 bis of the Fixed Platform Protocol as amended are defined in article 2 ter. Those means are essentially identical to the other means of committing or participating in an offence established in article 3 quater of the 2005 SUA Convention and so are not analysed here.

1. If an inland country has no access to the sea and no fixed platforms on the continental shelf, why should it adopt the maritime security instruments?

2. Can a threat to release harmful chemical substances if a government does not make an extortion payment be considered an offence under the 2005 SUA Convention?

3. What significance does an IAEA comprehensive safeguards agreement have with respect to the transportation of nuclear materials under the 2005 SUA Convention?

4. In what way is article 3 ter of the 2005 SUA Convention consistent with political and law enforcement emphasis on the travel mobility of terrorists?

5. What innovation with respect to the political offence exception to international cooperation was introduced in the 2005 SUA Convention? Does the new non-discrimination article introduced by 2005 SUA Convention cancel the effect of the elimination of the political offence exception or can the two be reconciled?

6. Does a military vessel of a State that suspects a ship of another State of carrying BCN weapons have the authority to stop that ship on the high seas, board it and search for weapons and evidence? Are there any conditions that must be observed prior to or during such a boarding? If weapons are found, which State has the right to exercise jurisdiction over the ship and cargo?

For a comparison table between the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and its 2005 version and between the 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf and its 2005 Protocol, see UNODC's *Counter-Terrorism Legal Training Curriculum, Module 5: Transport-related (civil aviation and maritime) Terrorism Offences.*

## 3.7 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010 Beijing Convention)

### *Key features*

- Defines as offences and obligates States parties to make punishable the acts of using civil aircraft for the purpose of causing death, serious bodily injury or serious damage; using civil aircraft to release or discharge any biological, chemical or nuclear (BCN) weapon or similar substances to cause death, serious bodily injury or serious damage; and using any BCN weapon or similar substances on board or against civil aircraft.
- Defines as an offence and obligates States parties to make punishable the unlawful transport of any BCN weapon or related material and technology that significantly contributes to the development of a BCN weapon.
- Specifically provides for the criminal liability of directors and organizers of an offence, as well as the liability of those who knowingly assist an offender to evade investigation, prosecution or punishment.[18]
- Defines as an offence and obligates States parties to make punishable the making of credible threats to commit an offence.
- Under certain conditions, agreement to contribute or contribution to an offence, whether such an offence is actually committed or not, may be punishable.
- A legal entity may be held criminally liable if the applicable national law so provides.
- Expands the grounds of jurisdiction under the earlier instruments by requiring each State party to establish jurisdiction when the offence is committed by its national, and

[18]It is noted that this Convention relates to resolution 1540 (2004) with respect to transportation by air in the same way as the 2005 SUA Protocol does with respect to transport by sea.

by enabling each State Party to establish jurisdiction when the victim of the offence is its national.

- Affirms the principles of fair treatment and non-discrimination.
- A State cannot refuse to extradite an offender on the sole ground that the offence would be political in nature.

### *Benefits*

- Modernizes the legal framework for aviation security to deal with new and emerging threats against civil aviation, including the use of BCN weapons or substances.
- Criminalizes a number of acts constituting new and emerging threats against civil aviation, including certain preparatory acts for the offences, thereby strengthening the capacity of States to prevent the commission of these offences, and to prosecute and punish those who commit such offences.
- Enhances the global treaty regime on counter-terrorism thereby contributing to the implementation of United Nations global counter-terrorism goals.

After the attacks on targets in the United States on 11 September 2001, the International Civil Aviation Organization (ICAO) Assembly adopted resolution A33-1 of October 2001. That resolution directed the ICAO Council and its Secretary General "to address the new and emerging threats to civil aviation, in particular to review the adequacy of the existing aviation security conventions" and directed the Council to convene a ministerial conference on aviation security with the objectives of preventing, combating and eradicating acts of terrorism involving civil aviation and otherwise strengthening aviation security. Pursuant to this resolution and recommendations of a High-Level Ministerial Conference on Aviation Security held in February 2002, the ICAO Council approved a project for review of the existing aviation security instruments. The ICAO secretariat conducted a survey of ICAO member States as well as internal research. Active development of a new instrument was carried forward after negotiation in 2005 of the Protocols to the IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Fixed Platforms Protocol.

In 2006, the ICAO secretariat Legal Affairs and External Relations Bureau convened a Study Group of 10 national experts, acting in their individual capacities, and a UNODC Terrorism Prevention Branch representative. This group met in 2006 and 2007 and recommended that the ICAO Legal Committee examine the advisability of certain proposals. The Legal Committee recommended that those drafts be considered by a diplomatic conference, which took place in Beijing in August and September 2010. The conference adopted the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation. As between States parties, its provisions will prevail over the 1971 Montreal Convention and the 1988 Airport Protocol.

The Beijing Convention introduces new offences relating to BCN weapons and radioactive substances which were not included in previous aviation instruments. It is therefore the first international legal instrument dealing with the prevention and suppression of aviation-related CBRN terrorism. The present module focuses on the aspects of the Beijing Convention relevant to combating CBRN terrorism. For a detailed analysis of the entire Convention, please refer to UNODC's *Counter-Terrorism Legal Training Curriculum, Module 5, Transport-related (civil aviation and maritime) Terrorism Offences*.

### 3.7.1 Criminalization

New offences established by article 1, paragraph 1, subparagraphs *(g)* through *(i)*, provide that any person commits an offence if that person unlawfully and intentionally:

*(g)* Releases or discharges from an aircraft in service any BCN weapon or explosive, radioactive, or similar substances in a manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment; or

*(h)* Uses against or on board an aircraft in service any BCN weapon or explosive, radioactive, or similar substances in a manner that causes or is likely to cause death, serious bodily injury or serious damage to property or the environment; or

*(i)* Transports, causes to be transported, or facilitates the transport of, on board an aircraft:

(1) Any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or

(2) Any BCN weapon, knowing it to be a BCN weapon as defined in article 2; or

(3) Any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to a safeguards agreement with the International Atomic Energy Agency; or

(4) Any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon without lawful authorization and with the intention that it will be used for such purpose;

provided that for activities involving a State Party, including those undertaken by a person or legal entity authorized by a State Party, it shall not be an offence under subparagraphs (3) and (4) if the transport of such subparagraphs or materials is consistent with or is for a use or activity that is consistent with its rights, responsibilities and obligations under the applicable multilateral non-proliferation treaty to which it is a party including those referred to in article 7.

The offences involving transport for BCN weapons have many features in common with certain international legal instruments, such as the treaties on nuclear non-proliferation and biological and chemical weapons referred to in article 7 of the Beijing Convention.

The language of the offences in subparagraphs *(g)* through *(i)* of article 1 of the 2010 Beijing Convention adapts offences involving BCN materials, and established in the 2005 SUA Convention, to the aviation context.

Article 1, paragraph 2, of the 2010 Beijing Convention repeats the offences found in article 2 of the 1988 Airport Protocol. It provides that:

2. Any person commits an offence if that person unlawfully and intentionally, using any device, substance or weapon:

*(a)* Performs an act of violence against a person at an airport serving international civil aviation which causes or is likely to cause serious injury or death; or

*(b)* Destroys or seriously damages the facilities of an airport serving international civil aviation or aircraft not in service located thereon or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at that airport.

Article 1, paragraph 3 *(a)* and *(b)* of the Beijing Convention make it an offence to threaten to commit any of the offences in subparagraphs *(a)* through *(d)* and *(f)* through *(h)* of paragraph 1 or in paragraph 2, or to unlawfully and intentionally cause a person to receive such a threat, under circumstances which indicate that the threat is credible.

Article 1, paragraph 4, of the Beijing Convention introduces additional forms of criminal liability which were not present in the previous aviation instruments. The Hague Convention, the Montreal Convention and its Airport Protocol all extended criminal liability to those who committed prescribed acts, attempted to do so, or were accomplices of the persons who directly committed or attempted to commit the offence defined in a particular convention. The scope of criminal liability in the Beijing Convention is significantly expanded beyond attempting the offence or being an accomplice.

Subparagraph 5 of article 1 of the Beijing Convention requires that one or the other of the following acts, when committed intentionally and unlawfully, be established as an offence:

*(a)* Agreeing with one or more persons to commit an offence set forth in paragraphs 1, 2 or 3 of this article and, where required by national law, involving an act undertaken by one or more of the participants in furtherance of the agreement; or

*(b)* Contributing in any other way to the commission of one or more offences set forth in paragraphs 1, 2 or 3 of this article by a group of persons acting with a common purpose, and such contribution shall either:

(i) Be made with the aim of furthering the general criminal activity or purpose of the group, where such activity or purpose involves the commission of an offence set forth in paragraph 1, 2 or 3 of this Article; or

(ii) Be made in the knowledge of the intention of the group to commit an offence set forth in paragraph 1, 2 or 3 of this Article.

Subparagraph 5 *(a)* describes a conspiracy type of offence and subparagraph 5 *(b)* describes a criminal association type of offence. Under subparagraph 5 *(a)*, the offence established may be the original historical common law conspiracy, in which the mere act of agreeing to commit an unlawful act is punishable as an offence. An alternative permissible means of criminalization is the conspiracy offence's modern statutory evolution, which usually requires an action by one of the participants in the conspiracy in furtherance of the agreement. This element is commonly called an overt act, which completes the existence of the offence with respect to all the co-conspirators.

Under subparagraph 5 *(b)* of article 1, the offence established may also be a knowing or intentional contribution towards a group's criminal activity or purpose.

### *Actual commission of the intended offence not necessary to constitute the preparatory offences established in article 1, paragraph 5*

The introductory heading of article 1, paragraph 5, contains language to the following effect:

> Each State Party shall also establish as offences, when committed intentionally, whether or not any of the offences set forth in paragraph 1, 2 or 3 of this article is actually committed or attempted, either or both ...

followed by the article 1, subparagraphs 5 *(a)*, conspiracy and 5 *(b)*, contribution to a criminal association.

Under subparagraph 5 *(a)*, the offence established may be a conspiracy that does or does not require an overt act as an essential element of its commission under national law, but the offence established must not require that the substantive offence that is the object of the conspiracy be attempted or accomplished. Under subparagraph 5 *(b)*, the offence established may be an association offence focused on participation in a group with a criminal activity or purpose with or without any requirement for a material action of preparation having taken place, but the offence established must not require that the substantive activity or purpose for which the group is preparing be attempted or accomplished. The effect of the chapeau language in article 1, paragraph 5, of the Beijing Convention is direct and clear with respect to the aviation offences established in it. It may, however, have an unpredictable retroactive effect on the understanding and interpretation of the criminal association type of offence required to be established by subparagraph *(e)* of article 3 quater of the 2005 SUA Convention.

### 3.7.2 Jurisdictional provisions

As in earlier aviation instruments, the jurisdictional scope of the Beijing Convention is limited to situations involving international elements, such as a flight taking off or landing in the territory of a State other than the State of registration or the presence in a State of an alleged offender. The jurisdictional grounds and limitations which appear in article 4, paragraph 2, through article 4, paragraph 6, of the Montreal Convention (i.e., exclusion of aircraft used in military, customs or police services from the Convention's scope) appear in article 5, paragraph 2, through article 5, paragraph 6, of the 2010 Beijing Convention.

Both the mandatory and optional grounds for jurisdiction recognized in prior aviation instruments were expanded in the Beijing Convention and Protocol under article 8, paragraph 2:

Each State party may also establish its jurisdiction over any such offence in the following cases:

*(a)* When the offence is committed against a national of that State;

*(b)* When the offence is committed by a stateless person whose habitual residence is in the territory of that State.

UNODC's *Counter-Terrorism Legal Training Curriculum*, *Module 3*, *International Cooperation in Criminal Matters: Counter-Terrorism*, section 1.2.2.1, contains a discussion of the principle of *aut dedere aut judicare*—the "extradite or prosecute" principle—and the module includes a number of case studies. The UNODC *Legislative Guide to the Universal Legal Regime against Terrorism* dedicates its chapter III to the topic of jurisdiction over offences.

#### *Liability of legal entities*

Article 4 of the Beijing Convention includes language concerning the liability of legal entities that has been adopted in a number of international conventions, including the 2005 maritime protocols.

1. Each State Party, in accordance with its national legal principles, may take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence set forth in article 1. Such liability may be criminal, civil or administrative.

2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.

3. If a State party takes the necessary measures to make a legal entity liable in accordance with paragraph 1 of this article, it shall endeavour to ensure that the applicable criminal, civil or administrative sanctions are effective, proportionate and dissuasive. Such sanctions may include monetary sanctions.

### 3.7.4 Protections for an accused person

The early aviation instruments established several guarantees protecting alleged offenders. Under articles 8 and 9 of the 1963 Tokyo Convention, a person may be disembarked to protect the safety of the aircraft and of persons or property or to maintain good order and discipline on board. Article 15, paragraph 1, of the Convention requires that a person so disembarked shall be at liberty to continue his journey unless his presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings. Under the 1963 Convention, a State party that takes delivery of a person in custody of a person from an aircraft commander may continue that custody only "for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted", and the person in custody "shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national". Article 15, paragraph 2, of the 1963 Tokyo Convention requires the State in which a person has been disembarked or delivered to accord to such person treatment no less favourable for his protection and security than that accorded to nationals of that State in like circumstances.

The duty to assist a person in custody to communicate immediately with the nearest appropriate representative of the State of nationality was carried forward into the 1970 Hague Convention and the 1971 Montreal Convention, appearing in article 6 of each of those instruments. The 1988 Airport Protocol supplemented the Montreal Convention with new offences, but it added no additional protection for accused persons. The Convention on the Marking of Plastic Explosives for the Purpose of Detection contained no criminal provisions and added no new protections.

By the time of the adoption of the 2010 Beijing instruments, human rights protections were being recognized in increasingly precise language in United Nations instruments. In addition to those found in the prior aviation instruments, the 2010 instruments included article 11 in the Beijing Convention, commonly known as a "fair treatment article", and a counterpart article 10 in the Beijing Protocol. The articles require that a person regarding whom measures or proceedings are being carried out pursuant to the Convention "(s)hall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law".

### 3.7.5 International cooperation

Like the recent international legal instruments dealing with CBRN terrorism, the Beijing Convention contains an obligation to extradite or prosecute. In accordance with article 12,

paragraph 1, all offences regulated in the treaty are deemed to be included as extraditable offences in any extradition treaty existing between any of the States parties. Pursuant to article 12, paragraph 2, if a State party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State party with which it has no extradition treaty, it may at its option consider the Beijing Convention as the legal basis for extradition in respect of the offences set forth therein. Extradition shall be subject to the other conditions provided by the law of the requested State. States not making extradition conditional on the existence of a treaty must recognize the Beijing Convention offences as extraditable, in accordance with article 12, paragraph 3.

Article 13 of the Beijing Convention of 2010 follows the language developed in the 1997 Terrorist Bombings Convention and ulterior instruments in excluding the political offence as a ground for rejecting a request for extradition or mutual legal assistance. The inadmissibility of the political offence exception is balanced by article 14, which contains a non-discrimination clause.

In accordance with article 17, States parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in the Beijing Convention.

### 3.7.6 Additional language relating to arms control agreements

Since 1963, all of the aviation and maritime security instruments have consistently excluded aircraft or ships used in military, customs or police services from their scope. That same exclusion is repeated in article 5, paragraph 1, of the 2010 Beijing Convention. When the transport-related instruments began to deal with issues of biological, chemical and nuclear weapons and non-proliferation issues in the maritime context, it was deemed advisable to include additional language in articles concerning the relationship of the relevant instruments to international humanitarian law relating to certain weapons and materials. The first such article was article 3 of the 2005 SUA Protocol. Substantially similar language was adopted in the 2010 Beijing Convention:

> **Article 6**
>
> 1. Nothing in this convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the charter of the United Nations, the Convention on International Civil Aviation and international humanitarian law.
>
> 2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.
>
> 3. The provisions of paragraph 2 of this article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.
>
> **Article 7**
>
> Nothing in this Convention shall affect the rights, obligations and responsibilities under the Treaty on the Non-Proliferation of Nuclear Weapons, signed at London, Moscow and

Washington on 1 July 1968, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972, or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, signed at Paris on 13 January 1993, of State Parties to such treaties.

1. During the hijacking of one of the planes used in the September 11 attacks, the perpetrators quickly gained control and sprayed mace, pepper spray or some other irritant in the first-class cabin in order to force the passengers and flight attendants towards the rear of the plane. They claimed they had a bomb. Would the use of mace meet the definition of "BCN weapon" under the Beijing Convention?

2. Would the intentional detonation of a radioactive explosive device at an airport be an offence under the Beijing Convention?

3. Is the transport of radioactive material always a crime under the Beijing Convention?

4. Is the transport of a chemical weapon by a military plane a crime under the Beijing Convention?

# 4. CONCLUSION

## 4.1 Combined legislative considerations of the offences set forth in the Convention on the Physical Protection of Nuclear Material and its 2005 Amendment and in the International Convention for the Suppression of Acts of Nuclear Terrorism

As discussed above, nuclear terrorism-related offences are scattered over several legal instruments and sometimes may even overlap. When incorporating such instruments into domestic law, legislative drafters may want to consider drafting provisions that cover offences set forth in the Convention on the Physical Protection of Nuclear Material (CPPNM), its Amendment and in the International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT). The rationale is that the offences found in these legal instruments deal largely with similar issues. For example, national authorities may choose to criminalize acts included under the legal regimes by either referring to radioactive or nuclear materials, taking into consideration that the definition of "radioactive material" in ICSANT includes "nuclear material"; and that the CPPNM only requires States parties to establish as offences acts committed in relation to "nuclear material used for peaceful purposes", whereas ICSANT has an expanded scope of application covering "radioactive material" in general. There is also a difference in the level of intent required for the defined acts to be offences. The differences in the definition of nuclear material in these instruments as well as with other IAEA instruments should also be taken into consideration.

For a further elaboration of the considerations and potential solutions to the interrelation between these and other legal instruments, see the UNODC Terrorism Prevention Branch *Model legislative provisions against terrorism* and the *IAEA Handbook on Nuclear Law on Implementing Legislation.*[19]

## 4.2 Combined legislative consideration of the 2005 maritime and 2010 aviation instruments

The considerations related to the domestic implementation of the 2005 maritime and 2010 aviation instruments have been already discussed in *Module 5: Transport-related (civil aviation and maritime) Terrorism Offences*, particularly in relation to the international cooperation provided in those treaties and harmonization of the extraterritorial reach of the offences contained

[19] Available from https://www.unodc.org/tldb/en/model_laws_treaties.html *The Model legislative provisions against terrorism* were developed to achieve a full and expeditious ratification of the universal legal instruments against terrorism.

in the two instruments. In the case of the offences dealing with biological, chemical and nuclear (BCN) weapons, the mere length and complexity of the definitions that would have to be repeated for separate offences implementing both the 2005 SUA Protocol and the 2010 Beijing Convention suggest the efficiency of establishing the unlawful use and transport of BCN weapons and materials in statutory provisions applicable to both the maritime and aviation context.

## 4.3 Implementation of the international legal instruments against CBRN terrorism

The legal instruments discussed in this module are complex and have significant legislative consequences. In the case of the Amendment to the CPPNM and the 2010 aviation and 2005 maritime instruments, States parties will need to be familiar with the instruments these most recent ones are amending. At the same time, officials in States parties considering ratification of the updating instruments will need to prepare themselves, their institutions and their national laws and regulations for the implementation of the recent instruments, including their chemical, biological, radioactive and nuclear (CBRN) provisions.

## 4.4 Relationship of the CBRN legal instruments to other multilateral and bilateral instruments

In terms of international cooperation, the CBRN international legal instruments are complemented by bilateral and multilateral instruments available in particular terrorism-related situations. Additionally, there are international legal instruments not dealing with terrorism-related offences which may also be useful. For example, the United Nations Convention on Transnational Organized Crime (UNTOC) has potential application to a broad range of offences committed by a group for a material or financial benefit.

In some situations, alternative instruments may be preferable to the agreements examined in this module. Bilateral and regional extradition and mutual assistance treaties often specify time limits and other helpful details that are not feasible in universal instruments open to all States, which must be adaptable to a variety of legal systems.

# ANNEX

## Comparative table of common elements in the international legal instruments against chemical, biological, radiological and nuclear terrorism

| Common element/legal instrument | Jurisdiction | Armed/military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| Convention on the Physical Protection of Nuclear Material (CPPNM) | Article 8:<br>1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offenses set forth in article 7 in the following cases:<br>*(a)* when the offense is committed in the territory of that State or on board a ship or aircraft registered in that State;<br>*(b)* when the alleged offender is a national of that State. | Article 4:<br>*(a)* Nothing in this Convention shall affect other rights, obligations and responsibilities of States Parties under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.<br>*(b)* The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by the military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention. | Article 10:<br>The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. | Article 11:<br>1. The offenses in article 7 shall be deemed to be included as extraditable offenses in any extradition Treaty existing between States Parties. States Parties undertake to include those offenses as extraditable offenses in every future extradition Treaty to be concluded between them. | N/A | N/A |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| Convention on the Physical Protection of Nuclear Material (CPPNM) *(cont'd)* | 2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over these offenses in cases where the alleged offender is present in its territory and it does not extradite him pursuant to article 11 to any of the States mentioned in paragraph 1.<br>3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.<br>4. In addition to the State Parties mentioned in paragraphs 1 and 2, each State Party may, consistent with international law, establish its jurisdiction over the offenses set forth in article 7 when it is involved in international nuclear transport as the exporting or importing State. | *(c)* Nothing in this Convention shall be construed as a lawful authorization to use or threaten to use force against nuclear material or nuclear facilities used for peaceful purposes.<br>*(d)* Nothing in this Convention condones or makes lawful otherwise unlawful acts, nor precludes prosecution under other laws.<br>5. This Convention shall not apply to nuclear material used or retained for military purposes or to a nuclear facility containing such material. | Article 10:<br>The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. | 2. If a State Party which makes extradition conditional on the existence of a Treaty receives a request for extradition from another State Party with which it has no extradition Treaty, it may at its option consider this Convention as the legal basis for extradition in respect of those offenses. Extradition shall be subject to the other conditions provided by the law of the requested State.<br>3. State Parties which do not make extradition conditional on the existence of a Treaty shall recognize those offenses as extraditable offenses between themselves subject to the conditions provided by the law of the requested State. | N/A | N/A |

| | | | | | | |
|---|---|---|---|---|---|---|
| Convention on the Physical Protection of Nuclear Material (CPPNM) *(cont'd)* | | | | 4. Each of the offenses shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the State Parties required to establish their jurisdiction in accordance with paragraph 1 of article 8. | N/A | N/A |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| Amendment to the CPPNM | The Amendment has the same jurisdictional provisions as the CPPNM. | The Amendment includes it. | Article 10: The State Party in whose territory the alleged offender is present shall, if it does not extradite him, submit, without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. The Amendment does not change the obligation to extradite or prosecute (same as in CPPNM). | The Amendment does not change the international cooperation provisions. | Article 11A:<br>None of the offences set forth in article 7 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 11B:<br>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 7 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. |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT) | Article 9:<br>1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:<br>*(a)* The offence is committed in the territory of that State; or<br>*(b)* The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or<br>*(c)* The offence is committed by a national of that State.<br>2. A State Party may also establish its jurisdiction over any such offence when:<br>*(a)* The offence is committed against a national of that State; or<br>*(b)* The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or | Article 4:<br>1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.<br>2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention. | Article 11:<br>1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 9 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State. | Article 13:<br>1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.<br>2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State. | Article 15:<br>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 16:<br>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. |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT) *(cont'd)* | *(c)* The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or<br>*(d)* The offence is committed in an attempt to compel that State to do or abstain from doing any act; or<br>*(e)* The offence is committed on board an aircraft which is operated by the Government of that State.<br>3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established under its national law inthat State to do or accordance with paragraph 2 of the present article. Should any change take place, the State Party concerned shall immediately notify the Secretary-General. | 3. The provisions of paragraph 2 of the present article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.<br>4. This Convention does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons by States. | | 3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.<br>4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 9, paragraphs 1 and 2.<br>5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention. | | |

| | | | | | | |
|---|---|---|---|---|---|---|
| International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT) *(cont'd)* | 4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2 of the present article.<br>5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its national law. | | | | | |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| Terrorist Bombings Convention | Article 6:<br>1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:<br>*(a)* The offence is committed in the territory of that State; or<br>*(b)* The offence is committed on board a vessel flying the flag of that State or an aircraft which is registered under the laws of that State at the time the offence is committed; or<br>*(c)* The offence is committed by a national of that State.<br>2. A State Party may also establish its jurisdiction over any such offence when:<br>*(a)* The offence is committed against a national of that State; or | Article 19:<br>1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.<br>2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention. | Article 8:<br>1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 6 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State. | Article 9:<br>1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be subsequently concluded between them.<br>2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. | Article 11:<br>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:<br>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. |

| | | | | | | |
|---|---|---|---|---|---|---|
| Terrorist Bombings Convention *(cont'd)* | *(b)* The offence is committed against a State or government facility of that State abroad, including an embassy or other diplomatic or consular premises of that State; or<br>*(c)* The offence is committed by a stateless person who has his or her habitual residence in the territory of that State; or<br>*(d)* The offence is committed in an attempt to compel that State to do or abstain from doing any act; or<br>*(e)* The offence is committed on board an aircraft which is operated by the Government of that State.<br>3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2 under its domestic law. Should any change take place, the State Party concerned shall immediately notify the Secretary-General. | | | Extradition shall be subject to the other conditions provided by the law of the requested State.<br>3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.<br>4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 6, paragraphs 1 and 2. | | |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| Terrorist Bombings Convention *(cont'd)* | 4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.<br>5. This Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law. | | | 5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between State Parties to the extent that they are incompatible with this Convention. | | |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| 2005 SUA Convention | Article 6:<br>1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 3, 3 bis, 3 ter and 3 quater when the offence is committed:<br>*(a)* against or on board a ship flying the flag of the State at the time the offence is committed; or<br>*(b)* in the territory of that State, including its territorial sea; or<br>*(c)* by a national of that State.<br>2. A State Party may also establish its jurisdiction over any such offence when:<br>*(a)* it is committed by a stateless person whose habitual residence is in that State; or<br>*(b)* during its commission a national of that State is seized, threatened, injured or killed; or | Article 2 bis 1:<br>Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international human rights, refugee and humanitarian law.<br>2. This Convention does not apply to the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law. | Article 10:<br>1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, 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 without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State. | Article 11:<br>1. The offences set forth in articles 3, 3 bis, 3 ter and 3 quater shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.<br>2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in articles 3, 3 bis, 3 ter and 3 quater. Extradition shall be subject to the other conditions provided by the law of the requested State Party. | Article 11 bis:<br>None of the offences set forth in article 3, 3 bis, 3 ter or 3 quater 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 11 ter:<br>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 3, 3 bis, 3 ter or 3 quater 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, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons. |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| 2005 SUA Convention *(cont'd)* | *(c)* it is committed in an attempt to compel that State to do or abstain from doing any act.<br>3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.<br>4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 3, 3 bis, 3 ter and 3 quater in cases where the alleged offender is present in its territory and it does not extradite the alleged offender to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.<br>5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law. | | | 3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in articles 3, 3 bis, 3 ter and 3 quater as extraditable offences between themselves, subject to the conditions provided by the law of the requested State Party.<br>4. If necessary, the offences set forth in articles 3, 3 bis, 3 ter and 3 quater shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in a place within the jurisdiction of the State Party requesting extradition. | | |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| 2005 Fixed Platforms Protocol | Article 3:<br>1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles<br>2. 2 bis and 2 ter when the offence is committed:<br>*(a)* against or on board a fixed platform while it is located on the continental shelf of that State; or<br>*(b)* by a national of that State.<br>2. A State Party may also establish its jurisdiction over any such offence when:<br>*(a)* it is committed by a stateless person whose habitual residence is in that State;<br>*(b)* during its commission a national of that State is seized, threatened, injured or killed; or<br>*(c)* it is committed in an attempt to compel that State to do or abstain from doing any act. | Art. 2 bis 2005:<br>Convention shall also apply mutatis mutandis.<br>[The Protocol does not change the military use and armed conflict exclusion] | Art. 10 2005:<br>Convention shall also apply mutatis mutandis.<br>[The Protocol does not change the extradite or prosecute obligation] | Art. 11 2005:<br>Convention shall also apply mutatis mutandis.<br>[The Protocol does not change the international cooperation provisions] | Art. 11 bis 2005:<br>Convention shall also apply mutatis mutandis.<br>[The Protocol does not change the political offence exclusion] | Art. 11 ter 2005:<br>Convention shall also apply mutatis mutandis.<br>[The Protocol does not change the non-discrimination clause] |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| 2005 Fixed Platforms Protocol *(cont'd)* | 3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.<br>4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 2, 2 bis and 2 ter in cases where the alleged offender is present in its territory and it does not extradite the alleged offender to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2.<br>5. This Protocol does not exclude any criminal jurisdiction exercised in accordance with national law. | | | | | |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| 2010 Beijing Convention | Article 8:<br>1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article I in the following cases:<br>*(a)* when the offence is committed in the territory of that State:<br>*(b)* when the offence is committed against or on board an aircraft registered in that State;<br>*(c)* when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;<br>*(d)* when the offence is committed against or on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence is in that State; | Article 6:<br>1. Nothing in this convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the charter of the United Nations, the Convention on International Civil Aviation and international humanitarian law.<br>2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention. | Article 10:<br>The State Party in the territory of which the alleged offender is found shall, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case 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. | Article 12:<br>1. The offences set forth in Article 1 shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.<br>2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences set forth in Article 1. Extradition shall be subject to the other conditions provided by the law of the requested State. | Article 13:<br>None of the offences set forth in Article 1 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 14:<br>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 1 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, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons. |

| Common element/legal instrument | Jurisdiction | Armed forces/ military forces of a State exclusion | Obligation to extradite or prosecute | International cooperation | Political offence exception | Non-discrimination clause |
|---|---|---|---|---|---|---|
| 2010 Beijing Convention *(cont'd)* | *(e)* when the offence is committed by a national of that State.<br>2. Each State Party may also establish its jurisdiction over any such offence in the following cases:<br>*(a)* when the offence is committed against a national of that State;<br>*(b)* when the offence is committed by a stateless person whose habitual residence is in the territory of that State.<br>3. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in Article 1, in the case where the alleged offender is present in its territory and it does not extradite that person pursuant to Article 12 to any of the States Parties that have established their jurisdiction in accordance with the applicable paragraphs of this Article with regard to those offences.<br>4. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law. | 3. The provisions of paragraph 2 of this article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws. | | 3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in Article 1 as extraditable offences between themselves subject to the conditions provided by the law of the requested State.<br>4. Each of the offences shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territories of the States Parties required to establish their jurisdiction in accordance with subparagraphs *(b)*, *(c)*, *(d)* and *(e)* of paragraph 1 of Article 8, and who have established jurisdiction in accordance with paragraph 2 of Article 8.<br>5. The offences set forth in subparagraphs *(a)* and *(b)* of paragraph 5 of Article 1 shall, for the purpose of extradition between States Parties, be treated as equivalent. | | |

# GLOSSARY*

**BCN (biological, chemical or nuclear) weapon:**

*(a)* "**Biological weapons**", which are:

(i) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or

(ii) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

*(b)* "**Chemical weapons**", which are, together or separately:

(i) Toxic chemicals and their precursors, except where intended for:

a. Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; or

b. Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; or

c. Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; or

d. Law enforcement including domestic riot control purposes, as long as the types and quantities are consistent with such purposes;

(ii) Munitions and devices specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (b) (i), which would be released as a result of the employment of such munitions and devices;

(iii) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b) (ii).

*(c)* **Nuclear weapons and other nuclear explosive devices**.

*(2005 SUA Convention, article 2; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, article 2.h)*

*The reader should refer to each Convention to determine whether a term is defined in a Convention. This is simply an illustrative list of terms that are defined in some of the Conventions—but these definitions do not apply to all Conventions.

**Device:** Any nuclear explosive device; or any radioactive material dispersal or radiation-emitting device which may, owing to its radiological properties, cause death, serious bodily injury or substantial damage to property or to the environment *(International Convention for the Suppression of Acts of Nuclear Terrorism, article 1.4)*

**Explosive or other lethal device:** An explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material *(International Convention for the Suppression of Terrorist Bombings, article 1.3)*

**Military forces of a State:** The armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defense or security and persons acting in support of those armed forces who are under their formal command, control and responsibility *(International Convention for the Suppression of Terrorist Bombings, article 1.4; International Convention for the Suppression of Acts of Nuclear Terrorism, article 1.6)*

**Non-State actor:** Individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution (United Nations Security Council resolution 1540 (2004))

**Nuclear facility (two definitions):**

A facility (including associated buildings and equipment) in which nuclear material is produced, processed, used, handled, stored or disposed of, if damage to or interference with such facility could lead to the release of significant amounts of radiation or radioactive material (*Amendment to the Convention on the Physical Protection of Nuclear Material, article 1.d)*

Any nuclear reactor, including reactors installed on vessels, vehicles, aircraft or space objects for use as an energy source in order to propel such vessels, vehicles, aircraft or space objects or for any other purpose; any plant or conveyance being used for the production, storage, processing or transport of radioactive material *(International Convention for the Suppression of Acts of Nuclear Terrorism, article 1.2)*

**Nuclear material:** Plutonium except that with isotopic concentration exceeding 80 per cent in plutonium-238; uranium-233; uranium enriched in the isotopes 235 or 233; uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore-residue; any material containing one or more of the foregoing *(Convention on the Physical Protection of Nuclear Material, article 1. a; International Convention for the Suppression of Acts of Nuclear Terrorism, article 1.2; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, article 2.f.)*

**Precursor:** Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system *(2005 SUA Convention, article 2; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, article 2.i)*

**Radioactive material:** Nuclear material and other radioactive substances which contain nuclides which undergo spontaneous disintegration (a process accompanied by emission of one or more types of ionizing radiation, such as alpha-, beta-, neutron particles and gamma

rays) and which may, owing to their radiological or fissile properties, cause death, serious bodily injury or substantial damage to property or to the environment *(International Convention for the Suppression of Acts of Nuclear Terrorism, article 1.1; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, article 2.e)*

**Sabotage:** Any deliberate act directed against a nuclear facility or nuclear material in use, storage or transport which could directly or indirectly endanger the health and safety of personnel, the public or the environment by exposure to radiation or release of radioactive substances *(Amendment to the Convention on the Physical Protection of Nuclear Material, article 1.e)*

**Source material:** Uranium containing the mixture of isotopes occurring in nature; uranium depleted in the isotope 235; thorium; any of the foregoing in the form of metal, alloy, chemical compound, or concentrate; any other material containing one or more of the foregoing in such concentration as the Board of Governors shall from time to time determine; and such other material as the Board of Governors shall from time to time determine *(Statute of the International Atomic Energy Agency, article XX.3)*

**Special fissionable material:** Plutonium-239; uranium- 233; uranium enriched in the isotopes 235 or 233; any material containing one or more of the foregoing; and such other fissionable material as the Board of Governors shall from time to time deter mine; but the term "special fissionable material" does not include source material *(Statute of the International Atomic Energy Agency, article XX.1)*

**State or government facility:** Includes any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of a Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties *(International Convention for the Suppression of Terrorist Bombings, article 1.1; International Convention for the Suppression of Acts of Nuclear Terrorism, article 1.5)*

**Toxic chemical:** Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere *(2005 SUA Convention, article 2; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, article 2.d )*

**Uranium enriched in the isotope 235 or 233:** Uranium containing the isotopes 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature *(Convention on the Physical Protection of Nuclear Material, article 1. b.; International Convention for the Suppression of Acts of Nuclear Terrorism, article 1.2; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, article 2.g)*

# LIST OF CONTRIBUTORS

UNODC is grateful for the invaluable contributions of the various organizations and individuals to the present module. UNODC is particularly thankful to the participants of the Expert Group Meeting for the development of a training module on The International Legal Framework against CBRN Terrorism, held in Vienna on 26 and 27 August 2015:

Maria Lorena Capra, First Secretary, Ministry of Foreign Affairs, Argentina

Anderson Wallace de Paiva Dos Santos, Major, Brazilian Army, Brazil

Gregory J. Koster, Counsel, Criminal Law Policy Section, Department of Justice, Canada

Irina Abramishvili, Deputy Head, Planning and Policy Division, Reforms and Development Agency, Ministry of Internal Affairs, Georgia

Roland Seeger, First Secretary, Permanent Mission of the Federal Republic of Germany to the United Nations (Vienna), Germany

Martin Sprenger, Permanent Mission of the Federal Republic of Germany to the United Nations (Vienna), Germany

Njeri Mwangi Wachira, Chief State Counsel, Office of the Attorney-General, Department of Justice, Kenya

Ahmad Tajuddin, Deputy Director, Planning and Training SEARCCT, Ministry of Foreign Affairs, Malaysia

B. M. (Martijin) Meeder, Senior Advisor, Strategy and Operations, Ministry of Security and Justice, Netherlands

Sadiq Olatunji Gegele, Assistant Director, Legal Service, Ministry of Defence, Nigeria

Adewunmi Ibironke Evelyn, Federal Ministry of Justice, Nigeria

Basit Akindele, First Secretary, Permanent Mission of Nigeria to the United Nations (Vienna), Nigeria

Angelie C. Agustin, Deputy Executive Director IV, Law Enforcement and Security Integration Office, Office of the Executive Secretary, Office of the President, Philippines

Ignacio Baylina, Counsellor, Permanent Mission of Spain to the United Nations (Vienna), Spain

Mercedes Trejo, Attaché, Permanent Mission of Spain to the United Nations (Vienna), Spain

Raquel Inocencio Vicálvaro, Head of Section, Intelligence Centre against Terrorism and Organized Crime (CITCO), Ministry of Interior, Spain

Irina Silkina, First Secretary, Permanent Mission of Russia to the United Nations (Vienna), Russian Federation

Christine Martin, United States Department of State, Office of WMD Terrorism, Bureau of International Security and Non-proliferation, United States Coordinator for GICNT, United States of America

Jeremy Freeman, United States Department of State, Office of the Legal Advisor, United States of America

Charles S. Matich, United States Permanent Mission to IOs in Vienna, United States of America

Michael D. Rosenthal, Expert, 1540 Committee Group of Experts

Gennady Lutay, Expert, 1540 Committee Group of Experts

Anthony Wetherall, Legal Officer, Office of Legal Affairs, International Atomic Energy Agency

Andrew Opolot, Legal Officer, Legal Affairs and External Relations Bureau, International Civil Aviation Organization

Dorota Lost-Sieminska, Head, Legal Affairs Office, Legal Affairs and External Relations Division, International Migration Organization

Jack McDonald, Research Associate and Teaching Fellow, King's College London, Department of War Studies, Centre for Science and Security Studies

Peter Clevestig, Senior Researcher, Stockholm International Peace Research Institute

Laura Rockwood, Executive Director, Vienna Center for Disarmament and Non-Proliferation

The following UNODC staff also contributed to the development of this module:

Trevor Rajah, Chief, Terrorism Prevention Branch (TPB)

George Puthuppally, Chief, Implementation Support Section II, TPB

Mauro Miedico, Chief, Implementation Support Section III, TPB

Dolgor Solongo, Officer-in-Charge, Implementation Support Section I, TPB

Philipp Divett, Programme Officer, Implementation Support Section I, TPB

Elena Rigacci-Hay, Policy Coordination Officer, Office of the Chief, TPB

Maria Lorenzo Sobrado, Programme Officer, Implementation Support Section I, TPB

Joaquin Zuckerberg, Programme Officer, Implementation Support Section I, TPB

Laura Adal (UNODC consultant) and Yuliya Hauff (UNODC intern) also contributed to the module.

# UNODC

United Nations Office on Drugs and Crime

Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria
Tel.: (+43-1) 26060-0, Fax: (+43-1) 26060-5866, www.unodc.org

V.16-04239