

Model Legislative Provisions on Measures to Combat Terrorism



The Commonwealth

Office of Civil and
Criminal Justice Reform

**MODEL LEGISLATIVE PROVISIONS
ON
MEASURES TO COMBAT TERRORISM**



Commonwealth Secretariat

INTRODUCTION

The following Model Legislative Provisions on Measures to Combat Terrorism were prepared on the basis of the Commonwealth Secretariat document: Report of the Expert Working Group on Legislative and Administrative Measures to Combat Terrorism. Excerpts from that report are included in the Explanatory Guide, which is at the end of this document and the full report is available from the Secretariat. As the model provisions were prepared on the basis of the expert group analysis of the Security Council resolution, they reflect that group's interpretation of the obligations as explained in their report.

These model legislative provisions do not represent a single approach to counter terrorism legislation that is to be adopted within the Commonwealth. In accordance with the Heads of Government Statement on Terrorism and the Plan of Action developed by the Commonwealth Committee on Terrorism, the provisions were developed to assist countries with implementation of United Nations Security Council Resolution 1373. They illustrate the legislative measures that are required under the resolution and also include measures that are not mandatory but are very useful in combating terrorism.

As any legislative measures adopted by countries would need to be considered and adapted to existing laws and structures, there are notes throughout the model provisions highlighting considerations in that regard. The Explanatory Guide at the end of the model provisions also sets out excerpts from the Expert Group Report to explain the background and intent of the clauses and provide additional notes of explanation.

As indicated, the model legislative provisions need to be assessed with regard to existing law and the requirements of the Security Council resolution. Some countries already may have enacted legislation in response to the resolution, such that existing law will be sufficient to meet the relevant obligations. Other countries may need only to add to or amend existing legislation and could use portions of the model for that purpose. Still others may require extensive legislative action, in which case the model provisions, in whole or in part, could be adopted to implement Security Council Resolution 1373. Finally, there may be some countries that wish simply to draw from the ideas in the model legislative provisions, the explanatory guide and Expert Group Report to develop domestic policy and legislation. The intention is to provide a flexible tool that countries can use in preparing and enacting domestic law to meet their obligations under the Security Council resolution.

The Criminal Law Section of the Legal and Constitutional Affairs Division of the Secretariat would be pleased to provide additional assistance to member countries with the use of the model legislative provisions for the development of domestic law in this area.

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**DRAFT MODEL LEGISLATION ON
MEASURES TO COMBAT TERRORISM**

PREAMBLE

WHEREAS terrorist acts in all their forms threaten the stability of the institutions and economy of (name of country), its development, the rule of law, pluralism and the right of its citizens to live in peace, freedom and security;

AND WHEREAS it is necessary to strengthen’s (name of country) capacity to suppress and detect terrorist acts, and to bring to trial or extradite, persons committing those acts;

AND WHEREAS it is necessary to take comprehensive measures to prevent the territory, resources and financial services of (name of country) from being used to commit terrorist acts;

AND WHEREAS it is necessary to cooperate with other states in suppressing terrorism by implementing the United Nations and other international instruments relating to the combating of terrorism;

Now be it enacted by the Parliament of (name of country) .

NOTE: *Name of country in which the legislation is enacted to be inserted in the blank spaces.*

PART I

INTERPRETATION

1. In this Act, unless the context otherwise requires –

“communication” means a communication received or transmitted by post or a telegraphic, telephonic or other communication received or transmitted by electricity, magnetism, or other means;

“communications service provider” means a person who provides services for the transmission or reception of communications;

“counter terrorism convention” means any of the following Conventions

- (a) Convention on Offences and certain Other Acts committed on Board Aircraft signed at Tokyo on 14 September 1963;
- (b) Convention for the Suppression of Unlawful Seizure of Aircraft done at The Hague on 16 December 1970;
- (c) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, done at Montreal on 23 September 1971;
- (d) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973;
- (e) International Convention against the taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979;
- (f) Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980;
- (g) Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988;
- (h) Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at the Rome on 10 March 1988;
- (i) Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988;
- (j) Convention on the Marking of Plastic Explosives for the Purposes of Detection, signed at Montreal, on 1 March 1991;

- (k) International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997;
- (l) International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999. (Not yet in force);

“entity” means a person, group, trust, partnership, fund or an unincorporated association or organisation;

“explosive or other lethal device” means:

- (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;
- (b) a weapon or device that is designed or has the capability to cause death, serious bodily injury or substantial material damage.

“financial institution” means a commercial bank, or any other institution which makes loans, advances or investments or accepts deposits of money from the public;

“Master” in relation to a vessel, means the owner or person (except a harbour master or pilot) having for the time being command or charge of the vessel;

“operator” in relation to an aircraft, means the owner or person for the time being in charge or command or control of the aircraft;

NOTE

The Convention for the Suppression of the Financing of Terrorism defines the term “funds” as opposed to “property”. Other conventions such as the United Nations Convention against Transnational Organized Crime use the term “property”. Countries should use the term most consistent with domestic legislation but in either event the actual definition is the same.

“property” means any asset of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, and legal documents or instruments in any form including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit;

“specified entity” means an entity in respect of which an Order under section 2 has been made, or is deemed by reason of the operation of section 3(2) to have been made, and is for the time being in force;

NOTE

The legislative scheme to implement UN SCR requires some definition of terrorist act or activities. The content of that definition needs to be decided within each country, as there is no international agreement on a specific definition. The following options for the definition of terrorist act have been included as illustrations of possible definitions. The difference between options 1 and 2 is that option 2 has an additional element of purpose of the act, captured in subsection 2(iii). Countries may choose to adopt a much narrower definition, for example, confined only to subsections 2(a) and (b) or to expand on the listed conduct. Countries may also wish to include specific exclusion clauses such as those relating to self-determination or national liberation movements.

“terrorist act” means –

Option 1

- (1) an act or omission in or outside (name of country) which constitutes an offence within the scope of a counter terrorism convention; or
- (2) an act or threat of action in or outside (name of country) which –
 - (a) involves serious bodily harm to a person;
 - (b) involves serious damage to property;
 - (c) endangers a person’s life;
 - (d) creates a serious risk to the health or safety of the public or a section of the public;
 - (e) involves the use of firearms or explosives;
 - (f) involves releasing into the environment or any part thereof or distributing or exposing the public or any part thereof to -
 - (i) any dangerous, hazardous, radioactive or harmful substance;
 - (ii) any toxic chemical;
 - (iii) any microbial or other biological agent or toxin;
 - (g) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
 - (h) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;
 - (i) involves prejudice to national security or public safety;

and is intended, or by its nature and context, may reasonably be regarded as being intended to:

- (i) intimidate the public or a section of the public; or
 - (ii) compel a government or an international organization to do, or refrain from doing, any act.
- (3) an act which –
- (a) disrupts any services; and
 - (b) is committed in pursuance of a protest, demonstration or stoppage of work, shall be deemed not to be a terrorist act within the meaning of this definition, so long and so long only as the act is not intended to result in any harm referred to in paragraphs, (a), (b), (c) or (d) of subsection (2).

Option 2

“terrorist act” means –

- (1) an act or omission in or outside (name of country) which constitutes an offence within the scope of a counter terrorism convention;
- (2) an act or threat of action in or outside..... (name of country) which –
 - (a) involves serious bodily harm to a person;
 - (b) involves serious damage to property;
 - (c) endangers a person’s life;
 - (d) creates a serious risk to the health or safety of the public or a section of the public;
 - (e) involves the use of firearms or explosives;
 - (f) involves releasing into the environment or any part thereof or distributing or exposing the public or any part thereof to -
 - (i) any dangerous, hazardous, radioactive or harmful substance;
 - (ii) any toxic chemical;
 - (iii) any microbial or other biological agent or toxin;
 - (g) is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
 - (h) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;
 - (j) involves prejudice to national security or public safety;

and is intended, or by its nature and context, may reasonably be regarded as being intended to –

- (i) intimidate the public or a section of the public; or
 - (ii) compel a government or an international organization to do, or refrain from doing, any act, and
 - (iii) is made for the purpose of advancing a political, ideological, or religious cause.
- (3) An act which -
- (a) disrupts any services; and
 - (b) is committed in pursuance of a protest, demonstration or stoppage of work, shall be deemed not to be a terrorist act within the meaning of this definition, so long and so long only as the act is not intended to result in any harm referred to in paragraphs, (a), (b), (c) or (d) of subsection (2).

NOTE

While jurisdiction over the individual offences is dealt with later in clause 24, the definition of “terrorist act” includes acts and omissions wherever committed (within or outside named country) as the Security Council obligations in respect of financing, support etc are not limited to terrorist acts committed within the territory of the state and in fact under 2(d) are specifically aimed at the financing and support of terrorism in another state. As indicated, this is distinct from the question of jurisdiction over the individual offences created under the Act, which is addressed later.

NOTE

Countries concerned about the use of incorporation by reference of the counter terrorism conventions in subsection (1) above may wish to specifically list the convention offences in the body of the text or in a schedule.

“terrorist group” means –

- (a) an entity that has as one of it’s activities and purposes, the committing of, or the facilitation of the commission of, a terrorist act; or
- (b) a specified entity;

“terrorist property” means –

- (a) proceeds from the commission of a terrorist act;
- (b) property which has been, is being, or is likely to be used to commit a terrorist act;

- (c) property which has been, is being, or is likely to be used by a terrorist group;
- (d) property owned or controlled by or on behalf of a terrorist group; or
- (e) property which has been collected for the purpose of providing support to a terrorist group or funding a terrorist act.

“vessel” means any thing made or adapted for the conveyance by water, of people or property;

“weapon” includes a firearm, explosive, chemical, biological or nuclear weapon.

PART II

SPECIFIED ENTITIES

NOTE

The “Attorney General” and “Minister” have been selected as illustrative of the types of authorities that should be accorded the legislative powers under this section. Countries may wish to use other competent authorities more appropriate to the legal structure within a particular jurisdiction. The Supreme Court represents the High Court or a Superior Court within the jurisdiction.

The choice as between grounds to believe or suspect is dependent on the standard normally employed for search warrants and other similar orders under domestic law.

Orders Declaring Certain Entities to be Specified Entities

2. (1) Where the Attorney General has reasonable grounds to [believe] [suspect] that –

(a) an entity has knowingly -

- (i) committed;
- (ii) attempted to commit;
- (iii) participated in committing; or
- (iv) facilitated the commission

of a terrorist act, or

(b) an entity is knowingly acting -

- (i) on behalf of;
- (ii) at the direction of;
- (iii) in association with;

an entity referred to in paragraph (a), he or she may recommend to the Minister that an Order be made under subsection (2) in respect of that entity.

- (2) If the Minister is satisfied that there is evidence to support a recommendation made under the subsection (1), he or she may, by Order published in the Gazette, declare the entity in respect of which the recommendation has been made, to be a specified entity.
- (3) Within [60] days of publication in the Gazette, a specified entity may make an application in writing to the Minister for the revocation of an Order made under subsection (2), or deemed under section 3 to have been made, in respect of that entity.

- (4) Prior to deciding on an application made under subsection (3) the Minister shall consult with the Attorney General.
- (5) If, on an application made under subsection (3), the Minister –
 - (a) decides that there are reasonable grounds for revocation he or she shall revoke the Order, and publish a notice of revocation in the Gazette,
 - (b) decides that there are no reasonable grounds for revocation, he or she shall refuse the application and shall, within 60 days of receiving the application, inform the applicant of his or her decision.
- (6) Within 60 days of receiving information of the decision referred to in subsection (5), the applicant may apply, on notice to the Attorney General, to a Judge of the Supreme Court for a review of that decision.
- (7) Upon an application being made under subsection (6), the judge shall –
 - (a) examine in chambers, any security or intelligence reports considered in recommending or making an Order under subsection (2) in respect of the applicant and hear any other evidence or information that may be presented by or on behalf of the Attorney General and may, at the request of the Attorney General, hear all or part of that evidence or information in the absence of the applicant or any counsel representing the applicant, if the judge is of the opinion that the disclosure of the information would be prejudicial to national security or endanger the safety of any person;
 - (b) provide the applicant with a statement summarizing the information available to the judge, so as to enable the applicant to be reasonably informed of the reasons for the decision, without disclosing any information the disclosure of which would, in the judge's opinion, be prejudicial to national security or endanger the safety of any person;
 - (c) provide the applicant with a reasonable opportunity to be heard; and
 - (d) determine whether the decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, make an order compelling the Minister to revoke the Order made, or deemed to have been made, under subsection (2) in respect of the applicant.
- (8) The judge may receive in evidence, anything (including information obtained from the government or institution or agency of a foreign state or an international organisation), that, in the opinion of the judge, is reliable and relevant, even if the thing would not otherwise be admissible in law, and may base his or her decision on that evidence.
- (9) The Attorney General shall review all the Orders made under subsection (2) every six months to determine whether there are still reasonable grounds, as set out in subsection (1), for any such Order to continue to apply to a specified entity, and if he or she determines that there are no such reasonable grounds, shall recommend

to the Minister, the revocation of the Order made under subsection (2) in respect of that specified entity.

NOTE

The publication of the list of specified entities in the Gazette is intended to constitute sufficient notice such that persons and in particular financial and related institutions would have knowledge that any property held by or on behalf of the specified entities would fall within the prohibitions set out in sections 4,5,7 and 8 below. If there is any doubt as to effectiveness of this “constructive notice” a country may wish to provide that the Financial Intelligence Unit or other similar authority shall transmit a copy of the list to specified financial and related institutions to ensure that the funds will be effectively frozen by the institutions in accordance with the requirements of the resolution.

Similarly a country may wish to include a provision requiring notice to the specified entity, upon their being listed.

Orders for the Implementation of Measures to Give Effect to Resolutions of the Security Council

3. (1) Where the Security Council of the United Nations decides, in pursuance of Article 41 of the Charter of the United Nations, on the measures to be employed to give effect to any of its decisions and calls upon the Government of (name of country) to apply those measures, the Minister responsible for Foreign Affairs may, by Order published in the Gazette, make such provision as may appear to him or her to be necessary or expedient to enable those measures to be effectively applied.
- (2) Where an Order under subsection (1), makes provision to the effect that there are reasonable grounds to believe that an entity specified in the Order is engaged in terrorist activity, that entity shall be deemed, with effect from the date of the Order, to have been declared a specified entity under section 2.

PART III

OFFENCES

NOTE

The applicable penalty for the offences is to be determined by each country, given the variation in approaches between various jurisdictions. However, while no terms have been included in the model, it is strongly recommended that specific maximum penalties be included for each offence and that those penalties, consistent with the resolution, reflect the grave nature of the offences.

NOTE

Under the model legislative scheme outlined below, no offence is created for the commission of a “terrorist act” per se on the basis of the assumption that such acts will in and of themselves constitute a criminal offence. A country could choose however to create an offence of “terrorist act” or alternatively provide for an enhanced penalty (life imprisonment for example) where a person commits an offence that also constitutes a “terrorist act”. If a country chooses to create an offence of “terrorist act” consideration should be given to whether the offence provision will also apply to acts or omissions wherever committed.

NOTE

The offences set out in sections 4 - 19 are illustrative of the types of “support” conduct that needs to be prohibited. Countries may choose, however, to combine some of the provisions into more general offences.

Provision or Collection of Property to Commit Terrorist Acts

4. Every person who –
- (a) provides,
 - (b) collects; or
 - (c) makes available

by any means, directly or indirectly, any property, intending, knowing or having reasonable grounds to believe that the property will be used in full or in part to carry out a terrorist act commits an offence and shall on conviction be liable to imprisonment for a term not exceeding () years.

Provision of Services for Commission of Terrorist Acts

5. (1) Every person who, directly or indirectly, provides or makes available, financial or other related services –
- (a) intending that they be used, in whole or in part, for the purpose of committing or facilitating the commission of, a terrorist act or for the purpose of benefiting any person who is committing or facilitating the commission of, a terrorist act; or
 - (b) knowing that in whole or part, they will be used by, or will benefit, a terrorist group,
- commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding () years.

Use of Property for Commission of Terrorist Acts

6. Every person who –
- (a) uses property, directly or indirectly, in whole or in part, for the purpose of committing or facilitating the commission of a terrorist act; or
 - (b) possesses property intending that it be used or knowing that it will be used, directly or indirectly, in whole or in part, for the purpose of committing or facilitating the commission of a terrorist act,
- commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding () years.

Arrangements for Retention or Control of Terrorist Property

7. Every person who knowingly enters into, or becomes concerned in, an arrangement which facilitates the acquisition, retention or control by or on behalf of another person of terrorist property –
- (a) by concealment,
 - (b) by a removal out of jurisdiction,
 - (c) by transfer to a nominee, or
 - (d) in any other way,
- commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding () years.

Dealing with Terrorist Property

8. (1) Every person who knowingly –

- (a) deals, directly or indirectly, in any terrorist property;
- (b) acquires or possesses terrorist property;
- (c) enters into, or facilitates, directly or indirectly, any transaction in respect of terrorist property ;
- (d) converts, conceals or disguises terrorist property; or
- (e) provides financial or other services in respect of terrorist property at the direction of a terrorist group,

commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding () years.

Soliciting and Giving of Support to Terrorist Groups or for the Commission of Terrorist Acts

9. (1) Every person who knowingly, and in any manner –

- (a) solicits support for, or gives support to, any terrorist group, or
- (b) solicits support for, or gives support to, the commission of a terrorist act,

commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding () years.

(2) Support under subsection (1) includes but is not limited to:

- (a) an offer to provide, or the provision of, forged or falsified travel documents to a member of a terrorist group;
- (b) an offer to provide, or the provision of a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group; or
- (c) entering or remaining in any country for the benefit of, or at the direction of or in association with a terrorist group.

Harbouring of Persons Committing Terrorist Acts

10. Every person who harbours or conceals, or prevents, hinders or interferes with the apprehension of, any other person knowing, or having reason to believe that such other person –

- (a) has committed or is planning or likely to commit a terrorist act; or
- (b) is a member of a terrorist group;

commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding () years.

Provision of Devices to Terrorist Groups

11. Every person who knowingly offers to provide, or provides any explosive or other lethal device to –

- (a) a terrorist group;
- (b) a member of a terrorist group;
- (c) any other person for use by, or for the benefit of, a terrorist group or a member of a terrorist group,

commits an offence and shall on conviction, be liable to imprisonment for () years.

Recruitment of Persons to be Members of Terrorist Groups or to Participate in Terrorist Acts

12. Every person who knowingly agrees to recruit, or recruits, another person –

- (a) to be a member of a terrorist group; or
- (b) to participate in the commission of a terrorist act,

commits an offence and shall on conviction be liable to imprisonment for a term not exceeding () years.

Provision of Training and Instruction to Terrorist Groups and Persons Committing Terrorist Acts

13. Every person who, knowingly agrees to provide training or instruction, or provides training or instruction –

- (a) in the making or use of any explosive or other lethal device,
- (b) in carrying out a terrorist act,
- (c) in the practice of military exercises or movements,

to a member of a terrorist group or a person engaging in, or preparing to engage in, the commission of a terrorist act commits an offence and shall on conviction, be liable to imprisonment for () years .

Incitement, Promotion or Solicitation of Property for the Commission of Terrorist Acts

14. Every person who, knowingly -

- (a) incites or promotes the commission of a terrorist act;
- (b) incites or promotes membership in a terrorist group; or
- (c) solicits property for the benefit of a terrorist group or for the commission of a terrorist act

commits an offence and shall on conviction, be liable to imprisonment for a period of term not exceeding () years.

Providing Facilities in Support of Terrorist Acts

15. Every person who being –

- (a) the owner, occupier, lessee or person in charge of any building, premises, room, or place knowingly permits a meeting of persons to be held in that building, premises, room or place;
- (b) the owner, charterer, lessee, operator, agent, or master of a vessel or the owner, charterer, lessee, operator, agent or pilot in charge of an air craft knowingly permits that vessel or aircraft to be used;
- (c) the owner, lessee or person in charge of any equipment or facility that allows for recording or conferencing or meetings via technology knowingly permits that equipment or facility to be used;

for the purposes of committing an offence under section 14, or planning, promoting or supporting the commission of a terrorist act, commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding () years.

Conspiracy to Commit Offences under this Act

- 16. (1) Every person who conspires with another person in (name of country) to do any act in any place outside (name of country), being an act, which if done in (name of country) would have constituted an offence under this Act shall be deemed to have conspired to do that act in (name of country).
- (2) Every person who conspires with another person in a place outside (name of country) to do any act in (name of country) which constitutes an offence under this Act shall be deemed to have conspired in (name of country) to do that act.

Note: Name of the country in which the legislation is enacted to be inserted in the blank space

NOTE

Countries will need to consider if prohibition of membership in and of itself is possible within constitutional constraints.

Membership of Terrorist Groups

- 17. (1) Every person who –
 - (a) is a member of,
 - (b) professes to be a member of,
 a terrorist group commits an offence and shall ,on conviction, be liable to imprisonment for term not exceeding () years.

- (2) It shall be a defence for a person charged with an offence under this section to prove that the entity in respect of which the charge is brought was not a terrorist group at or on the date that he or she -
- (a) became a member of, or
 - (b) professed to be a member of,
- that entity, or that he or she has not taken part in the activities of that entity, after it became a terrorist group.

Arrangements of Meetings in Support of Terrorist Groups

18. (1) Every person who arranges, manages or assists in arranging or managing a meeting which he or she knows is –
- (a) to support a terrorist group,
 - (b) to further the activities of a terrorist group,
 - (c) to be addressed by a person who belongs or professes to belong to a terrorist group,
- commits an offence and shall on conviction be liable to imprisonment for a term not exceeding () years.
- (2) In this section “meeting” means a meeting of 2 or more persons, whether or not the public are admitted.

Participation in the Commission of Offences under this Act

19. Every person who –
- (a) aids and abets the commission;
 - (b) attempts to commit;
 - (c) conspires to commit;
 - (d) counsels or procures the commission of;
- an offence under this Act commits an offence and shall on conviction, be liable to the same punishment as is prescribed for the first mentioned offence.

PART IV

INVESTIGATION OF OFFENCES

NOTE

The provisions in sections 20-23 are not mandated by SCR 1373 and are provided solely to illustrate the types of investigative tools that have been adopted in other jurisdictions for use in terrorism investigations. Countries may wish to consider these for inclusion in counter terrorism legislation.

Powers of Arrest

20. *Any police officer may arrest without warrant any person who has committed or is committing or whom he or she has reasonable grounds for suspecting to have committed or to be committing an offence under this Act.*

Detention Orders

21. (1) *Subject to subsection (2), a police officer may, for the purpose of preventing the commission of an offence under this Act or preventing interference in the investigation of an offence under this Act, apply ex parte, to a Judge of the High Court for a detention order.*
- (2) *A police officer may make an application under subsection (1) only with the prior written consent of the Attorney General.*
- (3) *A judge to whom an application is made under subsection (1) may make an order for the detention of the person named in the application if the judge is satisfied that the written consent of the Attorney General has been obtained as required by subsection (2) and that there are reasonable grounds to[believe][suspect] that –*
- (a) *the person is preparing to commit an offence under this Act, or*
- (b) *is interfering, or is likely to interfere with, an investigation into an offence under this Act.*
- (4) *An order under subsection (3) shall be for a period not exceeding 48 hours in the first instance and may, on application made by a police officer, be extended for a further period, provided that maximum period of detention under the order does not exceed 5 days.*
- (5) *An order under subsection (3) shall specify the place at which the person named in the order is to be detained and the conditions subject to which he or she is to be detained (including conditions relating to access to a government medical officer and the video recording of the person in detention so as to constitute an accurate, continuous and uninterrupted record of his or her detention for the whole period of his or her detention).*

Note: *The references in this section and in subsequent sections to High Court, is a reference to the highest court exercising original criminal jurisdiction.*

Power to gather information

22. (1) *Subject to subsection (2), a police officer may, for the purpose of an investigation of an offence under this Act, apply ex parte to a Judge of the High Court for an order for the gathering of information.*
- (2) *A police officer may make an application under subsection (1) only with the prior written consent of the Attorney General.*
- (3) *A judge to whom an application is made under subsection (1) may make an order for the gathering of information if the judge is satisfied that the written consent of the Attorney General has been obtained as required by subsection (2) and -*
- (a) *that there are reasonable grounds to [believe] [suspect] that*
 - (i) *an offence under this Act has been committed, and*
 - (ii) *information concerning the offence, or information that may reveal the whereabouts of a person suspected by the police officer of having committed the offence, is likely to be obtained as a result of the order; or*
 - (b) *that –*
 - (i) *there are reasonable grounds to [believe] [suspect] that an offence under this Act will be committed,*
 - (ii) *there are reasonable grounds to [believe] [suspect] that a person has direct and material information that relates to an offence referred to in subparagraph (i), or that may reveal the whereabouts of a person who the police officer suspects may commit the offence referred to in this paragraph, and*
 - (iii) *reasonable attempts have been made to obtain the information referred to in subparagraph (ii) from the person referred to in that subparagraph.*
- (4) *An order made under subsection (3) may –*
- (a) *order the examination, on oath or not, of a person named in the order;*
 - (b) *order the person to attend at the place fixed by the judge, or by the judge designated under paragraph (d), as the case may be, for the examination and to remain in attendance until excused by the presiding judge;*
 - (c) *order the person to bring to the examination any document or thing in his or her possession or control, and produce it to the presiding judge;*
 - (d) *designate another judge as the judge before whom the examination is to take place; and*
 - (e) *include any other terms or conditions that the judge considers desirable, including terms or conditions for the protection of the interests of the person named in the order and of third parties or for the protection of any on going investigation.*

- (5) *An order made under subsection (3) may be executed anywhere in (name of country).*
- (6) *The judge who made the order under subsection (3), or another judge of the same court, may vary its terms and conditions.*
- (7) *A person named in an order made under subsection (3) shall answer questions put to the person by the Attorney General or the Attorney General's representative, and shall produce to the presiding judge documents or things that the person was ordered to bring, but may refuse to do so if answering a question or producing a document or thing would disclose information that is protected by the law relating to non disclosure of information or privilege.*
- (8) *The presiding judge shall rule on an objection or other issue relating to a refusal to answer a question or to produce a document or thing.*
- (9) *No person shall be excused from answering a question or producing a document or thing under subsection (7) on the ground that the answer or document or thing may tend to incriminate the person or subject the person to any proceedings or penalty, but*
 - (a) *no answer given or document or thing produced under subsection (7) shall be used or received against the person in any criminal proceedings against that person, other than in a prosecution for perjury or giving false evidence; and*
 - (b) *no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person, other than in a prosecution for perjury or giving false evidence .*
- (10) *A person has the right to retain and instruct counsel at any stage of the proceedings under this section.*
- (11) *The presiding judge, if satisfied that any document or thing produced during the course of the examination is likely to be relevant to the investigation of any offence under this Act, shall order that the document or thing be given into the custody of the police officer or someone acting in the police officer's behalf.*

Power to intercept communications and the admissibility of intercepted communications

23. (1) *Subject to subsection (2), a police officer may, for the purpose of obtaining evidence of the commission of an offence under this Act, apply, ex parte, to a Judge of the High Court, for an interception of communications order.*
- (2) *A police officer may make an application under subsection (1) only with the prior written consent of the Attorney General.*
- (3) *A judge to whom an application is made under subsection (1) may make an order-*

- (a) *requiring a communications service provider to intercept and retain a specified communication or communications of a specified description received or transmitted, or about to be received or transmitted by that communications service provider,*
- (b) *authorizing the police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communication or communications of a specified description and to remove and retain such device,*

if the judge is satisfied that the written consent of the Attorney General has been obtained as required by subsection (2) and that there are reasonable grounds to believe that material information relating to –

- (i) the commission of an offence under this Act, or*
- (ii) the whereabouts of the person suspected by the police officer to have committed the offence,*

is contained in that communication or communications of that description.

(4) *Any information contained in a communication –*

- (a) intercepted and retained pursuant to an order under subsection (3);*
- (b) intercepted and retained in a foreign state in accordance with the law of that foreign state and certified by a Judge of that foreign state to have been so intercepted and retained,*

shall be admissible in proceedings for an offence under this Act, as evidence of the truth of its contents notwithstanding the fact that it contains hearsay.

PART V

TRIAL OF OFFENCES

NOTE

The High Court is used to illustrate that the offences would most appropriately be tried before a superior court within the relevant jurisdiction. The designation of such a court should be made in accordance with the practice within each country with respect to serious offences.

Jurisdiction to Try Offences under this Act

24. (1) The High Court shall have jurisdiction to try offences under this Act.
- (2) The High Court shall have jurisdiction to try an offence under this Act if the act or omission constituting the offence is committed in (name of country)

NOTE

The Security Council resolution does not mandate the extension of jurisdiction beyond clause 24(1) territorial jurisdiction and clause 24(3)a(i) on nationals for some of the support offences. However, there is under subparagraphs 2(c) and (e) of the resolution, obligations to deny safe haven and to ensure that those who commit the offences are brought to justice. In the absence of extended jurisdiction beyond territory and nationals there is a danger that countries will be unable to meet these obligations if extradition of an alleged offender is not possible. Further, several of the counter terrorism conventions include a prosecute or extradite obligation which cannot be met in the absence of such extended jurisdiction. For that reason subparagraph 3 – two optional approaches – has been included, albeit parts of it are denoted by italics as not strictly mandated by SCR 1373.

- (3) For the purposes of subsection (2) an act or omission committed outside (name of country) and which would if committed in (name of country) constitute an offence under this Act shall be deemed to have been committed in(name of country) if –
- (a) the person committing the act or omission is –

Option 1

- (i) a citizen of (name of country);
- (ii) *not a citizen of any country but is ordinarily resident in (name of country);*
- (b) *the act or omission is committed to compel the government of (name of country) to do or refrain from doing any act;*

- (c) *the act or omission is committed against a citizen of (name of country);*
- (d) *the act or omission is committed against property belonging to the Government of (name of country) outside (name of country); or*
- (e) *the person who commits the act or omission is after its commission, present in (name of country).*

OR

Option 2

- (3) b) *if the person committing the act or omission is present in (name of country) and cannot be extradited to a foreign state having jurisdiction over the offence constituted by such act or omission.*

Note: *Name of the country in which the legislation is enacted to be inserted in the blank space.*

Evidence by Certificate

- 25. Where in any proceedings for an offence under this Act, a question arises as to whether any thing or substance is a weapon, a hazardous, radioactive or a harmful substance, a toxic chemical or microbial or other biological agent or toxin, a certificate purporting to be signed by an appropriate authority to the effect that the thing or substance described in the certificate is a weapon, hazardous, radioactive or harmful substance, a toxic chemical or microbial or other biological agent or toxin, shall be admissible in evidence without proof of the signature or authority of the person appearing to have signed it and shall, in the absence of evidence to the contrary, be proof of the facts stated therein.

PART VI

INFORMATION SHARING, EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS

NOTE

The Commissioner of Police is used below to illustrate that this power should be accorded to a senior law enforcement authority. The designation of that authority within a particular jurisdiction will depend on the applicable legal structure. This power can also be assigned to a relevant Minister responsible for policing if appropriate within the domestic context. This exchange of information provision is separate and apart from formal mutual legal assistance powers which are also mandated under SCR 1373 and should be incorporated by way of separate general mutual legal assistance legislation.

Exchange of Information Relating to Terrorist Groups and Terrorist Acts

26. The Commissioner of Police may, on a request made by the appropriate authority of a foreign state, disclose to that authority, any information in his or her possession or in the possession of any other government department or agency, relating to any of the following -
- (a) the actions or movements of terrorist groups or persons suspected of involvement in the commission of terrorist acts;
 - (b) the use of forged or falsified travel papers by persons suspected of involvement in the commission of terrorist acts;
 - (c) traffic in explosives or other lethal devices or sensitive materials by terrorist groups or persons suspected of involvement in the commission of terrorist acts;
 - (d) the use of communication technologies by terrorist groups;
- if the disclosure is not prohibited by any provision of law and will not, in the Commissioner's view be prejudicial to national security or public safety.

NOTE

The references to "Extradition Act" and "Mutual Assistance in Criminal Matters Act" below are reference to applicable legislation governing extradition and mutual assistance within the Commonwealth, though the name of the applicable legislation will vary as between jurisdictions.

Counter terrorism Conventions to be used as Basis for Extradition

27. (1) Where (name of country) becomes a party to a counter terrorism convention and there is in force, an extradition arrangement between the Government of (name of country) and another state which is a party to that counter terrorism Convention, the extradition arrangement shall be deemed, for the purposes of the Extradition Act, to include provision for extradition in respect of offences falling within the scope of that counter terrorism convention.
- (2) Where (name of country) becomes a party to a counter terrorism convention and there is no extradition arrangement between the government of (name of country) and another state which is a party to that counter terrorism convention, the Minister may, by Order published in the Gazette, treat the counter – terrorism convention, for the purposes of the Extradition Act, as an extradition arrangement between the Government of (name of country) and that state , providing for extradition in respect of offences falling within the scope of that counter-terrorism convention.

Note: Name of the country in which the legislation is enacted to be inserted in the blank space.

Counter Terrorism Convention to be used as Basis for Mutual Assistance in Criminal Matters

28. (1) Where (name of country) becomes a party to a counter terrorism convention and there is in force, an arrangement between the government of (name of country) and another state which is a party to that counter terrorism convention, for mutual assistance in criminal matters, the arrangement shall be deemed, for the purposes of the Mutual Assistance in Criminal Matters Act, to include provision for mutual assistance in criminal matters in respect of offences falling within the scope of that counter terrorism convention.
- (2) Where (name of country) becomes a party to a counter terrorism convention and there is no arrangement between the government of (name of country) and another state which is a party to that counter terrorism convention for mutual assistance in criminal matters, the Minister may, by Order published in the Gazette, treat the counter terrorism convention as an arrangement between the Government of (name of country) and that state providing for mutual assistance in criminal matters in respect of offences falling within the scope of that counter terrorism convention.

Note: Name of the country in which the legislation is enacted to be inserted in the blank space.

Offences under this Act Deemed not to be Offences of a Political Character for the Purposes of Extradition

29. (1) Notwithstanding anything in the Extradition Act or Mutual Assistance Act, an offence under this Act or an offence under any other Act where the act or omission constituting the offence also constitutes a terrorist act, shall, for the purposes of extradition or mutual assistance, be deemed not to be:

- (a) an offence of a political character or an offence connected with a political offence or an offence inspired by political motives; or
 - (b) *a fiscal offence.*
- (2) *Notwithstanding anything in the Mutual Assistance Act, no request for mutual assistance in relation to an offence under this Act or an offence under any other act where the act or omission also constitutes a terrorist act may be declined solely on the basis of bank secrecy.*

NOTE

While SCR 1373 does not strictly mandate the exclusion of the fiscal offence ground of refusal and the overriding of bank secrecy, these are obligations arising under the Convention for the Suppression of the Financing of Terrorism and are directly related to some of the obligations in SCR 1373. For that reason subparagraph 29(1) b and paragraph 29(2) have been included though they are denoted by italics as not specifically mandated under SCR 1373.

In addition, the necessity of sections 27-29 would depend on the content and application of existing mutual assistance and extradition legislation.

PART VII

DISCLOSURE AND SHARING OF INFORMATION

NOTE

Each country will need to determine the appropriate authority for receipt of the disclosures, depending on domestic structures and context.

Duty to Disclose Information Relating to Offences and Terrorist Acts

30. (1) Every person who has any information which will be of assistance in –

- (a) preventing the commission by another person, of a terrorist act,
- (b) securing the arrest or prosecution of another person for an offence under this Act, or an offence under any other act where the act or omission also constitutes a terrorist act,

shall forthwith disclose the information to an officer not below the rank of ... (insert appropriate rank or level of police officer)

- (2) Nothing in subsection (1) requires the disclosure of any information which is protected by privilege.
- (3) No civil or criminal proceedings shall lie against any person for disclosing any information, in good faith, under subsection (1).
- (4) Any person who fails to comply with subsection (1) commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding () years.

NOTE

The obligation below requires disclosure of information to a Financial Intelligence Unit given that most countries have or are in the process of establishing such a unit. In the absence of a FIU an alternative authority should be named.

Paragraphs (3) and (4) have been included as an additional obligation that some countries have imposed with respect to financial institutions and other related persons or entities dealing in financial matters. Its appropriateness and usefulness would be dependent on the local financial structure and thus it is designated by italics as an optional approach.

The term “financial institution” is used below to illustrate the obligation that can be imposed. However the scope of its application can and should be extended beyond financial institutions to other businesses or entities dealing in financial matters.

Duty to Disclose Information Relating to Property of Terrorist Groups or Property Used for Commission of Offences under this Act

31. (1) Every person shall forthwith disclose to the Financial Intelligence Unit –
- (a) the existence of any property in his or her possession or control, which to his or her knowledge, is terrorist property, or for which there are reasonable grounds to [believe] [suspect] is terrorist property;
 - (b) the existence of any property in his or her possession or control, owned or controlled by or on behalf of a specified entity or for which there are reasonable grounds to [believe] [suspect] is owned or controlled by or on behalf of a specified entity;
 - (c) any information regarding a transaction or proposed transaction in respect of terrorist property; or
 - (d) any information regarding a transaction or proposed transaction for which there are reasonable grounds to [believe] [suspect] may involve terrorist property.
- (2) The Financial Intelligence Unit shall disclose to the Financial Intelligence Unit of a foreign state or the appropriate authority of a foreign state, as the case may be, any information in its possession relating to any property owned or controlled by or on behalf of a terrorist group, if such information is requested or if the Financial Intelligence Unit in (..... name of country) is of the view that the information would be relevant to a foreign state.
- (3) *Every financial institution shall report, every three months, to the Financial Intelligence Unit and any body authorized by law to supervise and regulate its activities –*
- (a) *that it is not in possession or control of any property owned or controlled by or on behalf of a terrorist group;*
 - (b) *that it is in possession or control of such property, and the particulars relating to the persons, accounts, and transactions involved and the total value of the property.*
- (4) *In addition to the requirements of subsection (3), every financial Institution shall report, to the Financial Intelligence Unit , every transaction which occurs within the course of its activities, and in respect of which there are reasonable grounds to suspect that the transaction is related to the commission of a terrorist act.*
- (5) No civil or criminal proceedings shall lie against any person for making a disclosure or report, in good faith, under subsection (1) or (2), or (3).or (4).
- (6) Every person who fails to comply with subsection (1) or (3) or (4) commits an offence and shall on conviction, be liable to imprisonment for a term not exceeding () years.

PART VIII

SEIZURE AND FORFEITURE OF TERRORIST PROPERTY

NOTE

The reference to Commissioner of Police is illustrative of a senior police official. The selection of an appropriate authority within each country will depend on local context and circumstances.

NOTE

There is an obligation under SCR 1373 to freeze assets. There is as well under the Convention for the Suppression of the Financing of Terrorism an obligation to forfeit or confiscate. Sections 32 – 35 are examples of provisions that can be used separately or in combination to meet the relevant obligations. This is in addition to the “freezing” of assets that will result from the combined effect of the listing process under Clauses 2 and 3 and the prohibitions in Clauses 4, 5, 7 and 8.

Power to Seize Property Used in Commission of Terrorist Acts

32. (1) Where the Commissioner of Police has reasonable grounds to [believe] [suspect] that any property has been, is being, or may be used to commit an offence under this Act, he or she may seize the property.
- (2) The Commissioner of Police may exercise his or her powers under subsection (1) whether or not any proceedings have been instituted for an offence under this Act in respect of that property.
- (3) The Commissioner of Police, shall as soon as practicable after seizing any property under subsection (1), and in any event within 10 days, make an application, ex parte, to a Judge of the High Court for a detention order in respect of that property.
- (4) A judge to whom an application is made under subsection (3), shall not make a detention order in respect of the property referred to in the application unless he or she –
 - (a) has given every person appearing to have an interest in the property, a reasonable opportunity of being heard;
 - (b) has reasonable grounds to believe that the property has been, is being, or may be used to commit an offence under this Act.

- (5) Subject to subsection (6), every detention order made under subsection (4), shall be valid for a period of 60 days, and may, on application, be renewed by a Judge of the High Court, for a further period of 60 days until such time as the property referred to in the order is produced in court in proceedings for an offence under this Act in respect of that property.
- (6) A Judge of the High Court may release any property referred to in a detention order made under subsection (4) if –
 - (a) he or she no longer has reasonable grounds to suspect that the property has been, is being or will be used to commit an offence under this Act; or
 - (b) no proceedings are instituted in the High Court for an offence under this Act in respect of that property within 6 months of the date of the detention order.
- (7) No civil or criminal proceedings shall lie against the Commissioner of Police for a seizure of property, made in good faith, under subsection (1).

Orders for Forfeiture of Property on Conviction for Offences under this Act

33. (1) Where any person is convicted of an offence under this Act, or an offence under any other Act where the act or omission also constitutes a terrorist act, the court may order that any property –
 - (a) used for, or in connection with; or
 - (b) obtained as proceeds from,the commission of that offence, be forfeited to the State.
- (2) Before making an order under subsection (1), the court shall give every person appearing to have an interest in the property in respect of which the order is proposed to be made, an opportunity of being heard.
- (3) Property forfeited to the State under subsection (1) shall vest in the State -
 - (a) if no appeal has been made against the order, at the end of the period within which an appeal may be made against the order; and
 - (b) if an appeal has been made against the order, on the final determination of the appeal.

Orders for Seizure and Restraint of Property

34. (1) Where a judge of the High Court is satisfied, on an *ex parte* application made to the judge in chambers, that there are reasonable grounds to [believe] [suspect] that there is in any building, place or vessel, any property in respect of which an order of forfeiture may be made under section 35, the judge may issue –
 - (a) a warrant authorising a police officer to search the building, place or vessel for that property and to seize that property if found, and any other property in

respect of which that police officer believes, on reasonable grounds, that an order of forfeiture may be made under section 35;

- (b) a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in, that property, other than as may be specified in the order.
- (2) On an application made under subsection (1), the judge may, at the request of the Attorney General and if the judge is of the opinion that the circumstances so require-
- (a) appoint a person to take control of, and manage or otherwise deal with, the whole or a part of the property, in accordance with the directions of the judge;
 - (b) require any person having possession of the property to give possession thereof to the person appointed under paragraph (a)
- (3) The power to manage or otherwise deal with property under subsection (2) includes -
- (a) in the case of perishable or rapidly depreciating property, the power to sell that property; and
 - (b) in the case of property that has little or no value, the power to destroy that property.
- (4) Before a person appointed under subsection (2) destroys any property referred to subsection 3 (b), he or she shall apply to a Judge of the High Court for a destruction order.
- (5) Before making a destruction order in relation to any property, the judge shall require notice to be given, in such manner as the judge may direct, to any person who, in the opinion of the judge, appears to have an interest in the property and may provide that person with a reasonable opportunity to be heard.
- (6) A judge may order that any property in respect of which an application is made under subsection (4), be destroyed if he or she is satisfied that the property has little or no financial or other value.
- (7) A management order under subsection (2) shall cease to have effect when the property which is the subject of the management order is returned to an applicant in accordance with the law or forfeited to the State.
- (8) The Attorney General may at any time apply to a Judge of the High Court to cancel or vary a warrant or order issued under this section.

Orders for Forfeiture of Property

35. (1) The Attorney General may make an application to a Judge of the High Court for an order of forfeiture in respect of terrorist property.
- (2) The Attorney General shall be required to name as respondents to an application under subsection (1) only those persons who are known to own or control the property that is the subject of the application.
- (3) The Attorney General shall give notice of an application under subsection (1) to the respondents named in the application in such manner as the judge may direct.
- (4) If a judge is satisfied, on a balance of probabilities, that the property which is the subject of the application is terrorist property, the judge shall order that the property be forfeited to the State to be disposed of as directed by the judge.
- (5) Where a judge refuses an application under subsection (1), the judge shall make an order that describes the property and declare that it is not property referred to in that subsection.
- (6) On an application under subsection (1), a judge may require notice to be given to any person, who in the opinion of the judge, appears to have an interest in the property, and any such person shall be entitled to be added as a respondent to the application.
- (7) If a judge is satisfied that a person referred to in subsection (6) -
- (a) has an interest in the property which is the subject of the application,
 - (b) has exercised reasonable care to ensure that the property is not the proceeds of a terrorist act, would not be used to commit or facilitate the commission of a terrorist act and would not be used by a terrorist group; and
 - (c) is not a member of a terrorist group,
- the judge shall order that the interest shall not be affected by the order. The order shall also declare the nature and extent of the interest in question.
- (8) A person who claims an interest in property that has been forfeited and who has not been given notice under subsection (6) may make an application to the Supreme Court to vary or set aside an order made under subsection (4) not later than 60 days after the day on which the forfeiture order was made.
- (9) Pending the determination of an appeal against an order of forfeiture made under this section, property restrained under section 34 shall continue to be restrained, property seized under a warrant issued under that section shall continue to be detained, and any person appointed to manage, control or otherwise deal with the property under that section shall continue in that capacity.
- (10) The provisions of this section shall not affect the operation of any other provision of this Act respecting forfeiture.

PART IX

CHARITIES

Note

Though not strictly required under the resolution, as the abuse of charities for financing of terrorism has been identified as a concern these provisions are included one possible measures that can be adopted. However, the need for and nature of legislation relating to charities will depend on domestic structures and laws governing such entities.

Refusal of Applications for Registration, and the Revocation of the Registration, of Charities Linked to Terrorist Groups

36. (1) *The Minister and the Minister of Finance may sign a certificate refusing or revoking registration of a charity, based on information received including any security or criminal intelligence reports, where there are reasonable grounds to [believe] [suspect] that an applicant for registration as a registered charity (in this section referred to as “the applicant”) or a registered charity has made, is making, or is likely to make available, any resources, directly or indirectly, to a terrorist group.*
- (2) *A copy of the signed certificate shall be served on the applicant or the registered charity, personally or by registered letter sent to its last known address, with a copy of the certificate.*
- (3) *The certificate or any matter arising out of it shall not be subject to review or be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with this section.*
- (4) *Within (30) thirty days of receipt of the copy of the notice under subsection (2), the applicant or the registered charity may make an application to the High Court to review the decision of the Minister.*
- (5) *Upon the filing of an application under sub section (4), a judge of that court shall –*
- (a) *examine in chambers, the information, including any security or criminal or intelligence reports, considered by the Minister and the Minister of Finance before signing the certificate and hear any evidence or information that may be presented by or on behalf of those Ministers (whether or not such information is admissible in a court of law), and may, on the request of the Minister, hear all or part of that evidence or information in the absence of the applicant or registered charity, or any counsel representing the applicant or the registered charity, if the judge is of the opinion that the disclosure of the information would be prejudicial to national security or endanger the safety of any person.*

- (b) *provide the applicant or the registered charity with a statement summarising the information available to the judge so as to enable the applicant or the registered charity to be reasonably informed of the circumstances giving rise to the certificate, without disclosing any information the disclosure of which would, in the judges opinion, be prejudicial to national security or endanger the safety of any person,*
- (c) *provide the applicant or registered charity with a reasonable opportunity to be heard, and*
- (d) *determine whether the certificate is reasonable on the basis of all the information available to the judge or if found not reasonable, quash it.*
- (6) *A determination under subsection (5) shall not be subject to appeal or review by any court.*
- (7) *Where the judge determines, under subsection (5), that a certificate is reasonable, or if no application is brought upon the expiry of (30) thirty days from the date of service of the notice, the Minister shall cause the certificate to be published in the Gazette.*
- (8) *A certificate determined to be reasonable under subsection (5), shall be deemed for all purposes to be sufficient grounds for the refusal of the application for registration of the charity referred to in the certificate or the revocation of the registration of the charity referred to in the certificate.*
- (9) *Where the judge determines that the certificate is not reasonable, he or she shall order the registration or continued registration of the charity.*

PART X

MISCELLANEOUS POWERS

Provision of Information Relating to Passengers of Vessels and Aircraft and Persons Entering and Leaving the Country

37. (1) The –

- (a) operator of an aircraft or master of a vessel, departing from (name of country); or
- (b) operator of an aircraft registered in (name of country) or master of a vessel registered in(name of country), departing from any place outside (name of country),

may subject to regulations made under subsection (5), provide –

- (i) to the Commissioner of Police any information in his or her possession, relating to persons on board, or expected to be on board, the aircraft or vessel, as the case may be;
 - (ii) to the competent authority in a foreign state, any information in his or her possession, relating to persons on board, or expected to be on board, the aircraft or vessel, as the case may be , and required by the laws of that foreign state.
- (2) The Commissioner of Immigration may, subject to regulations made under subsection (5), provide to the competent authority in a foreign state any information in his or her possession relating to persons entering or leaving (name of country), by land, and that is required by the laws of that foreign state.
- (3) The provision of any information under subsection (1) or (2), subject to regulations made under subsection (5), shall be deemed not to be a contravention of any provision of law prohibiting the disclosure of the information.
- (4) No information provided to the Commissioner of Police under subsection (1) shall be used or disclosed by the Commissioner of Police except for the purpose of protecting national security or public safety.
- (5) The Minister may make regulations generally to give effect to the purposes of this section, including regulations –
- (a) respecting the types or classes of information that may be provided under this section,
 - (b) specifying the foreign states to which the information may be provided.

Note: The name of the country in which the legislation is enacted to be inserted in blank space.

Power to Prevent Entry and Order the Removal of Persons

38. (1) The Commissioner of Immigration or other authorized officer under the laws relating to immigration shall not grant an endorsement or other authority permitting a person to enter (name of country) if he or she has reasonable grounds to [suspect] [believe] that that person has been, is, or will be, involved in the commission of a terrorist act.
- (2) Where the Minister in charge of Immigration has reasonable grounds to believe that a person in (name of country) has been, is or will be, involved in the commission of a terrorist act, he or she may make an order requiring that person to leave (name of country) and remain thereafter out of (name of country).
- (3) A person with respect to whom an order under subsection (2) is made shall leave (name of country) and shall, so long as the order is in force, remain out of(name of country).
- (4) A person with respect to whom an order under subsection (2) is made may be detained in such manner as may be directed by the Minister in charge of Immigration and may be placed on a vessel or aircraft leaving (name of country).

*Note: The name of the country in which the legislation is enacted to be inserted in blank space.
The reference to the Minister in charge of Immigration is in case that Minister is not the same as the Minister charged with the enforcement of this Act.*

Power to Refuse Refugee Application

39. The Minister in charge of Immigration may, having regard to the interests of national security and public safety, refuse the application of any person applying for status as a refugee, if he or she has reasonable grounds to believe that the applicant has committed a terrorist act or is or is likely to be, involved in the commission of a terrorist act.

Note: The name of the country in which the legislation is enacted to be inserted in blank space.

Power to Make Regulations

40. (1) The Minister may make regulations in respect of all matters for which regulations are required or authorized to be made by this Act.

- (2) Every regulation made under subsection (1) shall be published in the Gazette and shall come into operation on the date of such publication or on such later date as may be specified in the regulation.
- (3) Every regulation made under subsection (1), shall, as soon as convenient after its publication in the Gazette, be brought before Parliament for approval. Any regulation which is not so approved shall be deemed to be rescinded as from the date of disapproval, but without prejudice to anything previously done thereunder.
- (4) Where an Order is deemed to be rescinded by reason of the operation of subsection (3), the Minister shall cause notice of such rescission to be published in the Gazette.

NOTE

In the absence of implementing legislation, some countries have chosen to respond to UN SCR 1373 by issuing detailed regulations under a provision equivalent to Clause 3 of the model legislation above or pursuant to separate legislation relating to resolutions of the UN Security Council. The following sample regulation is provided solely to illustrate an alternate approach that may be adopted either in the short term or as general implementing legislation. Some countries may have difficulty with this approach because of restrictions on the use of the regulation power.

SAMPLE REGULATION UNDER CLAUSE 3

Whereas the Security Council of the United Nations, acting under section 41 of the Charter of the United Nations, adopted Security Council Resolution 1373(2001) on September 28, 2001;

And Whereas it appears to me to be necessary to make provision for enabling the measures set out in that resolution to be effectively applied in (name of country);

Now therefore I, Minister responsible for Foreign Affairs, in the exercise of the powers conferred on me by section 3 (1) of the Measures to Combat Terrorism Act, make the Order set out hereunder.

Minister responsible for Foreign Affairs

UNITED NATIONS SUPPRESSION OF TERRORISM ORDER

Interpretation

1. This Order may be cited as the United Nations Suppression of Terrorism Order.

2. In this Order -

“entity” means a body corporate, trust, partnership of fund or an unincorporated association or organization;

“listed person” means -

(a) a person whose name is listed in the Schedule to this Order in accordance with section 3;

“Minister” means the Minister responsible for Foreign Affairs;

“person” means an individual or an entity;

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

List

3. (1) A person whose name is listed in the Schedule to this Order is a person who there are reasonable grounds to believe –
 - (a) has carried out, attempted to carry out, participated in or facilitated the carrying out of, a terrorist activity;
 - (b) is controlled directly or indirectly by any person conducting any of the activities set out in paragraph (a); or
 - (c) is acting on behalf of, or at the direction of, or in association with any person conducting any of the activities set out in paragraph (a).
- (2) Any listed person may apply in writing to the Minister to be removed from the list.
- (3) The Minister shall consider and decide on any application made under subsection (2) and advise the applicant in writing of his or her decision. If the Minister decides to remove the person from the list, the schedule shall be amended accordingly.

Providing or Collecting Funds

4. No citizen of (name of country) and no body corporate incorporated in (name of country) shall outside (name of country) knowingly provide or collect by any means, directly or indirectly, funds with the intention that the funds be used, or in the knowledge that the funds are to be used, by a listed person.

Freezing Property

5. No citizen of (name of country) and no body corporate incorporated in (name of country) shall outside (name of country) knowingly -
 - (a) deal directly or indirectly in any property of a listed person, including funds derived or generated from property owned or controlled directly or indirectly by that person;
 - (b) enter into or facilitate, directly or indirectly, any transaction related to a dealing referred to in paragraph (a);

- (c) provide any financial or other related service in respect of the property referred to in paragraph (a); or
 - (d) make any property or any financial or other related service available, directly or indirectly, for the benefit of a listed person.
6. All secured and unsecured rights and interests held by a person, other than a listed person or their agent, in the frozen property are entitled to the same ranking as they would have been entitled to had the property not been frozen.

Causing Assisting or Promoting

7. No citizen of (name of country) and no body corporate incorporated in (name of country) shall outside (name of country) knowingly do anything that causes, assists or promotes, or is intended to cause, assist or promote, any activity prohibited by section 4 or 5, unless the person has a certificate issued by the Minister under section 12.

Disclosure

8. Every citizen of (name of country) and every body corporate incorporated in (name of country), outside (name of country) shall disclose forthwith to the Commissioner of Police -
- (a) the existence of property in their possession or control that they have reason to believe is owned or controlled by or on behalf of a listed person; and
 - (b) information about a transaction or proposed transaction in respect of property referred to in paragraph (a).

Offences and Punishment

9. Any person who contravenes sections 4, 5, 7, or 8 is guilty of an offence and liable, on conviction after trial to a fine not exceeding or to imprisonment, for a term not exceeding years.

Certificate

10. No offence is committed under Section 9 by doing any act or thing that may be prohibited by this Order or omitting to do any act or thing that may be required by this Order if, before that person does or omits to do that act or thing, the Minister issues a certificate to the person stating that Minister has reasonable grounds to believe that -
- (a) the Security Council of the United Nations Resolution 1373 adopted September 28, 2001, does not intend that that act or thing be prohibited,
 - (b) the act or thing has been approved by the Security Council of the United Nations or by the Committee of the Security Council; or

- (c) the person named in the certificate is not a listed person.

Coming into Force

10. This order shall come into force on the day on which it is published in the Gazette.

SCHEDULE
(Sections 2 and 3)

List persons and entities as identified in the relevant resolution

EXPLANATORY GUIDE TO MODEL LEGISLATIVE PROVISIONS

PREAMBLE

Expert Group Report

Each country will need to decide whether to include a preamble or use other explanatory tools in the legislation that is adopted. A decision on this issue will depend on policy towards legislative drafting and the Group noted that there were differing views as to the usefulness and value of such provisions.

Note

The Preamble should reflect the fundamental issues to be addressed by the legislation from the perspective of the enacting country.

CLAUSE 1

Expert Group Report

At law, it is not possible to make the provision and collection of funds for terrorism a criminal offence without defining the underlying concept, with enough certainty to allow for prosecution of the offence. Thus, before considering the content of the specific offence, the Group deliberated on legislative approaches to a definition of “terrorism” or “terrorist acts” to which the specific offences will apply.

The members of the Expert Group emphasized that in this exercise, they were not in any way attempting to arrive at an acceptable international definition of terrorism, recognizing that this was a serious and complex question, which was still under consideration by the United Nations. Further in the domestic context, it is for each country to decide upon the sensitive and complex policy considerations relating to a definition and to adopt a legislative provision appropriate for that country.

At the same time, the Group was of the view that it was important to provide countries with some guidance and information as to the general structure of and existing legislative approaches to such a definition. It was noted that this would hopefully be of some assistance to those countries with no previous legislation of this nature and may also allow for some uniformity of approach that will enhance international cooperation to combat terrorism.

Much guidance was drawn from the various Security Council and General Assembly resolutions on terrorism, existing UN counter-terrorism conventions¹, and the legislation of Singapore, Canada, the United Kingdom and the Mauritius Bill.

An analysis of this documentation revealed that the legislative approaches were quite consistent. Generally, the definitions were comprised of a list of underlying acts and a requirement that the act was threatened or committed to intimidate or threaten the population or to compel a government or international organization to do or refrain from

¹ This term, which is used throughout the document, refers to the 12 conventions listed in Annex 25.

doing an act. A third element, found in some of the legislative provisions, was an additional requirement that the act is motivated by a political, religious or ideological cause.

The Group considered each component of the definition. It was agreed that the list of underlying acts should include, as a minimum, conduct that constitutes an offence as described in the existing UN counter-terrorism conventions. However, consistent with the Convention for the Suppression of the Financing of Terrorism, all of the definition provisions examined also covered other acts not addressed specifically in the counter terrorism conventions. As to the scope of the acts to be covered, it was accepted that this would need to be determined based on domestic policy. The list could range from acts which are intended to cause death or serious bodily harm, as in Article 2 of the Convention for the Suppression of the Financing of Terrorism, to a broader range of acts covering matters such as serious property damage or attacks on essential services.

The fundamental problem, which was discussed at length, was how to craft a provision that was sufficiently comprehensive and flexible to capture the various activities of terrorists and yet avoid an overly broad definition that would extend well beyond real terrorist acts and have the potential for abuse. The Group noted particular concerns about the relationship of the definition to matters such as lawful protest or strike action.

After discussion, the Group concluded that in order to provide countries with a comprehensive view of the issue, it would be best to incorporate an extensive, rather than limited, list of underlying acts, drawn from all of the legislative provisions examined. This would be accompanied by an explanatory note, which would outline that this was an illustrative list and countries would need to decide what acts to cover in domestic law. Because of particular concerns regarding lawful protests and strikes, a provision drawn from the Canadian legislation has also been included as paragraph 3 for consideration.

As to the purpose of the act, there was consensus that it should generally follow Article 2 of the Convention on the Suppression of the Financing of Terrorism, which was the approach adopted in most of the existing and proposed legislation.

The Group went on to consider the additional element of “for political, ideological or religious motivation”, focusing on the reasoning behind the absence or inclusion of this as a further component of the definition. The inclusion of a “motivation” element provides the special characterization to the offence that separates terrorist acts and activity from other criminal acts, such as those related to organized crime groups. It also provides parameters that will narrow the application of the offence to some extent, such that it is less likely that it can be subject to abuse in its application.

Alternatively, there were reasons supporting a definition without this additional requirement. In particular, it reflects a policy approach where the act and purpose alone constitute “terrorism” and the motivation is of no relevance. This approach is also easier to apply in practice, as there is no requirement to prove motivation as an element of the offence. As well, such an approach is consistent with the definition in the Convention on the Suppression of the Financing of Terrorism as noted above.

The Group considered that ultimately this was a fundamental policy decision that each country would need to make when developing implementing legislation and therefore, two optional approaches have been included.

Note

Clause 1 sets out the definitions that apply in the Act.

The definition of “Explosive or other lethal devices” is taken from the International Convention on the Suppression of Terrorist Financing and includes weapons and other devices.

The term “property” is defined using the definition for “funds” found in the Convention on the Suppression of Terrorist Financing. As indicated in the model, countries may choose to use either term depending on consistency with other domestic legislation. Countries that have implemented the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances or the United Nations Convention against Transnational Organized Crime may wish to use the term “property” that is used in those conventions but which carries the same definition, with some detail added, as the term “funds” in the Financing Convention.

The background to the definition of “terrorist act” is outlined above by the expert group report. It is important to emphasize that while “terrorist act” is included in the definitions because of the link to the financing and support offences, it is not made a criminal offence itself under the Act. The assumption is made that countries will already have in place offences to governing the underlying “terrorist act”. Instead, it is defined in order that the relevant supporting conduct can be criminalized. Nothing however precludes a country from creating, in addition, a separate offence of “terrorist act”.

As noted in the model, terrorist act includes extraterritorial acts because the intent and scope of UN SCR is such that the support offences were clearly intended to cover support to both domestic and foreign terrorist acts. This is a distinct concept from the jurisdictional provisions relating to the offences created under the act.

CLAUSE 2

Expert Group Report

For the prohibition on making funds available and the general support offences under para 1(d) of the Security Council resolution, it is also useful to adopt a domestic process by which persons and entities can be proscribed as terrorists or terrorist groups by executive action. This will avoid the requirement to establish a link to terrorist acts in each individual case. The requirements for and process adopted for the “listing” of individuals and groups will be dependent upon the requirements of domestic law in this regard.

Note

As indicated the design of the “listing process” will be dependent on domestic law. Clause 2 provides an example of a procedure that can be employed to designate specified or prohibited entities. It is important that the process adopted strikes an appropriate balance between effective law enforcement, including according protections to national security and other secure information and the rights of the individual. Clause 2 is designed to balance those competing interests.

Under the legislative scheme of the model provisions Clause 2 is integral to implementation of the obligation to “freeze assets” that is discussed below under Clauses 32-36 and the Sample Regulation. Once an entity is listed the various prohibitions in the offence section with respect to dealing in any manner with property or providing financial or other services will become operative. If a country chooses not to adopt a “listing” process then another mechanism such as regulations under Security Council legislation will have to be employed to meet the critical obligation of freezing the assets of those entities listed by the Security Council.

CLAUSE 3

Expert Group Report

SCR 1(c) - Freezing of Assets

Sub-paragraph 1c of the resolution requires countries to have mechanisms under domestic law that will allow for the freezing of funds and assets related to terrorists and terrorist activities. It was noted that the most critical and challenging aspect of this obligation is the requirement to act expeditiously to freeze assets and funds of persons or entities named by the Security Council. The Group discussed the legal issues surrounding this obligation at some length.

One approach, adopted by several countries to deal with freezing, particularly on the basis of lists, is to pass regulations under legislation that allows for implementation of Security Council resolutions. These regulations provide for the freezing of assets of named individuals and entities and thus freezing action would be available in relation to the lists provided by the Security Council, which can be annexed to or form part of the regulation.

One approach that may facilitate the use of the lists is to provide that where a person or entity is included in the list they are deemed to have been involved in terrorist activity or there is deemed to be reasonable grounds to believe or a prima facie case against them. The freezing action is then based on that deeming provision. Canada used this technique in adopting implementing regulations by providing in section 2 that the persons in the list are persons for whom there are reasonable grounds to believe are involved in terrorist activity. (Annex 9)

The Group concluded that in terms of implementing the obligations with respect to “listed” persons or entities, each country would have to determine how best to do so, given the constraints and limitations that exist under their domestic laws. However, it was emphasized that whatever path is chosen, countries must have in place a scheme to allow for quick and effective action to be taken with reference to any lists issued by the Security Council. On this point, the Group recommended that countries adopt a regime of regulations under general United Nations Security Council legislation for that purpose.

Note

Clause 3 is tied to the requirement under the Security Council resolution to freeze the assets of persons named by the Security Council. In accordance with the expert group recommendation, a general power for regulations to implement Security Council resolutions has been incorporated. In addition, paragraph 2 allows for entities named by the Security Council to be included in the prohibited list by a deeming process. As noted, each country

will need to consider if this approach is feasible under domestic law and constitutional restrictions.

CLAUSE 4

Expert Group Report

In this sub-paragraph of the resolution, States are obligated to ensure that the conduct of wilfully providing or collecting funds for terrorist activity is made criminal, on a broad basis. The Group looked at some of the existing or proposed legislation, noting the different approaches that can be used to meet the obligation. In particular, a country may choose to enact one general offence or a series of separate offences.

The Group chose to recommend a simple but effective option of basing the offence on Article 2 of the Convention for the Suppression of the Financing of Terrorism, which parallels the language used in this subparagraph of the resolution, but including a mental element of intent, knowledge or objective basis to believe.

Note

Subparagraph 1(b) of the resolution requires the criminalization of the provision and collection of funds for terrorism. As noted above, the term used in the legislation is property, consistent with other international instruments, but the definition accords with that of “funds” in the Financing Convention. The term property as defined is also sufficiently broad so as to cover the terms used in the resolution which include “financial assets” and “economic resources”.

CLAUSES 5-8

Expert Group Report

Under SCR (1) d, countries are required to prohibit making funds, financial assets, or economic resources or financial or other related services available for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts.

The Group noted that in enacting legislation to implement this aspect of the resolution countries should give careful consideration to the interpretation given to the words “for the benefit of persons” and in particular what the concept of “benefit” will cover. There are also questions as to the applicable intent or level of knowledge required in relation to the offence.

The Group noted that to meet this obligation a country may wish to establish one general offence or several separate offences or both, to capture all of the elements contained in the resolution.

Note

As indicated, there are alternate approaches that can be taken to implement this aspect of the resolution. Clauses 5-8 of the model legislative provisions, combined with clause 4 (making property available) illustrate the use of several specific offences to cover the obligation comprehensively. As an alternative a country could employ one general offence covering these various elements of “making available”.

CLAUSES 9-13 and 18

Expert Group Report

The Group noted that paragraph 2 of the resolution is broadly framed placing obligations on states to undertake or refrain from the action specified in each sub-paragraph. In so far as the obligations are directed to State activity, the Group considered that this would need to be addressed at the executive level of each state. However, by placing obligations on States, for example, to refrain from providing support or to deny safe haven, there are legislative provisions that can be adopted to prevent individuals of that State from providing such assistance or to ensure that individuals will not find safe haven there. The legislative recommendations on paragraph 2 relate to this second application of the obligations.

There are several types of offences that can be created in response to the obligation under sub-paragraph 2(a) to refrain from providing support to terrorist groups. As the subparagraph highlights assistance by way of recruitment and the supply of weapons, the Group recommended that countries consider a combination of specific recruitment, training and weapons offences, along with a general “support” offence or offences. This combination should ensure that the obligations under sub paragraph 2(a) can be met in that all “support” activities will be criminalized.

The Group noted that a country could choose to adopt several specific support offences or a few that could be used in combination with existing conspiracy, and aiding and abetting provisions. If the latter approach is adopted, a country should ensure that the combination of provisions provides a sufficiently broad basis for prosecution of terrorist support activity.

Note

In these clauses, the model provides examples of the types of conduct that should be criminalized to fully implement this obligation under the resolution. Again, countries might wish to combine some of these into more general offences.

CLAUSES 14,15 AND 16

Expert Group Report

Subparagraph 2(d) places an obligation on states to prevent acts against other states and the citizens of those states. The Group was of the opinion that implementation of this obligation clearly requires improvements to investigation and intelligence gathering capacity (addressed in a separate part of the Expert Group Report). In addition, some countries have in place laws that specifically criminalize planning and preparation activity aimed at the commission of offences against another country or its citizens.

Note

Clauses 14 and 15 implement both subparagraph 2(a) on support and subparagraph 2(d) on preventing acts against other states by criminalizing various acts such as incitement and promotion of terrorist acts and provision of property or services for the commission of the offences or meetings at the planning stage. As the definition of “terrorist act” is not territorially limited, these offences can be used to implement this obligation with respect to the protection of other states.

Clause 16 widens the scope of the conspiracy provisions to create offences for both conspiring in one country to do something in another and vice versa. This clearly extends countries’ powers in respect of this obligation of the resolution.

CLAUSE 17

Expert Group Report

A central issue that must be considered in implementing the obligation to prohibit the provision of support to terrorist groups is whether or not to create an offence of “membership” in a terrorist group. It was noted that this approach has been adopted in several jurisdictions and does provide an effective means to prevent terrorists from receiving training, obtaining weapons or recruiting members, as any involvement in the prohibited group is criminal in and of itself. However, some countries might face constitutional problems with the creation of a membership offence. Countries facing possible challenges of this nature may wish to consider the approach adopted by Canada, which combines the listing of persons and groups with a broad range of “support “ offences but does not make membership, per se, an offence.

Note

As indicated it is for each country to determine if membership alone in an organization can be made the subject of a criminal offence.

CLAUSE 19

Expert Group Report

The Group recommended that all of the offences adopted should cover those who participate in the act. As the actual content of such a “participation” clause may vary from country to country, a comprehensive list has been included from which a country may make specific selections if it considers the content to be duplicative.

CLAUSES 20 AND 21

Expert Group Report

One of the obligations in subparagraph 2(e) is to ensure that those who engage in terrorist activity face trial. In that regard, the Group examined the question of investigative detention provisions, which have been adopted or are under consideration by some countries. Clearly in the context of terrorism investigations, there may be circumstances where concerns for

public safety or the need to prevent interference with an investigation require swift action by authorities, including the immediate detention of individuals prior to the institution of charges.

At the same time, there are justifiable concerns about the rights of the individual and the need to guard against arbitrary arrest and detention. After lengthy discussion, the Group concluded that, depending on the particular circumstances in the country, it may be important to have such a power in order to react effectively in some situations. However, any such power would need to be limited in scope and application and restricted to detention periods of short duration. Therefore, the Group recommended the inclusion of an optional investigative detention power for a short period (36-48 hours), with a possible extension by court order for up to 5 days. To reduce the possibility of abuse of such a power the Group further recommended that the power be restricted in application to where there are reasonable grounds to believe that detention is necessary to prevent an act of terrorism or interference with an investigation relating to terrorism. The Group also noted the added protections of the Mauritius draft bill of ensuring access by a government medical officer and the use of video taping.

CLAUSES 22 AND 23

Expert Group Report

With regard to the obligation under sub-paragraph 2(e) to bring terrorists to justice, consideration should be given not only to the offence provisions but also the powers available to law enforcement authorities to investigate terrorist activities. While SCR 1373 does not require the adoption of any specific forms of investigative measures, the Group recommended consideration, on a purely optional basis, of powers to take investigative statements from witnesses under court order and the interception of communications under court authorization.

In the realm of communication interception, problems can arise where the interception evidence is lawfully gathered in one country and a second country seeks to rely on that evidence in its prosecution. This issue can be of particular concern in the context of investigations relating to terrorism. To avoid arguments as to the admissibility of the evidence in these circumstances, the Group recommended consideration, again on an optional basis, of providing by legislation for the admission of evidence in those circumstances.

The model law includes optional provisions for these investigative powers, and an evidentiary clause for the admission of intercept evidence lawfully gathered in a foreign country.

CLAUSE 24

Expert Group Report

The Group discussed the approach on jurisdiction in relation to the offences in the model legislative provisions.

The Group noted that the Security Council resolution requires, in relation to some obligations, that jurisdiction be extended to nationals.² Thus, for those offences, countries need to adopt legislation that allows for prosecution of nationals for those offences, wherever they may have occurred. The Group recognized that the resolution itself does not require specifically that states provide for universal jurisdiction³ over the relevant offences. However, the Group considered that because of the international nature of terrorism, in particular the global reach of terrorist financing, consideration should be given to establishing universal jurisdiction over the relevant offences. The Group highlighted that this approach was consistent with resolutions 1373 and 1269, both of which require states to deny safe haven to those who carry out terrorist acts.

The Group further highlighted that some of the offences required by SCR 1373 are also contained in the UN counter-terrorism conventions. Most of those conventions obligate countries to either prosecute or extradite persons alleged to have committed the convention offences and mandate countries to provide for jurisdiction over the offences, where extradition is refused. One way to ensure that these obligations can be met is to have universal jurisdiction over the relevant offences such that if the situation requires it, the State will be able to prosecute an offender who cannot be extradited, regardless of the fact that there is no direct connection between the offence or offender and the country in question, aside from his or her presence there. An alternative approach would be to provide for jurisdiction over the offence in instances where extradition is refused. Therefore, while not a strict requirement, the Group recommended that implementing legislation should provide for extraterritorial jurisdiction over the relevant offences on the basis of the universality principle or alternatively allow for jurisdiction in circumstances where the person is not extradited.

Note

As indicated while the extended jurisdiction in the model is not mandated by SCR 1373, countries may wish to consider taking such jurisdiction, particularly in relation to offences also governed by the counter-terrorism conventions which contain a prosecute or extradite obligation.

CLAUSE 26

Expert Group Report

The Group reiterated the need for countries to review and enhance existing mechanisms for the gathering and sharing of information, both domestically and internationally, regarding not only terrorist activities but also related criminal activity, such as that outlined in subparagraph 3(a) of the resolution. Countries need to ensure that, if required, a proper legislative framework is in place to allow for such information exchange.

² See SCR paragraphs 1(b), and 1(d).

³ The term “universal jurisdiction” is used here to denote that a country may assert jurisdiction over an offence on the basis that the person is found in that country, without the requirement for any other nexus between the country and the offence.

Note

Clause 26 in the model is illustrative of the types of provisions that can be made in domestic law to allow for the sharing of information. Countries may wish to substitute other authorities depending on domestic laws and structures. Further, the information sharing provisions will need to be consistent with any applicable privacy and data protection laws.

CLAUSES 27 AND 28

Expert Group Report

Paragraph 3(c) of the resolution relates to the use of bilateral and multilateral instruments for cooperation. The expert group stressed that countries need to ensure that existing laws will permit full implementation of the mutual legal assistance and extradition obligations under the UN counter terrorism conventions. One way to achieve this objective is through general provisions in extradition and mutual legal assistance laws that defines treaty to include a multilateral treaty, to which that country is party and which contains a provision on mutual assistance or extradition.

CLAUSE 29

Expert Group Report

Under sub-paragraph 3(g) countries must ensure that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists. Consideration was also given to the obligation to ensure that alleged terrorists cannot rely on the political offence exception as a basis for the refusal of extradition. In so far as this exception is recognized under existing extradition laws, countries need to amend the legislation to ensure that it does not apply to any person accused or convicted of a terrorist offence.

CLAUSES 30 AND 31

Expert Group Report

Various provisions of the resolution require enhanced information gathering and sharing, both domestically and internationally. The obligation under this sub-paragraph to share information and cooperate in administrative and judicial matters requires powers both to obtain the relevant information and to share it. In establishing such powers, countries need to ensure that a proper balance is struck between the need for information gathering and dissemination and appropriate safeguards for privacy and data protection. Each country will have to consider how best to achieve this balance within the context of its legal system.

The important role that a Financial Intelligence Unit (FIU) can play in gathering information was emphasized. While such units have a general mandate respecting all money laundering matters, they can be particularly useful for the gathering of information relating to the financing of terrorism. The Group recommended that those countries that have yet to establish such a unit take steps to do so and those with existing units ensure that their powers and mandate are sufficient to be effective with respect to the terrorist financing. As well, in

terms of distributing information, if the FIU does not have a specific power to share information internationally with other similar bodies, that power should be created.

In addition to information sharing by FIU's, all relevant regulatory agencies should have a similar power to exchange information that may be relevant to combating terrorist financing.

The Group also noted that because of the special nature and concerns surrounding terrorist activities, some countries have chosen to require the disclosure of information regarding terrorist activities or at least with respect to terrorist property and assets. While such an obligation is contrary to the position at common law that generally no individual is required to report an offence that he or she may have witnessed or be aware of, it can be of critical importance in combating the activities of terrorists. For this reason, such a provision is included in the model law, albeit some countries may face legal challenges to it.

In summary, the Group was of the view that countries should adopt a series of measures related to information sharing, including effective mutual legal assistance legislation, specific powers that provide for the sharing of information between police, regulatory and other relevant agencies and powers to compel disclosure of information.

CLAUSES 32-35 AND SAMPLE REGULATION UNDER CLAUSE 3

Expert Group Report

Sub-paragraph 1(c) requires countries to have mechanisms under domestic law that will allow for the freezing of funds and assets related to terrorists and terrorist activities. It was noted that the most critical and challenging aspect of this obligation is the requirement to act expeditiously to freeze assets and funds of persons or entities named by the Security Council. The Group discussed the legal issues surrounding this obligation at some length.

One approach, adopted by several countries to deal with freezing, particularly on the basis of lists, is to pass regulations under legislation that allows for implementation of Security Council resolutions. These regulations provide for the freezing of assets of named individuals and entities and thus freezing action would be available in relation to the lists provided by the Security Council, which can be annexed to or form part of the regulation.

While several countries have used this regulatory approach, there are variations as to the extent and scope of the regulations and whether the regulations are used in addition to a separate legislative scheme. For example, Singapore has adopted extensive regulations to implement the obligations regarding the freezing of assets and other requirements of the resolution. Other countries have passed regulations solely for the freezing of assets and some have adopted the regulations only as an interim measure, pending introduction of legislation allowing for the freezing and confiscation of such assets. Each country will need to decide which approach will be best, given the applicable laws and the legal system context.

Additional approaches to freezing action were identified. Some countries, like Australia, have used the existing powers of their Financial Intelligence Units (FIU) to issue directives to financial institutions, calling for the tracing and freezing of funds of listed persons or entities and prohibiting any dealing with such funds. In other countries, where the existing FIU had no such power, that power has been created through legislation. Canada has

amended its laws to place a positive obligation on listed financial and related institutions to determine if they are in possession of any assets or funds of identified persons or entities and report accordingly. This is coupled with an offence for dealing in any manner with such assets or funds. Mauritius proposes under its Bill to extend the existing powers for temporary freezing (90 days), vested in the Commissioner of Police for general proceeds of crime, to terrorist financing. Any subsequent extension of the freezing takes place through court proceedings.

In the case of both Canada and Mauritius a power has been created under domestic law to proscribe or list persons or entities. The effect of this domestic power is that the lists relied upon are adopted on the basis of a decision taken by domestic authorities.

The Group highlighted and discussed the serious problems, constitutional and otherwise, that many Commonwealth countries may face with freezing action that is based solely on a list. It was noted that in the event of a court challenge, while judges may be prepared to give considerable weight to a list provided by the Security Council, ultimately that may not be sufficient, without the production of underlying evidence. Examples were cited of challenges that have already been brought in some jurisdictions. One approach that may facilitate the use of the lists is to provide that where a person or entity is included in the list they are deemed to have been involved in terrorist activity or there is deemed to be reasonable grounds to believe or a prima facie case against them. The freezing action is then based on that deeming provision. Canada used this technique in adopting implementing regulations by providing in section 2 that the persons in the list are persons for whom there are reasonable grounds to believe are involved in terrorist activity. (Annex 9)

The problem is even more significant where the list emanates from another country, as the court is even less likely to accept that as a basis for proceeding without underlying evidence to support the suspicion or believe that the person or entity is involved in terrorist activity. Many countries may be unable to obtain the relevant supporting evidence from the country that has submitted the list or the evidence may be protected by national security requirements.

It was also noted that countries which elect to issue directives on the basis of the existing powers of the FIU may face problems if that power is not clearly established by legislation, as happened in one jurisdiction where such action has been successfully challenged.⁴ While the decision is currently under appeal, countries need to carefully consider whether such an administrative power will withstand challenge in their jurisdictions and if so, whether a more clear and detailed legislative scheme should be created for this purpose.

The Group concluded that in terms of implementing the obligations with respect to “listed” persons or entities, each country would have to determine how best to do so, given the constraints and limitations that exist under their domestic laws. However, it was emphasized that whatever path is chosen, countries must have in place a scheme to allow for quick and effective action to be taken with reference to any lists issued by the Security Council. On this point, the Group recommended that countries adopt a regime of regulations under general United Nations Security Council legislation for that purpose. In addition, if possible under domestic law, countries should use existing powers or adopt new legislative powers to allow for the issuance of directives by the FIU’s or other similar authorities. If the domestic law

⁴ See *Financial Clearing Corporation v. Attorney General* 27, November 2001, Supreme Court of The Bahamas.

will not allow for the use of administrative powers without court approval for the freezing of assets, a country would need to extend existing powers for freezing proceeds of crime or create a new regime to allow for the freezing of funds and assets related to terrorism, as required by the resolution. Provisions for all of these approaches have been included in the model law.

Strictly, SCR 1373 does not require countries to adopt measures for the confiscation of assets or funds that have been frozen. However, the Group recommended that, in addition to any administrative freezing powers adopted, particularly to deal with lists, countries should put in place a full scheme for the freezing and confiscation of assets related to terrorist activities and to persons involved in such activities. It was noted that this was an obligation of the International Convention for the Suppression of the Financing of Terrorism and thus countries would be required to implement those obligations in domestic law in any event. The Group also considered that the freezing of assets indefinitely, without a capacity for confiscation, could result in legal challenges and present significant legal problems.

A sample scheme has been included in the model. However, countries need to consider their existing laws and approaches to restraint and confiscation of proceeds of crime. There are a variety of systems currently employed to freeze and ultimately confiscate proceeds of crime. It is important to ensure that there is some consistency under domestic law as to the process used in relation to proceeds of crime and procedures adopted to freeze and confiscate assets and funds related to the financing of terrorism. At the same time, countries will want to ensure that the procedures adopted in relation to terrorist financing provide for a comprehensive, speedy and effective scheme.

Note

As indicated under Clause 2 above, in addition to the specific provisions on seizing and forfeiting terrorist property, the combination of the listing process in Clause 2 and the offences relating to dealing in property or providing financial services will also operate to allow the effective “freezing” of terrorist property of those entities identified by the UN Security Council.

CLAUSE 36

Expert Group Report

In respect of the prohibition on making property available, if applicable, countries should consider possible amendments to laws relating to charities or non-profit organizations to ensure that these cannot be abused for terrorist financing.

Note

Clause 36 is illustrative of a scheme that can be employed in the regulation of charities and non-profit organizations to prevent abuse of such entities for the financing of terrorism. The type of scheme implemented would vary considerably depending on the domestic legal structure relating to charities.

CLAUSE 37

Expert Group Report

Subparagraph 2(g) requires that steps be taken to prevent the movement of terrorists

The Group recommended various legislative measures that could be adopted to implement this obligation. These would include providing for the transmission of passenger information from private industry, in particular airline companies, to relevant government authorities and ensuring adequate powers for sharing of information by border control officers. They were of the view that each country would have to adopt an approach that was most appropriate, within the particular context of the country and region and taking into account resource and capacity restrictions. The Group also noted that careful consideration would have to be given to the relationship between these provisions and any applicable privacy/data protection laws and an appropriate balance struck in that regard.

With respect to any legislation allowing for the dissemination of information, particularly information held by private industry, the Group highlighted the need for legislative protections in terms of use limitations, confidentiality and the scope of information available.

Note

Clause 37 again utilizes authorities such as the Commissioner of Immigration and Commissioner of Police to illustrate the appropriate type of authorities for these powers. Each country would need to select the domestic authority most suitable within the legal context and structure.

CLAUSE 38

Expert Group Report

Sub-paragraph 2(a) requires the denial of safe haven to terrorists. In order to effectively implement this obligation, countries need to carefully review and consider the application and operation of existing laws relating to immigration and extradition, to determine their efficacy in application to those involved in terrorist activity. With respect to immigration, the Group noted that many existing laws provide for the exclusion and removal of persons on the basis of reasonable grounds to believe that they have, are or will be involved in criminal activity. The Group recommended that if existing laws do not allow for exclusion and removal on this basis, amendments should be made to introduce such a provision either limited to terrorist activity or extended to criminal activity generally.

CLAUSE 39

Expert Group Report

SCR 3(f) and (g) require that in conformity with international law and standards countries take steps to prevent the granting of refugee status or abuse of refugee status by those committing or facilitating the commission of terrorist acts.

There are a number of sensitive and difficult issues in this area, which the Group discussed at some length. As parties to international conventions, many countries have existing

obligations with respect refugee claimants. At the same time, countries need to ensure that the refugee process established to implement those obligations is not misused by individuals involved in terrorist activities to obtain safe haven. In both legislative and administrative action in this area it is necessary that countries find an approach that strikes an appropriate balance between the various important interests and obligations involved.

The Group recognized that in some instances, the existing legislative schemes may be sufficient and the main emphasis will be on the administration and implementation of the laws. However, other countries may need to enhance their legislative structure to deal more effectively with individuals involved in terrorist activity, who seek refugee status. The Group considered the approaches adopted in existing and proposed legislation. Of particular note in some legislation was the executive power to preclude consideration of a refugee claim where the authority was of the view that the individual had, is or would be involved in terrorist activity. The Group was of the view that such provisions were necessary because of legitimate concerns for national security and public safety and the need to prevent safe havens. At the same time, the existing powers of judicial review would serve to protect the rights of the individual in such cases.

Note

The provision extends the power of refusal beyond those who have committed or facilitated commission to those who are or may be involved at a future time. It is consistent with the intent of the resolution. It also provides a broader protection for countries. At the same time, the rights of the individual are protected in that there must be reasonable grounds to believe and there will be a right of judicial review flowing from the decision under the general application of law.



The Commonwealth