Transport-related (civil aviation and maritime) Terrorism Offences
Counter-Terrorism Legal Training Curriculum

MODULE 5

Transport-related (civil aviation and maritime) Terrorism Offences
Preface

Message from the Executive Director,
United Nations Office on Drugs and Crime

Transportation is a key element in today's globalized and ever-increasingly open societies. Terrorist acts involving aircraft and airports, ships and seaports, passengers, crew and cargo continue to pose a serious threat to human and national security.

Effective criminal justice responses founded on a strong legal regime are essential elements for countering those civil aviation and maritime-related terrorist acts.

UNODC is working closely with Member States to strengthen the capacity of national criminal justice systems to implement the international legal instruments against terrorism in accordance with the rule of law and with due respect for human rights.

With a high level of ratification being achieved for several of the transport-related counter-terrorism legal instruments, the challenge is to ensure that their provisions are effectively applied. To achieve this, a high level of specialized expertise and skills pertaining to these provisions is required on the part of investigators, prosecutors and judges who are called upon to handle civil aviation and maritime-related terrorism cases.

UNODC has been assisting countries to acquire the required expertise and skills. An important tool in this respect are the specialized modules of the Counter-Terrorism Legal Training Curriculum.

The present module on Transport-Related (Civil Aviation and Maritime) Terrorism Offences concerns 12 of the 19 international conventions and protocols against terrorism. Its purpose is to help increase understanding of their provisions and assist Governments to effectively implement them.

I am pleased to place at the disposal of our stakeholders this new module as yet another useful tool and contribution of UNODC in the global effort to counter the menace of terrorism.

Yuri Fedotov
Executive Director
United Nations Office on Drugs and Crime
Message from the Secretary General, 
International Civil Aviation Organization

I wish to congratulate the United Nations Office on Drugs and Crime (UNODC) for the publication of Counter Terrorism Legal Training Module on the Transport related Terrorism Offences.

Civil aviation has been, and continues to be, a vulnerable and highly attractive target for terrorists. To confront with these attacks and threats, it has been a top priority of the International Civil Aviation Organization (ICAO) and its member States to ensure the implementation of sustainable aviation security measures worldwide. As a part of ongoing efforts to protect civil aviation security and to combat terrorism, eight international conventions and protocols have been developed under the auspices ICAO. These instruments form a part of the 19 worldwide treaties on counter terrorism adopted within the United Nations system. ICAO has also developed international standards, recommended practices, and guidance material to safeguard civil aviation against acts of unlawful interference.

Some of the legal instruments adopted under the auspices of ICAO have been most widely accepted by the international community. Some of the more newly adopted treaties will still require more ratifications by States. In this context, the development of this module is very timely and significant, not only to ensure the uniform application and implementation of these legal instruments, but also to promote the entry into force of the new treaties. On behalf of ICAO, I would like to take this opportunity to thank the UNODC for this important initiative, and for inviting ICAO to participate in this work.

I am confident that this module will assist States to strengthen their capacity to prevent and combat terrorism, and to reinforce the global chain of aviation security as a whole.

Raymond Benjamin
Secretary General
International Civil Aviation Organization
Message from the Secretary-General,  
International Maritime Organization

While the probability of an act of maritime terrorism might be low in many parts of the world, its consequences could be devastating. The media frequently refers to the risks of a terrorist group using a ship to transport the materials needed for a “dirty bomb” or using the ship as the weapon itself. To counter these risks and consequences, and to create a deterrent for those who might commit an act of maritime terrorism, the international community has developed a comprehensive legal framework to decrease the chances of this scenario from occurring and to prosecute those who try. Two important parts of this framework are the treaties and protocols on the suppression of unlawful acts against the safety of maritime navigation, known as the SUA Treaties, adopted under the auspices of the International Maritime Organization (IMO) in 1988 and 2005.

We should not forget, however, that our work does not stop with the adoption of new treaties. If the objectives of conventions are to be achieved they must be quickly and widely ratified, effectively implemented and aggressively enforced. I therefore welcome this Counter-Terrorism Legal Training Module and I wish to express my appreciation to the United Nations Office on Drugs and Crime for this valuable initiative.

From the IMO perspective, the SUA treaties form the fundamental legal regime developed to combat maritime transport-related terrorism. The prevention and suppression of terrorism, piracy and other international crimes can only be effective with a coordinated, integrated approach between nations, enforcement agencies and intergovernmental organizations. UNODC and IMO have worked closely together in developing this important training module, and I look forward to continuing that close relationship in making the most effective use of our technical cooperation resources to provide practical assistance where needed.

Koji Sekimizu  
Secretary-General  
International Maritime Organization
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Background: Counter-Terrorism Legal Training Curriculum

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

The Counter-Terrorism Legal Training Curriculum is one of the tools developed by the Branch for transferring the knowledge and expertise needed to strengthen the capacity of national criminal justice officials to put the universal legal framework against terrorism into practice.

This knowledge transfer is pursued through:

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

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

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

Transport-related terrorism offences

In the Global Counter-Terrorism Strategy (A/RES/60/288) adopted by the General Assembly in 2006, United Nations Member States recognized that capacity-building in all States is a core element of the global counter-terrorism effort and encouraged the United Nations Office on Drugs and Crime to enhance its provision of technical assistance to States to facilitate the implementation of the international conventions and protocols related to the prevention and suppression of terrorism.

Twelve of the nineteen international legal instruments against terrorism specifically address violent acts involving international maritime and civil aviation transport. This Module aims at raising awareness of the importance of ratifying them and incorporating their provisions into national law; assisting national officials in carrying out these processes; and contributing to building the capacity of criminal justice officials to implement them effectively.
**Target audience**

Consistent with the mandates and focus of work of UNODC, the primary target audience of the Counter-Terrorism Legal Training Curriculum typically includes:

- Prosecutors and judges
- Investigators and other law enforcement officials
- Policymakers and government officials from concerned key departments—notably Foreign Affairs, Justice and Interior—who are involved in legislative drafting or mutual legal assistance in criminal matters or have responsibilities with regard to the ratification of international treaties.

The modules are easily adaptable to suit the specific needs, expertise and expectations of specific groups.

The present Module on Transport-related Terrorism Offences is tailored for use in capacity-building initiatives addressing policymakers, legislators, judges and prosecutors. Nevertheless, it may also be used successfully in capacity-building activities for the other broader target audiences indicated above.

**Planning training based on this Module**

The inclusion of both maritime and civil aviation legal thematic areas in one single module stems from their similarities in defining offences and legal procedures. Moreover, recent amendments can be best understood in the context of conceptual developments in maritime instruments which were then applied in new civil aviation instruments. That said, the present Module was written with separate sections on civil aviation and maritime-related offences so that it could address audiences interested in either topic, except for specific cross-references which are clearly indicated in the text.
Index of training tools

Focus boxes: Readers are introduced by a series of boxes to topics of specific interest, providing in-depth background information or illustrative examples and allowing a comparative approach to the subject.

Practical guidance: Frequent practical guidance has been included to encourage trainers to adopt a concrete and practical approach.

Case studies: These are real and fictitious scenarios designed to aid understanding and stimulate discussion of the legal issues raised in each section and to inject a practical perspective. Some of the case studies straddle several sections of this Module, and can either serve as “mini” case studies for working on specific issues or be brought together as a single whole. When using the fictitious case studies, trainers should limit their role to that of moderator, promoting an exchange of views rather than teaching as such. Participants should be encouraged to study the various scenarios with the help of the relevant legal texts.

Activities: These boxes offer ideas for exploring how the various topics covered in this Module are handled or reflected in the legal system and practice of the participants’ countries. Participants are encouraged to apply their skills and share their experience with reference to specific topics. During workshops, trainers may propose an activity to stimulate an initial discussion among participants. Persons studying independently will also be able to use the activity boxes to focus on the practical application of knowledge acquired.

Assessment questions: There are tests on the topics covered in each section. Unlike the activities, assessment questions tend to require straightforward answers, making them a useful tool for trainers who need to quickly assess the level of knowledge acquired by participants. The assessment typically takes place at the end of a training session, but can also serve as a preliminary tool to identify training needs, delivery methods and the level of competence of participants.

Tools: This section offers teaching materials to assist criminal justice practitioners. It includes practical guides, manuals, treaties and model laws, databases and sources, for a comparative law perspective. Website links have been added under each tool to enable practitioners to access them with just one click.

Further reading: A condensed bibliography for trainers aimed at broadening their knowledge on specific legal issues.

Supplementary material: PowerPoint presentations produced and used by UNODC provide a visual aid to trainers when they give oral presentations on various topics. The presentations are meant to provide inspiration to trainers, but should not be used without being adapted in each case. This type of material also includes copies of actual legal assistance and extradition requests, where available to trainers.

Reference: There is inevitably a degree of overlap between the modules because the topics under consideration are often interrelated. In some cases, the same topic is examined from different angles in two or more modules. In other words, there are many ways of looking at the same subject. This should not be seen as a drawback, but rather as an asset, enabling trainers to arrange tailor-made activities depending on specific training needs. For example,
in preparation for a training workshop, the need may arise to cover certain issues more in
depth, to analyse them from multiple perspectives, or to examine their connection with others.
The symbol, along with links to parts of the same module, is used to inform trainers of the
location of information covering the same or connected topics.
INTRODUCTION

The tools for international cooperation against intentional threats to aviation and maritime security have developed in piecemeal fashion in 12 conventions and protocols adopted since 1963 in reaction to terrorist incidents and other perceived threats. Accordingly, effective understanding and application of those tools can best be achieved with the assistance of a comprehensive overview and explanation such as the present Module, which can serve national authorities as a valuable resource for their capacity-building efforts.

Purpose of the Counter-Terrorism Legal Module

The present Counter-Terrorism Legal Module focuses on transport-related (civil aviation and maritime navigation) terrorist offences. It was prepared by the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime (UNODC). Its purpose is to assist practitioners and policymakers to identify, understand, and effectively incorporate and implement a set of international legal tools into national legislation. These legal tools are found in conventions and protocols developed to combat transport-related terrorism since the 1960s. The module introduces the relevant instruments, places them in their context so they can be correctly understood, analyses their content and explains their use. Training tools and aids are interspersed with the explanatory text so that the structure, terminology and practical application of the relevant instruments will be clear.

The increasing ease and availability of international travel resulted in increased risks to aviation security in the 1960s and 1970s. Violent groups seeking international publicity for their political, ideological or other goals focused on international air travel as a vulnerable target, attacks on which produced immediate and intense publicity. Continuing into the 1980s terrorist groups seized or bombed international flights, murdered passengers, crew members and persons in airports and destroyed multiple aircraft. These actions were designed to gain visibility for the causes to which the various groups were dedicated, to intimidate and to coerce compliance with those groups’ demands. Maritime transportation also became a target in the 1980s. A body of international law has been developed over the decades since 1963 to deal with these threats to the travelling public and the transport industry, both with regard to aviation and maritime transportation.

There is no single legal instrument covering all possible civil aviation and maritime security offences related to terrorism. The body of international aviation and maritime security law developed gradually as responses to particular attacks, and only in this century as more comprehensive instruments. This developmental approach was characterized by incremental introduction and expansion of criminal offences and bases of jurisdiction and other substantive and
procedural provisions. As a result, there is no single instrument of universal application that can be relied upon as a basis for cooperation in dealing with aviation or maritime-related terrorism. Instead, a practitioner must know what potentially relevant instruments may furnish the necessary tools for extradition, evidence gathering or other international cooperation. Ministerial officials, legislators and relevant national stakeholders must know or be able to find what their obligations are under a number of conventions and protocols, particularly with regard to the criminalization of offences, establishment of jurisdiction and international cooperation procedures and how those international instruments are incorporated into national law.

See Section 1.1.1 in the UNODC Counter-Terrorism Legal Training Curriculum, International Cooperation in Criminal Matters: Counter-Terrorism. That section explains the indirect method by which international law is implemented almost exclusively through national legal systems and the differing methods those systems use to incorporate international treaties into domestic legislation.

The central role of criminalization of civil aviation and maritime-related offences in efforts to deter and counter terrorism is demonstrated by the fact that of 19 universal legal instruments adopted to deal with terrorism-related offences between 1963 and 2014, 14 address threats to international aviation or maritime transport.¹ The present Module focuses on the legal responses to the demonstrated threat of terrorist acts involving international civil aviation and maritime transportation. It also deals with the provisions that in those instruments address the possible use of radioactive material or biological, chemical and nuclear (BCN) weapons and their transport under certain conditions. Part 2 of the Module concerns civil aviation instruments and part 3 concerns maritime instruments. Those parts will detail how the transport security instruments of the 20th century focused on the protection of air and sea travellers and on the aircraft and ships they travelled in, with some expansion to airports and fixed platforms on a continental shelf in response to specific terrorist attacks. By the

¹Summaries of the 19 instruments can be found at http://www.un.org/en/terrorism/instruments.shtml. The term “universal” is used here to indicate agreements open to all States, as opposed to agreements limited to a regional or other grouping. Listed chronologically, together with the names by which they have come to be popularly known, the 11 transport related conventions and protocols are:

1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention)
1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention)
1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention)
2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (Beijing Convention)
2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (Beijing Protocol)
2014 Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Montreal Protocol)
time the maritime instruments were updated in 2005 and the aviation instruments in 2010, the possibility of BCN weapons and radioactive material falling into the hands of terrorist groups and other non-State actors had become more real. The 2005 and 2010 instruments establish offences and contain procedural provisions that require an understanding of, inter alia, concepts and terminology from relevant treaties dealing with BCN weapons. The maritime section additionally examines how the terrorism-related maritime instruments fit with other elements of the law of the sea.

Presenting aviation and maritime-related terrorist offences in a single module emphasizes how the various universal legal instruments evolved to define transportation offences and related international cooperation procedures. The maritime instruments of 1988 followed the models of aviation conventions developed in 1963, 1970 and 1971. Advances achieved by modernizing the 1988 maritime instruments in 2005 were then adapted in 2010 to update the older aviation instruments. Placing the various instruments in context facilitates the reader’s understanding of the purpose, scope and problems of application of these interrelated conventions and protocols.

In connection with the ratification of the new aviation and maritime instruments, State authorities will necessarily be concerned with implementing the instruments by incorporating the required offences and procedures in domestic law. Logical questions will arise as to whether obligations arising from the new maritime and aviation instruments can be dealt with in legislation covering both areas or will require separate offences and procedures. With regard to the procedural aspects, there are many reasons to combine the extradition and mutual assistance mechanisms in both the aviation and maritime instruments into the general statutory scheme for international cooperation. With regard to jurisdiction and offence definitions, some unique issues arise, but there are many similarities that provide opportunities for efficiency in legal drafting and in securing legislative approval.

By combining the examination of aviation and maritime-related terrorist offences and treaty procedures, a single module can thus provide a comprehensive capacity-building tool useful to a wide range of practitioners for a number of purposes. At the same time, the parts of the Module on aviation and maritime-related terrorism are designed to be sufficiently autonomous such that they may be used as stand-alone modules to suit the needs of specific audiences in either the aviation or in the maritime areas.

A historical precedent for the prevention and punishment of acts of terrorism

International efforts to combat terrorism began years before the United Nations was established. One precedent for international instruments to combat terrorism was the 1937 Convention for the Prevention and Punishment of Terrorism of the League of Nations. The precipitating event for the League Convention was the assassination in Marseilles, France, of King Alexander I of Yugoslavia in October 1934. The French Foreign Minister and several

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other people also died of wounds suffered in the attack. A French attempt to extradite two suspected conspirators in the attack from Italy under a bilateral extradition treaty failed. That treaty contained an exception for political offences and an Italian court found that regicide and related offences were politically motivated and thus non-extraditable.

Within months of the assassination, the Council of the League of Nations adopted a French initiative in a resolution that noted that “the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international cooperation”. The resolution established an expert Committee for the International Repression of Terrorism to draft a proposed international instrument. An early draft of the Convention would have explicitly included within its definition of terrorist acts “the intentional causing of a disaster by impeding the working of rail, air, sea or river communications”. Ultimately a more generic approach to the endangerment of the public was applied. As adopted, the 1937 Convention required criminalization of:

- Willful acts causing death or grievous bodily harm to persons within certain specified protected categories (article 2, paragraph 1);
- Willful destruction of or damage to public property or property devoted to a public purpose (article 2, paragraph 2);
- Willful act calculated to endanger the lives of members of the public: if directed against another High Contracting Party (article 2, paragraph 3)

if the act constituted an act of terrorism within the meaning of Convention article 1. That article defined acts of terrorism to mean “criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public”.

Perhaps because of the groundbreaking nature of the Convention, the outbreak of global hostilities in 1939 and the subsequent replacement of the League by the United Nations, this instrument never came into force. However, the League of Nations 1937 Convention for the Prevention and Punishment of Terrorism was a pioneering innovation, which anticipated many of the concepts of criminalization and international criminal justice cooperation eventually applied in the aviation and maritime instruments examined in this Module.

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4 Protection of the public is dealt with in article 2, paragraph 3 of the Convention. Article 2, paragraph 1 deals with causing death or grievous bodily harm to Heads of State, persons associated with them and person charged with public functions. Article 2, paragraph 2 is directed to wilful destruction or damage to public property or property devoted to a public purpose.
5 The term “States Parties” will generally be used in the Module to refer to sovereign states which have entered into a treaty or convention. However, the original terminology of an instrument will be used in a quotation, as is done here with respect to the League of Nations Convention term “High Contracting Party”.
6 See Module footnote 4.
International counter-terrorism legal instruments related to civil aviation and maritime navigation

Civil aviation

The universal instruments against terrorism dealing with civil aviation were developed by the International Civil Aviation Organization (ICAO), a specialized United Nations body charged with developing international standards and regulations for safety, security and efficiency as well as the environmental protection of aviation.

The first international legal instrument specifically directed to aviation security dates back to the 1963. The Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963 Tokyo Convention) applies to acts affecting in-flight safety: it authorizes the aircraft commander to impose reasonable measures on any person who has committed or is about to commit such acts, and requires States Parties to take custody of offenders.7

The Convention for the Suppression of Unlawful Seizure of Aircraft (1970 Hague Convention) makes unlawfully seizing or exercising control of an aircraft an offence for any person on board, requires parties to punish hijackings by “severe penalties”, and to either extradite or prosecute the offenders. It also requires parties to assist each other in connection with criminal proceedings brought under the Convention.

In 1971, a diplomatic conference in Montreal adopted the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971 Montreal Convention). This instrument makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft, and to place an explosive device on an aircraft. The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988 Airport Protocol) extends the provisions of the 1971 Montreal Convention to encompass terrorist acts at airports.

The Diplomatic Conference held in 2010 in Beijing adopted two new instruments. The Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (2010 Beijing Convention) introduces new criminal acts such as using civil aircraft as a weapon; discharging biological, chemical and nuclear (BCN) weapons or the act of using such substances to attack civil aircraft; unlawful transportation of BCN weapons or related material; and a cyber attack on air navigation facilities.

The 2010 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010 Beijing Protocol) expands the scope of the 1970 Hague Convention to cover different forms of aircraft hijackings and incorporates the provisions of the Beijing Convention relating to a threat or conspiracy to commit an offence.

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7 Under article 13, paragraph 2 of the Tokyo Convention, any Contracting State shall, upon being satisfied that the circumstances so warrant, take custody or other measures to ensure the presence of any person suspected of unlawfully committing by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight (an act contemplated in article 11, paragraph 1) and of any person of whom it has taken delivery from an aircraft commander who, in his opinion, has committed a serious offence on board his aircraft.
In 2014, a diplomatic conference held in Montreal adopted the Protocol to Amend the Convention on Offences and Certain Other Acts committed on Board Aircraft (2014 Montreal Protocol). The Protocol introduces additional mandatory bases for exercising jurisdiction based on the State of the operator and the state of landing, recognizes in-flight security officers, which did not exist at the time of adoption of the Tokyo Convention, and also harmonizes the definition of aircraft in flight.

**Maritime navigation**

Several international treaties for the suppression of unlawful acts, including terrorism, were adopted by the International Maritime Organization (IMO). All of them are commonly mentioned under the acronym of “SUA” (Suppression of Unlawful Acts).

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (1988 SUA Convention) provides the legal basis for action to be taken against persons committing unlawful acts against ships, including the seizure of ships by force, acts of violence against persons on board ships and the placing of devices on board which are likely to destroy or damage the ship.

A protocol to this treaty, namely the Protocol relating to Fixed Platforms Located on the Continental Shelf, 1988 (1988 Fixed Platforms Protocol), extends the application of the SUA Convention, as appropriate, to unlawful acts against the safety of fixed platforms on the continental shelf. Only Parties to the 1988 SUA Convention can become Parties to this Protocol.


The Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (2005 SUA Convention) amends the original treaties by broadening the list of offences, so as to include, inter alia, the offence of using a ship itself in a manner that causes death or serious injury or damage and the transport of any explosive or radioactive material, any BCN weapon or any equipment, materials or software that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose. It also introduces provisions for the boarding of ships where there are reasonable grounds to suspect that the ship or a person on board the ship is, has been, or is about to be, involved in committing an offence regulated by the Convention.


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8 The International Maritime Organization (IMO) is the sole specialized agency of the United Nations entirely devoted to the adoption of universal rules and standards governing the safety and security of navigation and the prevention of marine pollution from vessels. It was originally established as IMCO (International Maritime Consultative Organization) as a result of a treaty adopted in 1948. It changed its name from IMCO to IMO in 1982.
treaties, as amended by the 2005 Protocols for the purpose of facilitating their incorporation into national law. They are known as:

- The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention); and

In the present Module, references will be made to either the 1988 or 2005 SUA Conventions. The Protocols extending the scope of the Convention to fixed platforms located in the Continental Shelf shall be simply referred to as the 1988 or 2005 Fixed Platforms Protocols.
1. COMMON ELEMENTS OF THE COUNTER-TERRORISM INTERNATIONAL LEGAL INSTRUMENTS ON CIVIL AVIATION AND MARITIME SECURITY

Section 1 functions as a sort of Executive Summary of the 12 transport-related instruments by providing an overview of four thematic elements common to those instruments: scope of application, jurisdiction, criminalization and international cooperation. Joining the transport-related instruments requires that a State assume legal obligations in those respective areas but also enables the State to call upon the mutual obligations and cooperation of the number of States that are Parties to those instruments.

From a structural perspective, nearly all international instruments conclude with articles dealing with the procedural implementation of the agreement, such as dispute resolution mechanisms, requirements for the agreement to come into force, depository arrangements, and renunciation procedures. Those formal articles are not unique to the aviation or maritime security field and so are not analysed in this Module.

1.1 Scope of application

1.1.1 International element

Eleven of the twelve aviation and maritime security instruments listed in footnote 1 apply only when an international element is present. The relevant international elements are defined differently in each instrument, but must involve a cross-border or international factor, such as location, movement, intended destination or nationality.

The 1963 Convention on Offences and Certain Other Acts on Board Aircraft applies:

... in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State.

Based upon its place of negotiation, this instrument is commonly referred to as the Tokyo Convention. For the sake of brevity, that terminology will be used throughout this Module, and similar common name references will be used for other instruments.

Article 3.3 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Convention) states that the Convention shall apply only:

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9 The single exception is the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, discussed in Module section 2.6. International security interests are served by the exchange of promises between the States Parties to participate in measures to facilitate the detection of plastic explosives, but the Convention’s obligations apply even without an element of international transport or travel.

... if the place of take-off or the place of actual landing of the aircraft on board of which the offence is committed is situated outside the territory of the State of registration of that aircraft; it shall be immaterial whether the aircraft is engaged in an international or domestic flight.

This language is intended to apply to circumstances in which a flight scheduled between domestic points is seized and forced to land outside the country of origin. Article 3.5 also extends the application of the international cooperation provisions of the Convention (extradition and mutual assistance) to situations in which the seizure does not involve an international element but:

... the offender is found in the territory of a State other than the State of registration of that aircraft.

The 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (the Montreal Convention) provides in its article 4 that the Convention shall apply, irrespective of whether the aircraft is engaged in an international or domestic flight, only if:

(a) The place of take-off or landing, actual or intended, of the aircraft is situated outside the territory of the State of registration of that aircraft; or

(b) The offence is committed in the territory of a State other than the State of registration of the aircraft;

Article 4.3 follows the example of article 3.5 in the 1970 Hague Convention in expanding the application of the Convention. If an offender alleged to have committed any of the acts endangering the safety of an aircraft in flight or in service is found in a State other than the State of registration of the aircraft, that international element alone makes the Convention applicable, even though no other international element is present.11

See section 2.2.1 on the meaning of the terms “in flight” and “in service” as used in the aviation security instruments.

The 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (the Airport Protocol) supplements the Montreal Convention by criminalizing acts of violence against passengers and destruction, damage to or interference with facilities of an airport serving international civil aviation if safety at that airport is endangered. No express revision is made to the scope of application of the 1971 Convention as defined in its article 4, but its expanded scope of application must be considered to be based upon the character of the concerned airport as serving international civil aviation. Article 3 of the Airport Protocol does explicitly add an obligation for States Parties to establish their jurisdiction when an alleged offender is present in its territory and it does not extradite that person, thus expanding the Montreal Convention’s application based upon the international element of the location of the offender. That same expansion of the jurisdiction provided in the Hague Convention is found in article V.4 of the Beijing Protocol.

11This provision does not apply to article 1.1(d), involving destruction or damage to or interference with the operation of air navigation facilities.
Article 4 of the 1988 SUA Convention provides that:

1. This convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.

2. In cases where the convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a state Party other than the State referred to in paragraph 1.

When a factual situation requires an interpretation of the phrase “territorial sea”, reference to the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS) will be necessary. That instrument sets out the overarching international legal regime for all activities on the oceans and seas, including detailed regimes for flag and coastal State jurisdiction in various maritime zones, which should be analysed carefully to arrive at their correct application. Similarly, the 1988 Fixed Platform Protocol impliedly relies upon well-established concepts of international law, as reflected in UNCLOS to establish the scope of its application. For example, the 1988 Fixed Platform Protocol does not itself provide a definition of the term “continental shelf” but implicitly incorporates the definition of this term set out in UNCLOS.

The 1988 Fixed Platforms Protocol extends the scope of the 1988 SUA Convention to the extent necessary to make it applicable to fixed platforms located on the continental shelf of States Parties.

The scope of application established by the 1988 SUA treaties remains the same in the two amending instruments of 2005. References in the 1988 and 2005 SUA Conventions to the territorial sea and references in the 1988 and 2005 Fixed Platform protocols to the continental shelf should be understood as conforming with the relevant provisions contained in UNCLOS.

1.1.2 Inapplicability of the instruments to military, police or customs aircraft or ships

Another limitation on the scope of application of transport-related instruments is that they are intended to protect civil transport. Accordingly, all of the aviation instruments provide that they do not apply to an aircraft used in military, customs or police services. The maritime instruments provide that they do not apply to a warship, a ship owned/operated by a State when used as a naval auxiliary or for customs or police purposes or a ship which has been withdrawn from navigation or laid up. Similarly, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation applies, as its title indicates, only to acts at airports serving civil aviation.
1.1.3 Evolution of the treatment of the political offence exception

Article 2 of the first aviation security convention, the 1963 Tokyo Convention, limited the instrument’s scope by providing that its provisions shall not be interpreted:

... as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

That is a formula of words which theoretically could limit the exclusion of political offences to those which are referred to as “purely political” offences, such as treason, sedition and espionage. As explained by one international law scholar, such offences “.... are exclusively directed against the state or the political organization without injuring private persons, property or interests”. In reality, however, the jurisprudence surrounding the political offence exclusion is so confused that it would be nearly impossible to predict in any given situation whether the unlawful seizure of an aircraft in connection with a political movement would be considered a political offence.

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**Case study. The In re Kavic, Bjelanovic and Arsenijevic case**

A case in point is *In re Kavic, Bjelanovic and Arsenijevic*, decided by the Federal Tribunal of Switzerland in 1952. A Yugoslav airline crew had diverted a local flight and landed in Switzerland. They were charged in Yugoslavia with offences of endangering the safety of public transport and wrongful appropriation of property and extradition was sought from Switzerland. The Swiss court denied extradition, finding the danger of harm to the passengers was not substantial and that “... escaping political constraint is no less worthy of asylum than active participation in the fight for political power ... Recent practice has been too restrictive in making the relative political character of an offence dependent on its commission in the framework of a fight for power”.¹


A principal consideration applied by the Swiss court was the so-called “relative political character” of the offence. This subjective criterion evaluates whether the ordinary or common crime aspects of the offence, such as violence to a private person, outweigh the political connection or motivation for the offence. Other tests, such as the political motivation for the act and whether it was committed incidental to and as a part of a political disturbance, further complicate the doctrinal framework for the application of the political offence exception.²


As a consequence of this doctrinal confusion and uncertainty as to how broadly a political offence exception would be applied, it is understandable that aviation instruments drafted to repress terrorist offences would not provide for a political offence exception from their scope.
of application. None of the aviation terrorism-related instruments subsequent to 1963 admitted the “political offence” exception as a ground for refusal of extradition or mutual legal assistance. Eventually, article 11 bis of the 2005 SUA Convention, article 13 in the 2010 Beijing Convention and article 8 bis in the Beijing Protocol 2010, declared that offences under those instruments were not to be regarded as political offences and that an extradition request could not be refused on that ground alone.13

The main purpose of the provisions in both the SUA and Beijing treaties excluding application of the political offence concept is to prevent political motivation from being relied upon as a bar to extradition and mutual legal assistance under those instruments.

In addition, in paragraph 3 (g) of its Resolution 1373 (2001) the Security Council called upon all States to:

Ensure, in conformity with international law, that refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists.

See sections 2.2.5, 2.7.7, 3.6.11 and 3.6.12 on the treatment of the political offence exception in the 2010 Beijing Convention and in the 2005 SUA Protocol.

Case study. United States v. Cordova

United States v. Cordova, 89 F. Supp. 298 (E.D. N.Y 1950) was an early case demonstrating the need for States to establish extra-territorial jurisdiction over offences on board aircraft. In 1949 a drunken passenger on a flight from Puerto Rico to New York engaged in a fight with another passenger and assaulted crew members, including the pilot, thereby endangering the safety of the aircraft in flight. The assault occurred over the ocean on a United States registered aircraft. The trial court held that United States law conferred extra-territorial jurisdiction based on the registration, or so-called flag state, of a maritime vessel. However, the applicable statute referred to vessels on the high seas. There was no domestic statute or principle of international law extending the principle of extraterritorial jurisdiction based upon vessel registration to an aircraft in flight over the ocean. Consequently the judge was unable to convict Cordova because of lack of jurisdiction over the offence. This situation was subsequently corrected by domestic legislation extending extra-territorial jurisdiction to aircraft owned in whole or in part by a United States person. Section 7(5) of Title 18 of the United States Code.

1.2 Jurisdiction

Extra-territorial jurisdiction based upon registration or ownership of an aircraft is not the only possible basis upon which a State could create jurisdiction over an offence on board the aircraft. Other possible bases for the exercise of criminal jurisdiction are the territorial principle, which in the case of an aircraft would mean the commission of an offence on or

13The first such provision in the universal terrorism-related instruments was article 11 in the International Convention for the Suppression of Terrorist Bombings (1997).
over the territory of a state; the nationality of the offender (or principle of active nationality); the nationality of the victim (or principle of passive nationality); and whether or not the act is done to harm the interests of or coerce the actions of a State (the protective principle). Another technical ground available in the aviation context is the nationality of the operator of an aircraft, which may be different from its non-operating owner due to the common practice of aircraft leasing. In the case of an offence on board aircraft on an international flight, it is possible to devise a hypothetical scenario in which half a dozen States could claim jurisdiction based upon these various theories of jurisdiction, including jurisdiction based upon the alleged offender being found in a State.

### Activities

Participants may wish to discuss whether the 1963 Tokyo Convention or subsequent instruments establish any priority among the States which may claim jurisdiction to prosecute an offence on board an international flight. What policy and practical considerations should or could influence a decision on which a State may exercise jurisdiction?

The 1963 Tokyo Convention established the State of registration of the aircraft as the fundamental criterion for jurisdiction under that instrument. Under article 4 of the Convention, a State Party which is not the State of registration is permitted to exercise criminal jurisdiction over an offence committed on board an aircraft only if the offence has effect on its territory, the offence is committed by or against that State’s national or permanent resident, the offence is against the security of that State or breaches the rules of flight in force in that State. A final ground permitting criminal jurisdiction to be exercised is to ensure the observance of an obligation under a multinational international agreement.

The Hague Convention listed its grounds of jurisdiction in its article 4.1 as:

- (a) When the offence is committed on board an aircraft registered in that State;
- (b) When the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
- (c) When the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

Article 4.2 provides that:

Each contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this Article.

The provisions for jurisdiction in article 5 of the 1971 Montreal Convention are substantially identical to those in article 4 of the 1970 Hague Convention with an additional ground: when the offence is committed in the territory of that State.
Case study. The Mohammed Hamadei case

In 1987 Mohammed Ali Hamadei was arrested on arrival in Frankfurt, Germany carrying a false passport and transporting liquid explosives. United States authorities immediately requested his extradition for having murdered an American passenger when a TWA flight to Beirut was seized by hijackers in 1985. The hijackers had been allowed to escape in exchange for releasing other hostages. The extradition request was made pursuant to a bilateral treaty and could have been made pursuant to The Hague Convention. Before Germany acted on the request, two Germans were kidnapped in Beirut and their lives were considered to be in danger if Hamadei were to be extradited. Germany chose to prosecute Hamadei in its courts and the hostages were eventually released. Mohammed Hamadei was convicted and received a life sentence for offences involving the unlawful seizure. His brother was subsequently convicted for complicity in the kidnapping of the German nationals. While expressing a preference that Hamadei should have been extradited, United States authorities publicly agreed that Germany acted within its rights in refusing extradition and referring the case for prosecution based upon the alleged offender’s presence in its territory.


The 2010 Beijing Convention adopted these same jurisdictional bases together with a new mandatory jurisdictional basis and two new optional bases. The new mandatory ground is based on the active nationality principle referred to above, meaning that a State Party must take measures to establish its jurisdiction when the offence is committed by its national. That same active nationality principle is the basis for one of the optional grounds, which is that the offence is committed by a stateless person whose habitual residence is in the territory of that State. The other optional ground of jurisdiction is based upon the passive personality principle, meaning that the State Party may establish its jurisdiction when the offence is committed against one of its nationals.

The 2010 Beijing Protocol amends the 1970 Hague Convention to adopt the same mandatory and optional jurisdictional bases established in the 2010 Beijing Convention.

The 2014 Montreal Protocol to the 1963 Tokyo Convention extends the criminal jurisdiction of a Contracting State over offences committed on board aircraft. While the 1963 Tokyo Convention originally only required the State of registration of the aircraft to establish such criminal jurisdiction, the 1970 Hague Convention went further to require the extension of jurisdiction to the State of landing, and to the State of the operator, but only for the offences specified in the 1970 Hague Convention.

The 2014 Montreal Protocol was adopted to address what had become recognized in recent years as a troubling escalation in the frequency of incidents involving disruptive and unruly passengers on scheduled commercial flights. In so doing, the 2014 Montreal Protocol addresses the gap in the criminal jurisdiction that prevents a State of landing from taking prosecution action against any person who commits an offence on board aircraft not specified in the 1970 Hague Convention as amended by the 2010 Beijing Protocol, the 1971 Montreal Convention as amended by the 1988 Airport Protocol and the 2010 Beijing Convention, notably in the event of an unexpected landing due to a diversion following the commission of an offence on board an aircraft that is not registered in the State of landing. The 2014 Montreal
Protocol mirrors some of the language of the 1970 Hague Convention’s jurisdictional elements and expands the bases for the establishment of mandatory jurisdiction. Contracting States are required to extend their criminal jurisdiction for offences committed on board aircraft as State of landing and as State of the operator. The extension serves to substantially strengthen the regime set up by the 1963 Tokyo Convention to ensure that unacceptable behaviour would not go unpunished.

Specifically, the 2014 Montreal Protocol article 3.2 bis provides that each Contracting State shall take measures to establish jurisdiction over offences committed on board aircraft as the State of landing if (i) the aircraft on board which the offence is committed has its last point of departure or next point of intended landing within its territory, and the aircraft subsequently lands in its territory with the alleged offender still on board; and (ii) the safety of the aircraft or of persons or property therein, or good order and discipline on board, is jeopardized.

Article 3.2 bis further provides that each Contracting State shall take measures to establish jurisdiction as the State of the operator on a mandatory basis when the offence is committed on board an aircraft leased without crew to a lessee whose principal place of business or, if the lessee has no such place of business, whose permanent residence, is in that State.

Additionally, article 3.2 ter requires that in exercising its jurisdiction as State of landing, a State shall consider whether the offence in question is an offence in the State of the operator.

Article 3.2 bis (ii) of the Protocol provides that the criminal act committed on board the aircraft must in fact endanger the safety of the aircraft or persons or property therein, or jeopardize the good order and discipline, in order for the Protocol’s requirement for mandatory jurisdiction of the State of Landing to attach. Also, there is no mention in the 2014 Montreal Protocol of optional grounds for jurisdiction based on the active or passive personality principles. This is because the Tokyo Convention already recognizes that a State may exercise criminal jurisdiction based on these principles as indicated by article 3.3 and article 4 (b).

Article 6 of the 1988 SUA Convention provides for mandatory and optional grounds of jurisdiction. In accordance with article 6.1, States Parties are mandated to establish jurisdiction in connection with the offences committed against or on board a ship flying the flag of the State of its registry, in the territory or territorial sea of that State, and by a national of that State. Article 6.4 also requires the establishment of jurisdiction when the alleged offender is present in the territory of a State and it does not extradite the offender to any of the State Parties which have established their jurisdiction under either the mandatory or optional grounds provided in article 6. The three optional grounds are regulated in article 6.2, according to which States Parties may also establish jurisdiction when the offence is committed by a stateless person whose habitual residence is in that State, a national of the State Party is seized, threatened, injured or killed during the commission of the offence, or the offence is committed in an attempt to compel that State to do or abstain from doing any act.

**Case study. United States v. Shi**

The provisions of United States law implementing the SUA Convention were applied in the case of *United States v. Shi*, 525 F. 3rd 709 (9th Cir. 2008). Shi was a crew member of a Taiwanese
vessel registered in the Seychelles. In international waters he killed the captain and first mate. Other crew members overpowered Shi and set a course for Hawaii. The ship was intercepted by the United States Coast Guard and brought to port in Hawaii. Shi was prosecuted there for seizing control of the ship by force and for performing acts of violence likely to endanger its safe navigation in violation of Section 2280 of Title 18, United States Code. That statute implements the SUA Convention, closely following its language in many particulars. Shi objected to United States jurisdiction on the ground of lack of a sufficient connection of the crime to an interest of the United States. The Court of Appeals rejected Shi’s claim. The Court reasoned that the statute was constitutionally justified because of the universal condemnation of illegal acts upon the high seas and because of the necessity for jurisdiction to enable the United States to prosecute if it did not extradite. Interestingly, the Court did not expressly state that the United States was bound by the SUA Convention to prosecute Shi. Instead, the prosecution was upheld because the need to be able to fulfill treaty obligations and the historical need to deal with crimes on the high seas provided a constitutional justification for the domestic statute under which Shi was properly prosecuted.

The 1988 Fixed Platform Protocol contains two mandatory grounds of jurisdiction in its article 3.1. One is the commission of an offence against or on board a fixed platform on the continental shelf of a State Party or when the alleged offender is one of its nationals. Optional grounds stated in article 3.2 are that the offence is committed by a stateless person habitually resident in that State, the fact that a national of that State Party was seized, threatened, injured or killed, or that the acts were committed in an attempt to compel that State to do or abstain from doing any act. Article 3.4 also requires that a State Party take such measures as are necessary to establish jurisdiction when the alleged offender is in its territory and it does not extradite the person to any of the States Parties that have established a mandatory or optional basis of jurisdiction under the Protocol. Provisions for the establishment of jurisdiction remain unchanged in the SUA instruments adopted in 2005.

1.3 Criminalization

While international incidents involving civil aviation would eventually require adoption of the criminal justice measures envisioned by the League of Nations Convention, several preliminary steps preceded criminalization. The Chicago Convention on International Civil Aviation (1944 Chicago Convention) had created the International Civil Aviation Organization (ICAO) to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.14 The ICAO Legal Committee recognized a need to address problems associated with offences and certain other acts committed on board an aircraft as early as 1950 and created the Legal Status of the Aircraft Subcommittee in 1953. The Subcommittee met over a period of years and produced a draft convention, which was the subject of a diplomatic conference in Tokyo in 1963. The conference resulted in the 1963 Tokyo Convention applicable to flights crossing international borders. The 1963 Tokyo Convention was a general purpose instrument, applicable to drunken misconduct by passengers and other acts jeopardizing good order on board the aircraft as well as to terrorist hijackings.

“Hijacking” is a colloquial term that has become a commonly used synonym for an unlawful seizure. Its use is harmless in most situations, but practitioners should recognize that it is not defined or used as a technical term in any of the international legal instruments analysed in the Module. Most importantly, it only covers one of the offences established in the aviation and maritime security instruments and therefore cannot be used as a generic term for all of the violent or threatening offences therein established.

Unlike the League of Nations counter-terrorism convention, the 1963 Tokyo Convention did not define an act of terrorism or impose any obligation on its States Parties to criminalize such an act. Its drafters left criminalization of offences on board an aircraft to the discretion of States Parties.

The high number of criminal acts in the 1970s and thereafter affecting civil aviation demonstrated the need for criminalization of terrorist acts against civil air transportation in order to facilitate international cooperation. As a consequence, the 1970 Hague Convention, the 1971 Montreal Convention, the 1988 Airport Protocol and the 2010 Beijing Convention and Protocol all establish international offences. Each instrument defines the acts and mental state constituting an international offence. The States Parties are required to criminalize the defined conduct and to punish it by penalties which are described as “severe” (article 3 of the Montreal Convention) or “appropriate penalties which take into account the grave nature of those offences” (article 5 of the 2005 SUA Protocol).

The offences described by both treaties on civil aviation and maritime navigation and related technical issues are analysed in the sections of the Module applicable to each of the individual aviation and maritime security instruments.

The criminalization requirements of these instruments are not self-executing, even though the physical and mental elements of the offence are defined in the respective treaties. Countries which follow the “dualist” principle of recognition of treaties consider international and domestic law as separate. Even if a country binds itself to an international treaty obligation, that obligation has no domestic effect until adopted into domestic law by the appropriate legal procedure. Even in countries of the so-called “monist” tradition, which regards ratified treaties as automatically incorporated into domestic law, legislative action is required to determine the appropriate penalty for the offence established in the criminalization provisions of a counter-terrorism convention.

The 1991 Convention for the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention) is the only aviation security instrument since the 1963 Tokyo Convention that does not establish an international offence or require its criminalization. The Plastic Explosives Convention establishes regulatory goals and leaves enforcement measures to the discretion of the States Parties.

1.4 International cooperation

The final common element and a fundamental reason for development of the transport related counter-terrorism instruments is an obligation to furnish international cooperation to other States Parties. In the 1963 Tokyo Convention that cooperation relates to the measures to be
adopted in case of offences or other misconduct committed by a person on board. Cooperation is focused on dealing with the hijacker or unruly passenger and allowing the aircraft and passengers to be on their way safely and with as little disruption and delay as possible. The 2014 Montreal Protocol supplements aspects of international cooperation by adding article 3 bis which establishes that Contracting States conducting an investigation, prosecution or judicial proceedings for the same offences or acts shall, as appropriate, consult each other with a view to coordinating their actions. Under the 1991 Plastic Explosives Convention, the cooperation obligations consist of reciprocal measures to control the manufacture of plastic explosives in order to allow their easier detection, including supporting the work of the International Explosives Technical Commission.

In all of the other nine aviation and maritime security instruments, specific articles provide for criminal justice cooperation in the form of obligations to investigate an offence covered by that instrument. Other provisions require Requested States to extradite the alleged offender or refer the case for domestic prosecution (the so-called “extradite or prosecute” principle) and to furnish assistance in obtaining evidence. Some instruments have additional cooperation requirements with regard to providing information and taking all practicable measures to prevent preparations in their territory for the commission of offences elsewhere.15

It is not feasible for every State to have treaty relations governing extradition and mutual assistance with all of the other 192 Member States of the United Nations. Joining universal instruments with broad membership, such as the aviation and maritime security instruments, provides the instant ability to call upon all other States Parties for international cooperation, such as extradition and mutual legal assistance.

1.4.1 Obligation to extradite or prosecute and legal bases for extradition

Article 7 of the Hague Convention contains an essential cooperation mechanism designed to make international criminalization of unlawful seizures an operational reality. It provides that:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

As explained in a scholarly article on aviation security,16 the Hague Convention was only the second universal instrument open to all States that actually imposed a mandatory obligation to extradite or prosecute, the first being the 1961 Single Convention on Narcotic Drugs.17 Article 8 in The Hague Convention establishes a number of legal bases for extradition between States Parties, many of which require a treaty basis for extradition. Under article 8.1 an

15See article 13 of the 1988 SUA Convention and article 16 of the 2010 Beijing Convention.
offence is deemed to be included in any existing extradition treaty between States Parties. Those States also undertake to include unlawful seizure of aircraft as an extraditable offence in every extradition treaty to be concluded between them. Article 8.2 provides that a State Party which makes extradition conditional on the existence of a treaty may consider the 1970 Hague Convention as the legal basis for extradition. Article 8.3 requires States Parties that do not make extradition conditional on the existence of a treaty to recognize unlawful seizure as an extraditable offence. Article 8.4 provides that unlawful seizures shall be treated for purposes of extradition as if they had been committed not only in the place in which they occurred but also in the territory of the States required to establish jurisdiction based on registration or the nationality of the lessee of the aircraft; on landing of the seized aircraft in a State Party’s territory with the offender on board, and on the presence of the offender, which may occur subsequent to that landing. Comparable provisions appear in subsequent civil aviation and maritime security instruments providing for criminal justice cooperation.

SUA provisions implementing the obligation to extradite or prosecute are contained in articles 11 to 12 of the 1988 SUA Convention. In accordance with article 11.1, all offences regulated in the treaty are deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. For cases where no extradition treaty exists among any two or more Parties, and one or more of these Parties makes extradition conditional on the existence of the treaty, the Convention devises a clear solution. Parties may consider the SUA Convention as sufficient legal title to enable extradition. States not making extradition conditional on the existence of a treaty must recognize the SUA offences as extraditable.

The obligation to “extradite or prosecute” may be misunderstood. The principle is an obligatory provision of the international counter-terrorism related instruments that must be implemented in good faith by treaty partners. However, it must be recognized that there may be circumstances in which an alleged offender whose extradition is refused may never be brought to trial without there being any violation of the Convention. The obligation of the State that does not grant extradition is to:

... submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.

Activity

The 2005 SUA Convention and the 2010 Beijing Convention contain what are commonly called non-discrimination articles. These articles provide that the conventions do not impose an obligation to extradite or to afford mutual legal assistance if the requested State has substantial grounds for believing that a request for extradition has been made for the purpose of prosecuting or punishing a person on account of a discriminatory motive or that compliance with the request would cause prejudice to person.
Assume that an extradition request is denied because there is substantial reason to believe that the accused will suffer prejudice in a criminal proceeding in the requesting State. The accused person is a member of a despised minority in that country and that country's dictatorial leader has made public statements declaring the alleged offender guilty before any trial. The lawyer representing the alleged offender seeks an immediate release from custody after extradition is denied, arguing that it would be unjust to refer a case for prosecution in the receiving State when there is reason to believe the prosecution is infected with a discriminatory motive and bias and the alleged offender is unlikely to receive fair treatment in the requesting State. The Foreign Ministry of the requesting State insists that the case must be referred for the purposes of prosecution. Would the strength of the available evidence make any difference to the determination of whether or not to refer the case for purposes of prosecution? What if the alleged offender released a statement in the requested State boasting that he had committed the offences charged for a noble cause and should be an inspiration to others to imitate them? Is there any inherent reason why an alleged offender cannot receive a fair trial in the requesting State even if the authorities of the requesting State would discriminate against that person? Would refusing to refer the case for prosecution be consistent with article 10.1 of the 1988 and 2005 SUA Conventions? Those articles state that the State Party in the territory of which the alleged offender is found “shall . . . be obliged, without exception whatsoever . . .” to submit the case for the purposes of prosecution in accordance with its laws.

If a common law legal system allows a prosecutor the discretionary power to decide against prosecution, that prosecutor may act upon the basis of police investigation and the extradition papers and decline to prosecute because the evidence appears deficient, the alleged offender appears to lack mental capacity or any other reason that would justify non-prosecution under the law of that State. In a civil law system the case may be archived at a preliminary stage if the appropriate magistrate determines the facts do not constitute an offence or otherwise determines that prosecution would not proceed in the case of an ordinary offence of a serious nature under the law of the State.

**Activity**

Common law prosecutors have some degree of discretion to decide whether or not to prosecute a case based on mitigating circumstances, cost effectiveness and collateral consequences. In a case wherein a person alleged to have committed a terrorist act is not extradited, is it permissible for a prosecutor in a common law system to decline prosecution because hostages have been threatened with death if an alleged terrorist is either extradited or prosecuted, or even if a terrorist organization threatens to commit future attacks if prosecution is pursued?

**Case study. Corner House Research and Others v. Director of the Serious Fraud Office**

A judicial examination of the exercise of prosecutorial discretion is found in the United Kingdom’s House of Lords’ judgment in *Corner House Research and Others v. Director of the Serious Fraud Office.* On 14 December 2006 the Director of the Serious Fraud Office issued a press release and made a statement in Parliament announcing his decision to discontinue an investigation into payments associated with a contract between the British firm BAE Systems and a Middle Eastern
government. The decision was explained as having been based on the need to safeguard national security and human lives that would be at risk if the Middle Eastern government interrupted its provision of information on terrorists and terrorist activity. Several non-governmental organizations sought a judicial review of the decision.

The trial court opinion acknowledged that extreme circumstances may require prosecution to be declined, citing a prior incident involving Leila Khalid. Ms. Khalid had been in custody in the United Kingdom for the attempted hijacking of an El Al flight from Amsterdam described in Module section 2.4.1. According to the trial court opinion the Palestinian Liberation Organization threatened to kill hostages unless she was released. The then-United Kingdom Attorney General declined prosecution in order to save the hostages’ lives and secure their liberty, and Khalid was released. The trial court distinguished the Khalid case from the BAE situation. The trial court found that the threat to human life and the effect of an intended withdrawal of intelligence cooperation by the concerned Middle Eastern government were too speculative to justify discontinuation of the BAE inquiry. He announced an intention to intervene in some unspecified fashion to correct the discontinuance of the investigation. The Government appealed. The House of Lords examined what it described as the unequivocal evidence demonstrating that the Director of the Serious Fraud Office acted solely to save human lives, and that no weight had been given to commercial interests or the national economic interest. Since no domestic principle of law had been violated, the Director was entitled to exercise his independent discretion. Moreover, his acts did not constitute a violation of the OECD’s Convention on Combating Bribery of Foreign Public Officials, which would have prohibited discontinuance of a proceeding for economic reasons. The United Kingdom had ratified that agreement but had not incorporated its provisions in domestic law. Even if the Convention had been properly incorporated into United Kingdom law by statute, the unequivocal evidence was that the danger to human life, not economic interest or the identity of persons involved caused the inquiry to be discontinued. Consequently, the judicial panel of the House of Lords determined that the Director of the Serious Fraud Office acted properly in discontinuing the BAE inquiry and vacated the lower court judgment.7 This precedent could have potential application to the exercise of prosecutorial discretion in a situation where a case must be referred for prosecution because extradition is denied.

7R. (On the Application of Corner House Research and Others v. Director of the Serious Fraud Office [2008] UKHL 60, opinion of the Lords of Appeal.

8OECD is an acronym for the Organisation for Economic Co-operation and Development, an international grouping of financial and trade-oriented economies.


The allegations of impropriety made by the non-governmental organizations that challenged the declination of prosecution in the BAE inquiry and the different interpretations attached by the trial court and by the House of Lords to the actions of the officials demonstrate the importance of transparency in prosecutorial decisions. Recognizing the importance of prosecutorial independence, public disclosure of controversial decisions and the factual reasons for which they are made can do much to maintain public confidence and should be considered a desirable approach or practice to be followed by prosecutors.

A comprehensive discussion of extradition procedure, the legal bases for extradition and its conditions or grounds for refusal is found in UNODC Counter-Terrorism Legal Training Curriculum, Module 3, International Cooperation in Criminal Matters: Counter-Terrorism, Section 2, Extradition. To avoid duplication, that discussion is not repeated here or in describing the other aviation and maritime security-related instruments. Module 3 is readily available at http://www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module3_EN.pdf with accompanying practical guidance, case studies, assessment questions, tools and further reading. Part V of the Legislative Guide to the Universal Legal Regime against Terrorism covers international cooperation in criminal matters. The UNODC Guide for the Legislative Incorporation and Implementation of the Universal Counter-Terrorism Legal Instruments covers the topic in greater depth and devotes a section to the modalities of international cooperation, including examples from national legislation. The guides are available at www.unodc.org/tldb/en/legislative_guides.html.

1.4.2 Obligation of States Parties to furnish evidentiary assistance

The 1963 Tokyo Convention required a Contracting State to take delivery of a passenger (whom an aircraft commander believes, on reasonable grounds, to have committed, in his opinion, a serious offence and whom he delivers to the competent authorities of that State) and to communicate its decision whether or not to prosecute that person. However, it made no provision for subsequent cooperation in investigating or prosecuting an offence. The 2014 Montreal Protocol added such a provision to facilitate mutual cooperation but on an optional, and thus voluntary basis at the Contracting States’ discretion. The 1970 Hague Convention introduced not only the obligation to extradite or prosecute a person whose extradition was requested but also bound all Contracting States, through its article 10, paragraph 1, to “...afford one another the greatest measure of assistance in connection with criminal proceedings”. This obligation is a logical corollary of the “extradite or prosecute” rule, which will almost inevitably involve international investigative and evidentiary assistance. The Hague Convention applies only to flights with international elements. Under article 3 the entire Convention\(^{19}\) applies if the place of take-off or landing is outside the territory of the State of registration, and its international criminal justice cooperation provisions apply in any situation in which an alleged offender is found in the territory of a State other than the State of registration. In either situation the resulting prosecution will very probably require investigative assistance, records and witnesses from a foreign State, so an obligation to furnish evidentiary assistance by other States Parties is a practical necessity for the implementation of the 1970 Convention.

Article 12 of the 1988 SUA Convention establishes that States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings, including assistance in obtaining evidence at their disposal necessary for the proceedings. The 2005 SUA Convention adds provisions on transfer of offenders serving sentences in a State Party to another State Party for the purposes of identification, testimony or provision of assistance in obtaining evidence for the investigation or prosecution of offences set forth in the Convention.

\(^{19}\)This phrase includes dealing with management of the immediate consequences of a seizure, such as restoring control of the aircraft to its lawful commander and allowing the passengers to proceed (article 9), as well as the international criminal justice features involving extradition, prosecution and evidentiary assistance (articles 6, 7, 8 and 10).
As is the case with regard to extradition procedures, a full discussion of mutual legal assistance procedures is not being repeated in this Module on Aviation and Maritime-Related Terrorism. Section 2, Mutual legal assistance in criminal cases, in Module 3, International Cooperation in Criminal Matters: Counter-Terrorism, provides a detailed analysis of that subject, with case studies and practical guidance.

1.4.3 Good practices in international cooperation

It is worthwhile to explicitly note in this section of the Module some of the good practices in international cooperation found in Module 3 and in other sources. Beginning with the ratification process, both customary international law and the Vienna Convention on the Law of Treaties recognize a duty known by the Latin words pacta sunt servanda meaning that agreements must be observed in good faith. In dualist countries, i.e. those requiring legislation to translate treaty obligations into domestic law, observance of the aviation and maritime instruments in good faith means that the necessary legislative implementation of treaty obligations should precede or be contemporaneous with adoption of the international instrument.

It is not good practice for a State to assume the obligation to extradite or prosecute under the aviation and maritime counter terrorism-related instruments if it does not promptly confer competence upon its courts to prosecute if extradition is not granted. In the absence of such competence, the courts will be legally incapable of exercising jurisdiction over an alleged offender on the required basis that the offender is found in the country and is not extradited.

With regard to all forms of international cooperation, communication is the key to success and should take place both at the formal and informal levels. Numerous entities and mechanisms exist to facilitate such communication, including INTERPOL and regional prosecutors’ organizations. The principle of dual criminality should be based upon the modern criterion of whether the conduct is punishable in both jurisdictions, not whether the offence bears an equivalent name or has the same elements in both legal systems.

The Report of the Informal Expert Working Group on Extradition20 convened by UNODC in 2004 recommended the greater use of INTERPOL while avoiding requests for provisional arrest when there is little risk of flight by the wanted person. An important tool for facilitating cooperation with extradition requests from civil law countries to those of the common law tradition is the acceptance of the dossier or a summary of the evidence as sufficient grounds for extradition rather than insistence upon personal testimony or sworn evidence constituting a prima facie case. Another impediment that multiplies delays without providing any significant legitimate benefit is the practice of allowing repetitive intermediate appeals. The Working Group recommended:

... wherever possible and consistent with its basic constitutional principles, States should adopt a single appeal mechanism for extradition casework to review all appropriate factual and legal issues, while eliminating repeated and partial reviews.

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While Module 3 should be consulted for a comprehensive discussion of mutual legal assistance, it can be useful to summarize some of the good practices in international investigative and evidentiary assistance discussed in that publication. Unless coercive measures are necessary, the possibility of informal police or prosecutorial cooperation should first be explored in the interest of speed and efficiency. Informal liaison can avoid the delays and translation costs of a mutual legal assistance request. Creation of a Central Authority to serve as a facilitator and central resource for receipt and execution of mutual assistance requests has significantly improved international cooperation. Ensuring that a country’s international cooperation procedures and mechanisms are readily available on an official website can save foreign authorities immense amounts of time in preparing requests. The improved quality of the requests received can then result in savings and greater efficiency for the recipient authorities charged with executing those requests. The United Nations Convention against Transnational Organized Crime introduced a cooperation provision that should ideally be adopted in national laws to expand the permissible forms of assistance that a legal system can provide. Article 18, paragraph 3 of the Convention specifies certain types of mutual legal assistance that can be provided under the agreement, including taking evidence or statements from persons, effecting service of judicial documents, executing searches, seizures and freezing, providing documents and other services. A crucial addition is found in subparagraph 3 (i) of article 18:

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party.

This type of flexibility is essential to accommodate the procedural difference between different legal systems. As described in section 3.1.2 of Module 3, International Cooperation in Criminal Matters, American authorities requested that an examining magistrate in France question a witness in the presence of the attorney representing the accused person. No such procedure exists in the French Code of Criminal Procedure, but it was allowed. The possibility of such innovative cooperation obviously requires that the request for mutual legal assistance spell out in clear factual detail exactly what procedure is requested to ensure the maximum utility of the request. A brief and simple explanation of why the particular procedure is requested would be a useful courtesy to the authority asked to follow an unfamiliar procedure and would enhance the likelihood of the foreign court acceding to such a request. Creation of joint investigative teams of police and prosecutors can be accomplished either by negotiated agreements or by mutual legal assistance requests, as is done between EUROPOL and the European Union prosecutorial group EUROJUST.

If joint investigative teams of police or police and prosecutors are established, appropriate foresight should be used to anticipate sensitive questions of national sovereignty. If foreign officers enter a country can they carry firearms? Can they use force and in what circumstances? Should they be under the operational control of a national official of the host State? Can foreign police or prosecutors conduct interviews or interrogations of nationals of the host State? All of these issues need to be addressed and reduced to a written understanding in advance, as is done with the Joint Investigation Teams encouraged by EUROPOL.

**Assessment question**

- Is customary international law sufficient to establish criminal jurisdiction over offences on board an aircraft in flight by the State of registration? (See case study in Module section 1.2, Jurisdiction).

**Tools and further reading**

- Chapter II B of the UNODC *Legislative Guide to the Universal Legal Regime against Terrorism* (2008) examines the ICAO aviation security instruments and chapter II C does the same with respect to the IMO maritime security instruments.
2. CIVIL AVIATION COUNTER-TERRORISM RELATED LEGAL INSTRUMENTS

Most States have adopted and implemented the main elements of the aviation security instruments dating from 1963 through 1991. The Beijing Convention and Protocol of 2010 updated earlier aviation instruments by adding new offences, new forms of criminal responsibility and new protections for suspected offenders. The Module can serve to familiarize national authorities with those changes and facilitate the implementation process with its analysis of the elements and obligations of the new instruments.

2.1 Creation of the International Civil Aviation Organization by the Convention on International Civil Aviation (1944, Chicago Convention)

The Convention on International Civil Aviation established the International Civil Aviation Organization (ICAO) to coordinate and regulate international air travel. Article 44 of the Convention describes the aims and objectives of the organization as being the development of the principles and techniques of international air navigation and fostering the planning and development of international air transportation in order to achieve a number of goals, such as meeting the needs for safe transport and navigation. As described in the Introduction, the ICAO recognized a need to address problems associated with offences and other acts jeopardizing good order on board aircraft as early as 1950. During the last 60 years, ICAO has been responsible for the development of the aviation security conventions and protocols analysed in this Part.

2.2 The Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963, Tokyo Convention)

2.2.1 Precedents established and followed in subsequent instruments

This 1963 Tokyo Convention established precedents that have been followed in subsequent aviation instruments. Its scope does not extend to aircraft used in military, customs or police services. The State of registration of the aircraft is declared to be competent to exercise jurisdiction over offences and other dangerous acts committed on board. For purposes of extradition, offences committed on aircraft are treated as if they had been committed not only in the place of occurrence but also in the territory of the States required to establish
jurisdiction under a particular convention. In the case of the 1963 Tokyo Convention, the only required basis of jurisdiction is the registration of the aircraft. However, the 2014 Montreal Protocol amended the 1963 Tokyo Convention to include the mandatory State of landing and State of the operator bases of jurisdiction. Other aviation security instruments require the establishment of similar or additional bases. Application of the Convention requires an international element in the route of the aircraft involved or its intended destination, or in the presence of an alleged offender in the territory of a State Party. The Tokyo Convention also established rules that limited the circumstances under which any State other than the State of registration might interfere with an aircraft “in flight” in order to exercise criminal jurisdiction over an offence committed on board. “In flight” was defined in article 1.3, as meaning from the moment when power was applied for take-off until the end of the landing run. However, the meaning of the term was expanded by article 5.2. That article stated that an aircraft shall be considered to be “in flight” from the moment when all external doors are closed following embarkation until a door is opened for disembarkation, and in case of a forced landing, until State authorities take over responsibility for the persons and property on board.

2.2.2 Powers of the aircraft commander to protect the safety of the aircraft

The 1963 Tokyo Convention recognizes the power of the aircraft commander to impose restraints upon a passenger whom he/she has reasonable grounds to believe has committed or is about to commit an offence or an act that may jeopardize the safety of the aircraft or persons or property on board. The commander and the crew, if required or authorized by the aircraft commander, may impose such restraints, and the commander may disembark the passenger or deliver the passenger in custody to the receiving State. The aircraft commander may request, but not require, the assistance of passengers to restrain a person whom he is entitled to restrain. All persons, whether crew or other passengers, acting on behalf of the aircraft commander in such circumstances shall enjoy legal protection for actions taken in accordance with the Convention. The 2014 Montreal Convention establishes that the aircraft commander may also request or authorize, but not require, the assistance of in-flight security officers to restrain any person whom he is entitled to restrain. Contracting States are required to take appropriate measures to maintain or restore the lawful commander’s control (in cases where an aircraft in flight has been or is about to be subjected to an act of interference, seizure or other wrongful exercise of control) and to permit passengers and crew to continue their journey as soon as practicable and to return the aircraft and its cargo to the lawful possessors.

2.2.3 The offence element relating to endangerment of safety in flight

Article 5, dealing with the powers of the aircraft commander, also provides that an aircraft’s status as being “in flight” within the Convention’s scope continues in the case of a forced landing until “the competent authorities of a State” take over responsibility for the aircraft and for the persons and property on board. This reference to the “competent authorities of a State” appears in the other instruments related to aviation security discussed in the Module, but no instrument explains which State’s authorities are intended to be described. It is common for an international agreement to leave some terms to be defined by customary international law or by the domestic law of each Member State. However, in the aviation instruments the reference to the “competent authorities of a State” taking over responsibility “for the aircraft and for persons and property on board” suggests a situation where one government, presumably that of the territory where the forced landing occurs, controls a negotiated or forceful resolution from the forced landing through reestablishment of lawful control.
The reality of actual hijacking cases has not always reflected the simplicity of that model. The armed forces used to regain control over a hijacked aircraft are not always the authorities of the State on whose territory the aircraft is forced to land. In a number of situations it has been a State whose nationals on board are at risk or the State of registration of the hijacked aircraft that has deployed armed forces to retake control of a hijacked aircraft. For instance, in October 1977 Lufthansa Flight 181 from Mallorca to Frankfurt was diverted through numerous stops in the Middle East to Mogadishu and German commandos, with support from Somali authorities, regained control of the aircraft. In November 1985, Air Egypt Flight 648 from Athens to Cairo was diverted to Malta by armed hijackers after a gun battle with an Egyptian security agent on board. With the permission of Maltese authorities, Egyptian commandos stormed the plane, resulting in a number of deaths and the destruction of the plane as a result of explosions and fire.

Case study. The Entebbe case

In 1976 Israeli commandos attacked the airport at Entebbe, Uganda, where a hijacked Air France plane with approximately 100 Israeli and Jewish passengers were being held hostage by hijackers from the Popular Front for the Liberation of Palestine and Germany’s Bader-Meinhof group. Israel was a party to the 1963 Tokyo Convention but Uganda was not a State Party at the time of the incident.

Activity

If Uganda had been a State Party and had complained about the violation of its sovereignty, could Israel have relied upon article 5.2 of the 1963 Tokyo Convention to assert that its authorities were competent to take over responsibility for the passengers to safeguard their lives and restore control to the aircraft commander? Could Uganda have complained that Israel violated the 1963 Tokyo Convention because its assault was an interference with an aircraft in flight and did not fall under any of the grounds enumerated in article 4 of the Convention?

Considerations: The aircraft was an Air France flight and France was the State of registration. The Ugandan authorities had exercised control over the aircraft after its landing and there was no realistic possibility of the aircraft commander taking off without Ugandan refuelling and cooperation. Article 11 of the 1963 Tokyo Convention requires the State in which the aircraft lands to permit its passengers and crew to continue their journey. Arguably the hijackers still controlled the passengers, keeping them under guard in the airport terminal building without opposition by the Ugandan authorities. Nothing in the 1963 Tokyo Convention changes the traditional rules of national sovereignty over a State’s territory. The International Court of Justice has ruled on cases involving the applicability of customary international law on non-intervention to the use of military force against another State.

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2.2.4 Duties of a State

As will be apparent in comparison with subsequent civil aviation counter-terrorism related instruments, the 1963 Tokyo Convention was oriented toward creating mandatory rules for managing the immediate physical consequences of an unlawful disruption or attempted disruption of a flight. Contracting States are required to receive persons disembarked by an aircraft commander or delivered to their authorities under restraint (articles 9, 12 and 13). Such persons are free to continue their journey, or if they cannot or will not do so, can be returned to their State of nationality or to the State of the origin of the flight on which they arrived, unless their presence is required for criminal or extradition proceedings (articles 14 and 15). A person may be delivered under restraint if the aircraft commander has reasonable grounds to believe that the person has committed on board the aircraft an act which, in his opinion, is a serious offence according to the penal law of the State of registration of the aircraft (article 9). Under the same article the State to whom a person is delivered by an aircraft commander must be informed of the evidence and information lawfully in the commander's possession. That State must assist that person in communicating with a representative of the State of which the person is a national (article 13.3).

A person received either by delivery (under restraint) or disembarked may be held in custody only for the time necessary to conduct criminal proceedings or for extradition proceedings to be instituted. Such persons are guaranteed treatment which is no less favourable for their protection and security than would be accorded to nationals of the receiving State (article 15, paragraphs 1 and 2).\(^{22}\) When a person on board has exercised or is considered about to exercise unlawful control of an aircraft, States Parties agree to take all appropriate measures to preserve control by the lawful commander or to restore the commander's control of the aircraft. The States Parties also shall permit the passengers and crew to continue an interrupted journey as soon as practicable and to return the aircraft to its lawful possessors.

As contrasted with its explicit obligations for managing the immediate physical consequences of an unlawful seizure or forced landing as a result of acts or offences on board, the Convention is more permissive with regard to the eventual legal consequences of an attempted or successful unlawful seizure or other serious offence. The actions to be taken and the management of legal consequences are largely left to the discretion of the States Parties. A State Party shall take delivery of a person delivered by the aircraft commander. The receiving State need only make a preliminary inquiry, report its finding to the States of aircraft registration and of the nationality of a detained person, and indicate whether it intends to exercise criminal jurisdiction (article 13, paragraphs 4 and 5). Nowhere in the instrument is there any obligation to institute criminal proceedings or to grant extradition. If the receiving State

\(^{22}\)Persons who are “disembarked” pursuant to article 12 are frequently those who commit disruptive acts rather than attempting to unlawfully seize an aircraft. Disembarked persons are less likely to be restrained after arrival but may be subject to prosecution or extradition. Non-nationals of the landing State need not be admitted to its territory and they may be returned to the State of nationality or permanent residence or the State from which the journey began, without acquiring any immigration status in the landing State (article 14). The same is true of “delivered” persons once their presence is no longer needed for criminal or extradition proceedings.
reports that its preliminary enquiry has determined that a serious offence has been committed but that it does not intend to exercise criminal jurisdiction or to extradite in response to a request by another State Party, that State has fulfilled its obligation under the treaty.

2.2.5 Absence of defined offences and of an obligation to extradite or prosecute exclusion of political offences

The rules established by the 1963 Tokyo Convention for managing the immediate physical consequences of an unlawful seizure continue in effect to the present and have served States, the aviation industry and the travelling public well. However, three aspects of the 1963 Convention proved to be inadequate or were no longer appropriate to conditions prevailing by the time the Convention came into effect in 1969. Those three aspects were the lack of mandatory, uniform definitions establishing offences; the lack of an obligation to extradite or prosecute; and the exclusion from the 1963 Convention of offences “against penal laws of a political nature”.23

Article 16.1 of the Tokyo Convention also provides that offences committed on board an aircraft registered to a Contracting Party shall be treated for the purposes of extradition as if they had been committed not only in the place in which they occurred but also in the territory of the State of the aircraft’s registration. Furthermore, since the 2014 Montreal Protocol extends the basis for exercising mandatory jurisdiction to the State of landing and the State of the operator, it will in effect increase the number of States that should treat the offence as committed in its territory for the purpose of requesting extradition. However, it is stated in article 16.2 that nothing in the Convention shall be deemed to create an obligation to grant extradition. Thus, the 1963 Tokyo Convention and the 2014 Montreal Protocol emphasize the various grounds for jurisdiction over acts on board aircraft and establish rules for its States Parties, which facilitate management of the immediate consequences of an unlawful seizure but do not provide mechanisms to deter or punish unlawful seizures or other offences on board aircraft.

Article 2 of the Convention removes from the scope of application of the instrument “offences of a penal law of a political nature”. As explained in Module section 1.1.3, that language was problematic, but nevertheless, it was not removed by the 2014 Montreal Protocol. This language has not been repeated in any other aviation or maritime security instruments, some of which eventually adopted provisions making the political offence exception inapplicable to the terrorist offences which those instruments defined.

See sections 2.7.7, 3.6.11 and 3.6.12 on the introduction in subsequent aviation and maritime security instruments of provisions declaring that convention offences shall not be considered political offences, accompanied by new protective provisions for alleged offenders.

23Mandatory offence definitions and the obligation to extradite or prosecute will be discussed in connection with their introduction in the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, where they were first adopted in an aviation security instrument.
2.3 Convention for the Suppression of Unlawful Seizure of Aircraft (1970, Hague Convention)

The Tokyo Convention lacked specific obligations to criminalize unlawful seizures or to require either extradition or prosecution of those who commit such seizures and proved to be an insufficient response when aircraft hijackings became increasingly dangerous and damaging. Throughout the 1960s a number of aircraft were hijacked and diverted, among them an El Al flight in July 1968.

In December 1968, the ICAO Council referred the unlawful seizure issue to the Legal Committee, which created a subcommittee to examine the problem. The subcommittee met during 1969 and prepared a report, accompanied by a draft convention designed to facilitate the prosecution and punishment of offenders. In August 1969, a TWA flight from Rome to Athens was seized and diverted to Damascus. The hijackers included Leila Khalid, whose release after a prior hijacking was described in the case study in Module section 1.5.1. In December 1969, a Korean Airlines flight was hijacked to the Democratic People’s Republic of Korea. In March 1970, members of the group that came to be known as the Japanese Red Army seized a domestic flight with hostages and ultimately reached the Democratic People’s Republic of Korea with the plane. The Legal Committee endorsed the criminal convention approach in meetings during 1970 and recommended convening a diplomatic conference. Up to 1967 the highest number of airline hijackings or attempted hijackings in a year was six. In 1968 the number was 38, 33 of which were successful. In 1969, 70 of 82 hijacking attempts were successful. In the first nine months of 1970, 86 aircraft with more than 800 passengers were unlawfully seized, with four aircraft seized at the same time and ultimately destroyed in September 1970.24

These events contributed to an atmosphere of urgency, and the conference was convened in The Hague, Netherlands to negotiate the proposed Convention, which was opened for signature on 16 December 1970. The global consensus on the urgency of the threat of unlawful seizures is demonstrated by the fact that, while it had taken six years to bring the 1963 Tokyo Convention into force. The Hague Convention came into force on 14 October 1971, less than a year after it was opened for signature. As with almost all of the other aircraft and maritime security counter-terrorism related instruments, the Hague Convention’s applicability depends upon the existence of an international element related to the aircraft, its flight or to an alleged offender.

For the text of the Convention, see Module annex II.

2.3.1 Introduction and scope of a criminalization requirement

The 1970 Hague Convention introduced the concept of mandatory criminalization of a defined offence in the transportation security context. That approach had been the cardinal

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mechanism of the 1937 League of Nations Convention for the Prevention and Punishment of Terrorism, together with an obligation to either extradite an alleged offender or to refer the matter for a domestic prosecutorial evaluation. The League of Nations Convention had defined acts of terrorism broadly. Article 1 of the 1970 Hague Convention imposes criminal liability in limited circumstances:

Any person who on board an aircraft in flight:

(a) Unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or

(b) Is an accomplice of a person who performs or attempts to perform any such act

commits an offence ...

In defining the limits of the offence, article 3 of the 1970 Convention follows article 5.2 of the Tokyo Convention in its definition of an aircraft in flight, that is:

... from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the flight shall be deemed to continue until the competent authorities take over the responsibility for the aircraft and for persons and property on board.

The Convention’s criminalization obligation is stated very simply in article 2:

Each Contracting State undertakes to make the offence punishable by severe penalties.

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**Case study. Criminalization obligation and the enforcement policy, the Tanaka and Rezaq cases**

The criminalization obligation in article 2 leaves the degree of enforcement emphasis and matters of enforcement policy and allocation of resources to the individual State Party. Some States Parties have been remarkably persistent in their pursuit of a judicial determination of charges against alleged offenders with respect to unlawful seizures. In the year 2000, Japan succeeded in extraditing Yoshimi Tanaka from Thailand despite his efforts to assert a political motivation defence to extradition. Tanaka had participated in a 1970 seizure of a Japan Airline flight that was diverted to North Korea. He was sentenced in Japan to twelve years imprisonment and died while serving his sentence in 2007. Rezaq was the only survivor of the group of hijackers who diverted an Egypt Air flight to Malta in 1985 and killed and wounded a number of passengers. Rezaq was released after serving seven years in Malta for offences related to weapons and injury to passengers. After his release he was eventually arrested in Nigeria and turned over to United States authorities. In 1996 he was sentenced to life imprisonment under a statute giving United States courts jurisdiction over an offence under the Convention for the Suppression of Unlawful Seizure of Aircraft (1970) when a United States national was aboard the aircraft. The UNODC publication, *Digest of Terrorist Cases* (2010) in Chapter II D explains how a United States appellate court relied upon the proceedings of the ICAO Legal Committee in upholding Rezaq’s conviction. The court noted that a proposal for an article inserting a ban on sequential prosecution in the 1970 agreement had been rejected in the Legal Committee because of the argument that the principle is not applied.
uniformly. Accordingly, the ICAO Legal Committee recommended that “the State concerned will in each case apply its own rule on the subject of *ne bis in idem*. Under United States law the offence for which Rezaq was being prosecuted in the United States was different from those for which he was convicted in Malta, and the prosecution was by different sovereigns. As a result, the sequential prosecution did not violate Rezaq’s right not to be placed twice in jeopardy for the same offence.

*See Module section 1.4.1.*


*See U.S. v. Omar Ali Rezaq, 234 F. 3d 1121 (D.C. Cir. 1998), West Publishing Company, United States; Aircraft Piracy, 49 U.S. Code Section 46502, formerly 49 App. Section 1472 (n). As explained in section 3.2 of this Module, the customary international law concept of maritime piracy requires the involvement of the crew or passengers of a second vessel. Accordingly, the title of the United States aviation offence in national legislative terminology is not necessarily representative of international usage.*


### 2.3.2 Jurisdictional grounds

The Hague Convention’s article 4 provides that:

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offence and any other act of violence against passengers or crew committed by the alleged offender in connection with the offence, in the following cases:

   *(a)* when the offence is committed on board an aircraft registered in that State;

   *(b)* when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

   *(c)* when the offence is committed on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offence in the case where the alleged offender is present in its territory and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

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See section 1.2 for the case study of a State’s right to refuse extradition on the basis of its right to jurisdiction based upon the alleged offender’s presence in its own territory.
2.3.3 International cooperation mechanisms

Article 6 of the Hague Convention establishes the obligation of a State where an alleged offender is found to immediately notify the State of registration and the State of that person’s nationality, to conduct a preliminary enquiry and to report to the concerned States whether it intends to exercise jurisdiction. Article 7 contains the “extradite or prosecute” obligation discussed in Module section 1.4.1. Article 8 deals with the legal bases for extradition under the Hague Convention.

2.4 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aircraft (1971, Montreal Convention)

2.4.1 Establishment of additional criminal offences against civil aviation

The Hague Convention had addressed the phenomenon of armed hijackers using force or the threat thereof to seize control of an aircraft, its crew and passengers in order to enforce a demand. In some cases the hijackers’ demand was to be transported to an unscheduled destination. In others it was for a monetary ransom or release of prisoners. While there were deaths and serious injuries in some seizures and in August 1969 the cockpit of a hijacked TWA flight from Rome to Tel Aviv had been blown up, in many cases the threats of bodily harm or death were not carried out and the aircraft was eventually returned without damage. The perception of the hijacking threat changed radically while the Hague Convention was in the final stage of development. In September 1970, four Swiss, United Kingdom and United States aircraft with numerous hostages were seized. Palestinian hijacker Leila Khalid, who had been involved in the August 1969 hijacking of a TWA flight to Damascus, attempted with a confederate to seize a fifth aircraft, an El Al flight, after its departure from Amsterdam. Her confederate was killed and she was taken into custody and the attempted seizure was successfully resisted. Three of the aircraft were destroyed by the hijackers at a former military airfield in Jordan controlled by the Palestine Liberation Organization and a fourth in Cairo. While no hostages were killed, the threat to the confidence of the travelling public and the monetary loss through destruction of multiple aircraft created a crisis situation for governments and the aviation industry.

See section 1.4.1 for a discussion of events involving Ms. Khalid and the permissible limits of prosecutorial discretion.

The September 1970 destruction of four aircraft, prior incidents and ICAO efforts led to the convening of a diplomatic conference on air law, which addressed issues not covered by the Hague Convention. This Conference met in September 1971 in Montreal, Canada and produced the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. Like the Hague Convention, this Convention created a criminalization obligation. In this case the offences required to be criminalized included acts of violence against a person on board an aircraft and damage to that aircraft or to air navigation facilities which endanger aircraft safety in flight, assuming the existence of an international element.
In the Montreal Convention, a number of additional international crimes were established. Article 1 (a) defines as offences any unlawful and intentional act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of the aircraft. Article 1 (b) defines as an offence the destruction of an aircraft “in service” or damaging it in a way that makes it incapable of flight or is likely to endanger its safety in flight. Article 1 (c) establishes an offence of placing or causing to be placed on an aircraft in service a device or substance likely to destroy or cause damage to the aircraft which renders it incapable of flight or endangers its safety in flight. Article 1 (d) creates the offence of destroying or damaging air navigation facilities or interfering with their operation if such act is likely to endanger the safety of the aircraft in flight. Article 1 (e) establishes the offence of knowingly communicating false information endangering the safety of an aircraft in flight. Article 1.2 provides that a person who attempts any of these acts commits an offence, as does an accomplice of the person who commits or attempts a defined offence.

Article 1 adopted the existing concept of an aircraft “in flight” and introduced the additional concept of an aircraft “in service”. An aircraft in flight was defined in the same way as in the previous two conventions, from the closing of exterior doors following embarkation until the moment when any door is open for disembarkation, except that the provisions of the conventions continue to apply in the case of a forced landing until the authorities of a State take over responsibility for the aircraft and for the persons and property on board. An aircraft was considered to be “in service” within the meaning of the 1971 Convention from the beginning of the pre-flight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing. In the case of a forced landing the aircraft is considered to be “in service” until the competent authorities take over the responsibility for the aircraft and for persons and property on board. This effect is accomplished by a cross-reference in article 2 (b) to the forced landing provision in article 2 (a) concerning the definition of “in flight”. With the introduction of the concept of an aircraft “in service” damage to an aircraft on the ground, prior to its departure or after its arrival, was defined as an international crime.

The international community’s recognition that increasingly frequent and violent incidents intended to terrorize the travelling public and governments demanded broader criminalization is reflected by the rapid entry into force of the Montreal Convention in January 1973 and its nearly universal acceptance.

2.4.2 The offence element relating to endangerment of safety in flight

All of the offences created in article 1 of the Montreal Convention require that the prohibited act endanger the safety of an aircraft in flight or render it incapable of flight. This element reflects a cautious approach to ICAO’s limited mandate as a specialized aviation organization, and not an organization with broad criminal justice or counter-terrorism responsibilities. Most civil aviation-related terrorist incidents involve unlawful seizure of the aircraft, which is inherently dangerous because control passes from the aircraft commander to the terrorists, or involve violence which itself endangers the aircraft. Due to the altitude at which international flights normally operate and the required pressurization, any violence inflicted by shooting or bombing while in flight is, as a practical matter, likely to endanger the safety of that aircraft. An explosion, bullet or piece of shrapnel disrupting the integrity of the fuselage could cause depressurization and loss of oxygen, even if it does not damage a control mechanism
or injure a pilot. However, it is a vexing question whether slitting the throat of a passenger after an unlawful seizure has been accomplished because that person belongs to a hated nationality would violate article 1.1 (a). That article applies only if the offender:

(a) Performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft ...

### Case study. Acts of violence “in flight”

During the unlawful seizures of Egypt Air 648 and TWA Flight 847 in 1985, passengers were murdered during ground stops. The murders occurred before competent authorities had taken over responsibility for the persons and property on board the unlawfully seized aircraft, so they were still “in flight” within the meaning of paragraph 1 of article 2 of the Montreal Convention. It can be argued that shooting passengers in the head and dropping the bodies through an open door of a parked aircraft cannot be considered likely to endanger the safety of the aircraft, which is already parked under the control of the hijackers. Consequently, it would be an arguable proposition that article 1.1 (a) of the Montreal Convention may not apply and that murders under such circumstances would not qualify as an international crime subject to the cooperation mechanisms of the 1971 Convention. The contrary argument is that murders during a hijacking are part of a course of conduct endangering the safety of the aircraft as well as of the passengers.

See also Module section 3.3.4 on treatment of a similar “endangerment of safe navigation” element in the 1988 SUA Convention. One offence in article 3.1 (b) of the 1988 SUA Convention requires as an element that an act of violence on board a ship “endanger the safe navigation of that ship”. However, another offence established by article 3.1 (g) applies to anyone who injures or kills a person in connection with the commission or attempted commission of offences under the Convention, without any requirement that the act is likely to endanger the safe navigation of the ship.

### 2.4.3 Continuation of the scope of application, jurisdictional provisions and bases for extradition of the 1963 Tokyo and 1970 Hague Conventions

Continuing the approach taken in the Tokyo and the Hague Conventions, article 4.1 of the 1971 Montreal Convention excluded aircraft used in military, customs or police services from its scope. The same article limited the application of the 1971 Convention to the same situations involving an international element, destination or registration as did the 1970 Hague Convention in its article 4, with the added provision that damage to air navigation facilities is within the Conventions' scope only if those facilities are used in international air navigation.

Article 5 of the Montreal Convention substantially adopts the same jurisdictional grounds provided in the 1970 Hague Convention with one minor change. The 1970 Convention only...
covered unlawful seizures committed “on board” an aircraft. The 1971 jurisdictional terminology refers to an offence “against or on board” an aircraft because its offence provisions include destruction of or damage to an aircraft while “in service” for a specified period prior to departure or after arrival. Article 5, paragraph 2 requires a State Party to establish jurisdiction based upon the presence of an alleged offender if that person is not extradited. Creation of such jurisdiction in the national courts is necessary to permit fulfilment of the “extradite or prosecute” obligation discussed in Module section 1.4.

The same legal bases for an extradition relationship, such as deeming the Convention offences to be included in an existing treaty, reliance on the Convention as an extradition treaty, and extradition without a treaty, described in Module section 1.4.1 also appear in article 8 of the 1971 Montreal Convention.

2.4.4 Cases applying the “extradite or prosecute” obligation found in Convention article 7

An obligation to either extradite an alleged offender or to refer the case for prosecution in the same manner as in the case of a serious domestic offence appears in article 7 of the 1971 Montreal Convention, just as it did in article 7 of the 1970 Hague Convention. This is a core provision of the Conventions, and has been the subject of several significant judicial interpretations.

Case study. The Lockerbie case

The explosion of a bomb composed of plastic explosives that destroyed a Pan American Airlines flight over Lockerbie, Scotland was a contributing factor to the negotiation and adoption of the 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection. After that event and the bombing of a UTA flight over Niger in September 1989, the United Nations Security Council adopted Resolution 731, encouraging Member States to urge Libya to respond to requests by the United Kingdom, France and the United States to cooperate fully in establishing responsibility for the bomb attacks. Those requests included requests for the extradition of Libyans considered responsible for the bombing. Libya asserted that as a party to the Montreal Convention it was entitled to refuse extradition, to refer the alleged offenders to its own competent authorities for the purpose of prosecution and to receive the evidence relied upon by France, the United Kingdom and the United States. To enforce its claim that it was acting within its treaty rights, Libya filed several actions in the International Court of Justice. A request for provisional measures ordering the United Kingdom not to seek action by the Security Council against Libya was filed on 3 March 1992. On 14 April 1992, the International Court of Justice decided on Libya’s request for provisional measures against the United Kingdom, which included a request to enjoin the United Kingdom from taking any action calculated to coerce or to compel the surrender of the accused individuals to any jurisdiction outside Libya. Libya’s request for provisional measures was denied, but the request for a decision on the interpretation of the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation remained on the docket of the Court. In February 1998, the Court issued a ruling that dealt only with the preliminary objections raised by the United States. The United States position, in substance, was that the Court could not interfere with the sanctions imposed by the Security Council in Resolution 731 and in a subsequent Resolution 883 in 1993. The Court rejected that position, finding that its power to interpret the 1971 Convention was independent of the Security Council’s actions. However, the Court never reached the ultimate question of whether Libya’s referral of the case for prosecution purposes to its own authorities complied with the Convention. A political settlement was reached in which the
United Nations sanctions were removed and Libya surrendered two defendants to a Scottish court sitting in The Hague. One was acquitted. The other, a Libyan intelligence officer, was convicted, sentenced to imprisonment and eventually released before succumbing to a terminal illness.\textsuperscript{a}

\textsuperscript{a}See Questions of Interpretation and Application of the Montreal Convention Arising From the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) Provisional Measures and Questions of Interpretation and Application of the Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States), April 14, 1992, International Court Of Justice, www.icj-cij.org/docket/index.

**Case study. United States v. Yousef and Others**

The provisions of United States law implementing the Montreal Convention were applied in the case of United States v. Yousef and others, 327 F.2nd 56 (2nd Cir. 2003). Yousef had engaged in a conspiracy to bomb multiple American registered aircraft over the Pacific Ocean. To test the explosive devices he placed a bomb on a Philippine Airline flight which killed a Japanese national. After being arrested in the United States, Yousef's convictions for the conspiracy and bombing, together with other offences, were upheld. The appeal court opinion discussed the application of various jurisdictional grounds to aviation offences. The District Court had upheld extraterritorial jurisdiction over the bombing of the Philippine Airline flight under the theory that a terrorist attack on an aircraft in flight, like maritime piracy, was a crime subject to universal jurisdiction under customary international law. The appellate court ruled that terrorism could not be considered a universal offence because customary international law did not provide a sufficiently precise definition of what conduct constituted such an offence. However, the court upheld the conviction for the bombing of the Philippine Airline flight and murder of a Japanese national on the basis of the Montreal Convention as implemented in United States domestic law. According to the court's interpretation, the prosecution of Yousef was mandatory under Convention article 7 when he was found in the territory of the United States and it did not extradite him, regardless of the location of the offence. The court found this obligation to exist even though no requests for extradition had been made or refused and even though Yousef was “found” in the territory of the United States after being returned in custody from Pakistan to face prosecution for a bomb attack in 1993 against the World Trade Center in New York.


The Hague and Montreal Conventions addressed the unlawful seizure and destruction of aircraft by providing criminal justice tools for international cooperation. Those tools included extradition, establishment of jurisdiction to prosecute offenders who were not extradited and mutual legal assistance in evidence gathering against aircraft-related offences. Another terrorist phenomenon that arose after the negotiation of the 1970 and 1971 Convention focused not on seizing or destroying aircraft but upon inflicting death and serious injury in airport terminals. This phenomenon was a tactic of fanatical groups which attacked crowded airports with the intent of causing maximum loss of life. An early example of this violent tactic was carried out in May 1972 by members of the Japanese Red Army revolutionary group in sympathy with the Palestinian cause. Using automatic weapons and hand grenades, the attackers killed or wounded over 100 victims at Lod Airport in Tel Aviv. In August 1973, a similar
attack was carried out at the Athens airport by members of the Black September organization. Three persons were killed and over 50 wounded, and hostages were held for several hours before the two attackers surrendered. In August 1982 a bomb and firearms attack was carried out by an Armenian terrorist organization at the Ankara airport with multiple deaths and injuries. In July 1983 another bomb was placed by members of the same organization near the Turkish Airlines area at Orly Airport, Paris, killing or wounding some 150 persons. In December 1985 coordinated attacks were carried out at the Rome and Vienna airports by the Abu Nidal organization. Most of the attackers were killed in the police response, but they had succeeded in killing twenty persons and wounding 140.

At its 1986 meeting, the Council of the ICAO called for the development of an international criminal law instrument to address this series of attacks in airports. The instrument was adopted at a diplomatic conference on air law in Montreal in February 1988. It amended the Montreal Convention by adding the requirement to criminalize violent attacks against persons at an airport serving international civil aviation, or against the airport facilities or its services or parked aircraft.

### 2.5.1 The offence established and the significance of the Airport Protocol

Section 2.1 of the Protocol provides that:

> “1 bis. Any person commits an offence if he unlawfully and intentionally, using any device, substance or weapon:

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

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

The reference to an airport serving international civil aviation paralleled the limitation found in article 4.5 of the 1971 Montreal Convention. That limitation in the 1971 Convention criminalizes damage to air navigation facilities only if they are used in international air navigation. Similarly, the Airport Protocol limits its offence definition to acts involving airports serving international civil aviation, thus excluding domestic incidents lacking a significant international element.

### Activity

Assume that a Minister of Justice or Attorney General has asked why her State should adopt the Airport Protocol, since it already has ordinary criminal law offences that punish acts of violence causing serious injury, death or damage at airports or any other location within its territory. The 1963, 1970 and 1971 instruments provide value added by requiring that criminal jurisdiction be established by the State of registration and that other interested States prohibit acts which in some situations were not adequately criminalized. (See the Cordova Case Study, p. 13). The 1988 Protocol does not clarify any extraterritorial jurisdictional issues or require criminalization of acts that are not already offences in every legal system. What arguments can be made to the Minister or Attorney General explaining how the Airport Protocol serves the State’s interests, identifying the advantages to be derived from its adoption?
Considerations: It is not feasible for every State to have treaty relations governing extradition and mutual assistance with all of the other 192 Member States of the United Nations. Joining a universal instrument with broad membership provides instant treaty relationships with all other States Parties to that agreement.

Case study. The destruction of Gaza International Airport case

An ICAO Information Paper, AVSEC-Conf/02-IP/29, “Destruction of Gaza International Airport” of 18 February 2002, paragraph 21, states the following:

“On 4 December 2001 Israeli military forces attacked the Gaza International Airport, destroyed the air navigation facilities and bombarded runways and taxiways until the airport became unserviceable. When the Palestinian Authority attempted a repair on 11 January 2002, the Israeli military forces bombarded once again the airport and its facilities by aircraft, artillery and tanks, thereby destroying the runway, the taxiways and all facilities.”

Activity


Consider whether the criminal provisions of the Airport Protocol can be applied to a State and its officials responsible for destruction of an airport serving civil aviation. Jiefang Huang of the ICAO Legal Affairs and External Relations Bureau argues persuasively that the history of the application of the Montreal Convention and its 1988 Airport Protocol indicates that those instruments were intended to apply only to non-State actors. The responsibility of a State before the International Court of Justice and of its officials before the International Criminal Court would be separate issues. That question arose with respect to the International Convention for the Suppression of Terrorist Bombings in 1997. Article 19 of that instrument resolved the issue by providing that:

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.


*See Jiefang Huang, Aviation Safety through the Rule of Law: ICAO’s Mechanism and Practices, Module footnote 16.
The 1997 International Convention for the Suppression of Terrorist Bombing crystallized the concept that the counter-terrorism legal instruments apply to non-State actors, while the conduct of States and their military forces are governed by the United Nations Charter and international humanitarian law. That resolution was then adopted in the 2005 SUA Convention amending the 1988 maritime SUA Convention, as well as in the 2010 Beijing Convention.

2.5.2 The relationship of the 1988 Airport Protocol to the 1971 Montreal Convention for the Suppression of Unlawful Acts against Civil Aviation

Article 1.2 of the Airport Protocol provides that the Protocol supplements the Montreal Convention. Between States Parties to the Protocol, the Convention and Protocol shall be read and interpreted together as one single document. Article 2 then provides that the Protocol’s offence definition shall be added to the 1971 Convention as new paragraph 1 bis. The Protocol is a supplement to the 1971 Convention which cannot be adopted by a State without that State also being or simultaneously becoming a State Party to the Montreal Convention. This is understandable, as the Protocol is a brief document that relies upon the international cooperation mechanisms contained in the underlying 1971 Montreal Convention and some of its formal provisions, such as a dispute resolution mechanism. One result of this choice of form is that denunciation of the 1971 Montreal Convention by a State Party would have the effect of denunciation of the Protocol. Conversely, States Parties to the Convention who join the Protocol may later choose to denounce the Protocol without denouncing the 1971 Convention.


In December 1988, a Pan American airlines flight from London to New York was destroyed by a bomb and crashed in Lockerbie, Scotland. The subsequent investigation established that a bomb composed of plastic explosives and located in the baggage compartment had destroyed the aircraft.

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In February 1989, the ICAO Council adopted a resolution urging its Member States to expedite research and development on detection of explosives and on security equipment. In June 1989, the United Nations Security Council adopted Resolution 635 condemning unlawful interference against civil aviation and calling on Member States to cooperate in devising and implementing preventive measures, including an international regime for the marking of plastic explosives for the purpose of detection. In the same month, the ICAO Council decided to include the preparation of a new legal instrument regarding the marking of explosives as a priority for the Legal Committee. On March 1, 1991, an International Conference on Air Law adopted the Convention on the Marking of Plastic Explosives for the Purpose of Detection. The Convention contained no criminal provisions and was aimed at establishing the obligation and procedures to ensure that plastic explosives are manufactured with specified detection agents. It came into effect in June 1998. Since the adoption of the Convention, various other technological solutions for the detection of explosives have also been developed.


For the text of the Convention, see Module annex II.

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

After the attacks on targets in the United States on 11 September 2001, the ICAO Assembly adopted Resolution A33-1 of October 2001. That resolution directed the ICAO Council and its Secretary General “to address the new and emerging threats to civil aviation, in particular to review the adequacy of the existing aviation security conventions” and directed the Council to convene a ministerial conference on aviation security with the objectives of preventing, combating and eradicating acts of terrorism involving civil aviation and otherwise strengthening aviation security. Pursuant to this resolution and recommendations of a High-Level Ministerial Conference on Aviation Security held in February 2002, the ICAO Council approved a project for review of the existing aviation security instruments. The ICAO Secretariat conducted a survey of ICAO Member States as well as internal research. Active development of a new instrument was carried forward after negotiation in 2005 of the Protocols to the IMO Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Fixed Platform Protocol.
In 2006 the ICAO Secretariat Legal Affairs and External Relations Bureau convened a Study Group of ten national experts, acting in their individual capacities, and a UNODC Terrorism Prevention Branch representative. This group met in 2006 and 2007 and recommended that the ICAO Legal Committee examine the advisability of certain proposals. The Legal Committee recommended that these drafts be considered by a diplomatic conference, which took place in Beijing in August and September 2010. The conference adopted the Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation. Once it enters into force between States Parties, the Convention will replace the Montreal Convention and its Airport Protocol. This instrument is distinguishable from the Montreal Convention by use of the terminology “relating to International Civil Aviation” in its title rather than the 1971 language “against the Safety of Civil Aviation”.

For the text of the Convention, see Module annex II.

Once the Beijing Convention comes into effect between its States Parties, its provisions will replace both the 1971 Montreal Convention and the 1988 Airport Protocol. For States which do not adopt the Beijing Convention but are Parties to both the Montreal Convention and its Airport Protocol, the Montreal Convention as amended by the Airport Protocol continues in effect. For those few States that are Parties only to the Montreal Convention but not its Airport Protocol, only the Montreal Convention will continue to apply until a State has adopted the Beijing Convention.

### 2.7.1 Jurisdictional provisions

As in earlier aviation instruments, the jurisdictional scope of the Beijing Convention is limited to situations involving international elements, such as a flight taking off or landing in the territory of a State other than the State of registration or the presence in a State of an alleged offender. The jurisdictional grounds and limitations which appear in article 4.2 through 4.6 of the Montreal Convention appear in article 5.2 through 5.6 of the 2010 Beijing Convention.

As explained in detail in Module section 1.2, both the mandatory and optional grounds for jurisdiction recognized in prior aviation instruments were expanded in the Beijing Convention and Protocol.

As stated in the 2010 Beijing Convention, article 8.2:

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

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

A State where a forced landing occurs allows the hijackers to escape in exchange for the safe release of hostages. The State Party of the nationality of the passengers held hostage and assaulted during the hijacking has established its jurisdiction over offences committed abroad against its nationals, has initiated a prosecution against the hijackers and has secured an Interpol Red Notice for their arrest.*

When the hijackers are arrested in a third State Party, their defence counsel asserts that they cannot be extradited pursuant to the 2010 Beijing Convention. The defence counsel argues that sovereignty and the protection of a State’s criminal policy positions are the reasons for the widely observed rule of double or dual criminality. Counsel argues that the principle of double criminality requires or should require not only that the acts constituting the alleged offence be punishable in both the requesting and requested States but that there must also be mutuality of jurisdiction. In this case mutuality is lacking because the policy of the requested State is not to exercise extraterritorial jurisdiction based upon its nationals being victims of an offence, commonly known as the passive personality principle.

Accordingly, counsel argues that the requested State should not assist another State to exercise a form of jurisdiction which it does not recognize, just as it would not extradite for an offence of blasphemy when it does not recognize such an offence. How should government counsel respond and what should the judge’s decision be on the ability of the requested State to extradite? The participants should base their answers on the law of their home country regarding the dual criminality principle. Consideration: Paragraph 3 of article 8 of the Beijing Convention provides that:

> “Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 1, in the case where the alleged offender is present in its territory and it does not extradite that person pursuant to article 12 to any of the States Parties that have established their jurisdiction in accordance with the applicable paragraphs of this article with regard to those offences.”

Under paragraph 3 of article 8 the consequence of a failure to extradite would be a mandatory duty, “without exception whatsoever” pursuant to article 10 of the 2010 Beijing Convention, to refer the case to the competent authorities of the requested State.

Consideration: Which interpretation best serves the criminal justice policy interests and sovereignty of the requested country: (a) having to undertake responsibility for a potentially sensitive and expensive international prosecution for an act committed elsewhere accompanied by the risk of terrorist retaliation or (b) having the discretion to decide whether to undertake a potentially burdensome prosecution or to extradite an offender to a State eager to undertake the prosecution?

*A factsheet on INTERPOL’s mechanisms for tracing wanted individuals is available at Publications / News and media / Internet / Home - INTERPOL

UNODC Counter-Terrorism Legal Training Curriculum, Module 3, International Cooperation in Criminal Matters: Counter-Terrorism, section 1.2.2.1 contains a discussion of the principle of aut dedere aut iudicare, that is to extradite or prosecute. The discussion includes a number of case studies. The UNODC Legislative Guide to the Universal Legal Regime against Terrorism dedicates its chapter III to the topic of jurisdiction over offences.
2.7.2 Offences criminalized under the Beijing Convention

Article 1.1 of the Beijing Convention contains subparagraphs (a) through (e), which repeat the offences initially defined in article 1 (a) through (e) of the Montreal Convention. Article 1.2 of the 2010 Beijing Convention repeats the offences found in article 2 of the 1988 Airport Protocol. In addition, new offences are found in article 1.1, subparagraphs (f) through (i). Those new offences provide that any person commits an offence if that person unlawfully and intentionally:

(f) Uses an aircraft in service for the purpose of causing death, serious bodily injury, or serious damage to property or the environment; or

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

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

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

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

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

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

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

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

29See Module section 2.4.1.
30See Module section 2.5.1.
31Defined in article 2 (h) as biological, chemical or nuclear weapons, with each of those terms explained.
32The multilateral non-proliferation treaties referred to in article 7 are: the Treaty on the Non-Proliferation of Nuclear Weapons (1968); the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972); and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993).
These offences involving use of an aircraft as a weapon, weapons delivery system or means of transport for BCN weapons have many features in common with certain regulatory instruments, such as the treaties on nuclear non-proliferation and biological and chemical weapons referred to in article 7 of the Beijing Convention.

The language of the offences in subparagraphs (f) through (i) of article 1 of the 2010 Beijing Convention adapts offences involving BCN materials and established in the 2005 SUA Convention to the aviation context. Consequently, those offences are discussed in Module section 3.6 in connection with the maritime 2005 SUA Convention in which those provisions were initially developed. Module sections 3.6.6 through 3.6.8 provide detailed discussions of the relevant terminology.

2.7.3 New forms of criminal participation

Article 1.3 (a) and (b) of the Beijing Convention make it an offence to threaten to commit any of the offences in subparagraphs (a) through (d) and (f) thorough (h) or to unlawfully and intentionally to cause a person to receive such a threat. A condition designed to reduce the risk of treating irresponsible but relatively harmless conduct as an international offence is the requirement that the threat be made “... under circumstances which indicate that the threat is credible”.

Article 1.4 of the Beijing Convention introduces additional forms of criminal liability which were not present in the previous aviation instruments. The Hague Convention, the Montreal Convention and its Airport Protocol all extended criminal liability to those who committed prescribed acts, attempted to do so, or were accomplices of the persons who directly committed or attempted to commit the offence defined in a particular convention. The scope of criminal liability in the Beijing Convention is significantly expanded beyond attempting the offence or being an accomplice.

This expansion continues a trend which has been developing since 1988 with respect to the scope of criminal liability in United Nations terrorism-related legal instruments. The 1988 SUA Convention and its Fixed Platform Protocol added liability for anyone who “abets the commission of any of the offences set forth” in the subparagraph, thus imposing criminal liability upon accomplices of the persons who commit the offence. The International Convention for the Suppression of Terrorist Bombings of 1997 made participation as an accomplice an offence in its article 2.3 (a). It then introduced new language imposing liability in terms suggestive of the concept of an association de malfaiteurs. This offence, which may also be called participation in an association to commit offences, is found in a number of systems of the Roman or “civil law” tradition.

Similar provisions were included in article 2.5 of the 1999 International Convention for the Suppression of the Financing of Terrorism; in article 2.4 of the 2005 International

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33Subparagraph (e) of article 1.1 is omitted from the listing in subparagraphs (a) and (b) of article 1.3, as the offence in subparagraph 1.1 (e) is the communicating of information known to be false, thereby endangering the safety of an aircraft in flight. Threatening to communicate false information does not entail the same risk of harm or require the same preventive measures as threatening to use violence or to misuse hazardous BCN substances.

34Article 3.2 (b) of the SUA Convention; article 2.2 (b) of the Fixed Platform Protocol.
Convention for the Suppression of Acts of Nuclear Terrorism; in article 1 \((k)\) of the 2005 Amendment to the Convention on the Physical Protection of Nuclear Material; and in article 4.6 of the 2005 SUA Protocol. The aviation instruments of 2010 continued the trend evidenced in these prior counter-terrorism related instruments of expansion of vicarious criminal liability, meaning criminal liability for acts done or to be done directly by other persons.

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

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

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

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

\((ii)\) Be made in the knowledge of the intention of the group to commit an offence set forth in paragraph 1, 2 or 3 of this Article.\(^{35}\)

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

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

\(^{35}\)Although not required by the Convention, as a matter of practice some States specify which type of offence they have established in a declaration submitted in connection with the ratification instruments.
Activity

Australia requires an overt act as an element of the offence in its federal conspiracy law. In the United States statutory conspiracies to commit some substantive offences require an overt act and others do not. Assume that the United States requests extradition after the Beijing Convention comes into effect between it and Australia. If the charge does not refer to the existence of an overt act, must Australia deny extradition because such an act is an essential element of a conspiracy under its law? If the factual materials supplied to Australia in the extradition request show the existence of an overt act, does that proof permit extradition under the Convention because the acts alleged would be an offence in Australia? Should Australia deny extradition because at trial the American jury need not find the presence of an overt act if the statute does not require one, and the prosecution may even elect not to offer the evidence of the overt act, or because by the time of trial that evidence could have been suppressed as illegally obtained?

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

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

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

followed by the subparagraphs 1.5 (a), conspiracy and (b), contribution to a criminal association. Under subparagraph 5 (a), the offence established may be a conspiracy that does or does not require an overt act as an essential element of its commission under national law, but the offence established must not require that the substantive offence that is the object of the conspiracy be attempted or accomplished. Under subparagraph 1.5 (b), the offence established may be an association offence focused on participation in a group with a criminal activity or purpose with or without any requirement for a material action of preparation having taken place, but the offence established must not require that the substantive activity or purpose for which the group is preparing be attempted or accomplished. The effect of the chapeau language in paragraph 5 of article 1 of the Beijing Convention is direct and clear with respect to the aviation offences established in paragraph 1.5. It may, however, have an unpredictable retroactive effect on the understanding and interpretation of the criminal association type of offence required to be established by subparagraph (a) of article 3 quater of the 2005 SUA Convention.

See Module section 3.6.8 for a discussion of how the article 1, paragraph 5 of the Beijing Convention may influence interpretation of paragraph (e) of article 3 quater of the 2005 SUA Convention.
2.7.5 Liability of legal entities

Article 4 of the Beijing Convention includes language concerning the liability of legal entities that has been adopted in a number of international conventions, including the 2005 maritime counter-terrorism related instruments.36

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

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

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

2.7.6 Protections for an accused person

The early aviation instruments established several guarantees protecting alleged offenders. Under articles 8 and 9 of the 1963 Tokyo Convention, a person may be disembarked to protect the safety of the aircraft and of persons or property or to maintain good order and discipline on board. Article 15.1 of the Convention requires that a person so disembarked shall be at liberty to continue his journey unless his presence is required by the law of the State of landing for the purpose of extradition or criminal proceedings. Under the 1963 Convention, a State Party that takes delivery of a person in custody of a person from an aircraft commander may continue that custody only “for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted”, and the person in custody “shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national”.37 Article 15.2 of the 1963 Tokyo Convention requires the State in which a person has been disembarked or delivered to accord to such person treatment no less favourable for his protection and security than that accorded to nationals of that State in like circumstances.

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

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37 Articles 13.2 and 13.3 of the 1963 Tokyo Convention.
The Tokyo Convention made no reference to international law standards and only required treatment equal to that received by nationals, which in some situations regrettably may not have satisfied international human rights obligations. The Hague and Montreal Conventions did not add any new protections for an alleged offender.

By the time of the adoption of the 2010 Beijing instruments, human rights protections were being recognized in increasingly precise language in United Nations instruments. In addition to those found in the prior aviation instruments, the 2010 instruments included article 11 in the Beijing Convention commonly known as a “fair treatment article”, and a counterpart article 10 in the Beijing Protocol. The articles require that a person regarding whom measures or proceedings are being carried out pursuant to the Convention:

... shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

Article 14 in the Beijing Convention and article XIII in the Beijing Protocol are what are commonly called non-discrimination articles. Article 14 of the Convention is representative of the language employed in other modern international treaties.38

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

The interaction of fair treatment and non-discrimination guarantees with the obligation of a requested State to extradite or prosecute rule is discussed in Module section 1.4.2.

2.7.7 Treatment of the political offence exception to international cooperation

Article 13 of the Beijing Convention provides that:

None of the offences set forth in article 1 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

The presence of this article in the Beijing Convention and its seemingly repetitive listing of grounds on the basis of which cooperation may not be refused, that is, “... a political offence or an offence connected with a political offence or an offence inspired by political motives” can best be understood in a historical context. Section 1.1.3 of the Module explained how article 2 of the Tokyo Convention incorporated what is commonly known as the “political offence” exception to extradition and mutual legal assistance into that instrument, as well as foreshadowing the anti-discrimination articles that were to appear in other United Nations conventions decades later. Article 2 of the 1963 Tokyo Convention declared that:

... no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

The political offence exception found in article 2 of the Tokyo Convention does not appear in the subsequent 1970 Hague Convention or in the 1971 Montreal Convention. The 1963 Tokyo Convention was a generic instrument, applicable to all types of disruptions on board, including an unruly or drunken passenger or an unlawful seizure by asylum seekers fleeing alleged persecution or discrimination. Subsequent aviation instruments were specific reactions to terrorist attacks intended to intimidate or coerce governments and populations. Excluding offences of a political nature would have nullified their essential purpose, as the communication of political messages and demands was precisely the motivation for the violent acts that led to the civil aviation counter-terrorism related instruments adopted in 1970, 1971, 1988, 1991 and 2010.

As was explained in Module section 1.1.3, the political offence exception has always suffered from a great deal of doctrinal confusion as to its elements and limits. Some schools of legal thought believed the concept applied only to so-called “pure political offences” such as treason and espionage. Others argued for an exception based primarily on individual political motivation or whether the act was connected to a political act or a widespread political movement. Yet other jurists engaged in a balancing of whether the offence had more characteristics of an ordinary crime or a political act.

A decision was made in 1997 by the drafters of the International Convention for the Suppression of Terrorist Bombings to expressly exclude the possibility of a State Party applying the political offence exception to international cooperation. Article 11 of the 1997 Convention contains comprehensive language which was clearly designed to apply to all the various permutations of the exception. That formulation has become standard in subsequent universal instruments focused on combating terrorism and was adopted in the aviation and maritime-terrorism related conventions and protocols of 2005 and 2010. Article 13 of the Beijing Convention of 2010 follows the language developed in the 1997 Terrorist Bombing Convention and provides that:

None of the offences set forth in article 1 shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

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39See article 10.2 of the 2005 SUA Protocol; article 2 of the Protocol to the Fixed Platform Protocol; article 13 of the Beijing Convention; article XII of the Beijing Protocol.
The purpose of the seemingly repetitive rephrasing in article 11 of the Beijing Convention of the basis for the political offence exception, “as a political offence or as an offence connected with a political offence or as an offence inspired by political motives”, is to expressly and comprehensively negate all of the justifications that have been advanced for such an exception, thereby ensuring it will not recognized in any formulation under conventions in which this article appears.

### Case study. Political offences and extradition

Well in advance of the Beijing Convention's inclusion of article 11 making the political offence exception inadmissible, and even before adoption of the predecessor article in the 1997 International Convention for the Suppression of Terrorist Bombings, the exception was being limited or rejected.

In December 1989 a Chinese national seized control of a China Air flight from Beijing to New York by threatening to destroy the plane with explosives. The aircraft landed in Japan, and extradition from Japan to China was requested.

The hijacker asserted the political offence defence to extradition, claiming that he was involved in political protests and was seeking political asylum.

The Tokyo High Court ruled that the hijacking was not a political offence. The unlawful seizure was found to have no direct relevance to a political purpose, any political connection with the protests did not outweigh the victimization to which the passengers and crew of the aircraft were subjected, and the hijacking was an effort to avoid prosecution for bribery.

In the current United Kingdom-United States extradition treaty, offences involving murder, grievous bodily harm, unlawful detention or hostage-taking, placing, using or threatening the use of an explosive, incendiary or destructive device or possession of such a device are explicitly excluded from the definition of political offences, as are any offences subject to an extradite or prosecute obligation under a multilateral treaty to which both the United Kingdom and the United States are parties.

### Additional language relating to humanitarian law and arms control agreements

Since 1963 all of the aviation and maritime security instruments have consistently excluded aircraft or ship used in military, customs or police services from their scope. That same exclusion is repeated in article 5.1 of the 2010 Beijing Convention. When the transport-related instruments began to deal with issues of biological, chemical and nuclear weapons and non-proliferation issues in the maritime context, it was deemed advisable to include additional language in articles concerning the relationship of the relevant instruments to international humanitarian law relating to certain weapons and materials. The first such article was article 3 of the 2005 SUA Protocol. Substantially similar language was adopted in article 6 of the 2010 Beijing Convention, divided between articles 6 and 7.

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40See Module section 1.1.2.
Article 6

1. Nothing in this convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the charter of the United Nations, the Convention on International Civil Aviation and international humanitarian law.

2. The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

3. The provisions of paragraph 2 of this article shall not be interpreted as condoning or making lawful otherwise unlawful acts, or precluding prosecution under other laws.

Article 7

Nothing in this Convention shall affect the rights, obligations and responsibilities under the Treaty on the Non-Proliferation of Nuclear Weapons, signed at London, Moscow and Washington on 1 July 1968, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972, or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, signed at Paris on 13 January 1993, of States Parties to such treaties.


Activity

The Achille Lauro cruise ship hijacking and subsequent events are described in Module section 3.2. In the aftermath of the ship seizure and murder, the hijackers were allowed transit on an aircraft supplied by the landing State as part of a negotiated arrangement to secure the release of hostages. If a similar situation occurred between States Parties to the Beijing Convention after it comes into effect and one State used its military forces to destroy the aircraft carrying the hijackers, would an offence have occurred under the Beijing Convention?

Considerations: Would a civilian airliner required by a Government to transport hijackers in these circumstances come within the scope of the Convention? Does it make any difference that Egypt Air was owned by the Egyptian Government at the time but was independently managed and financed? Do these circumstances qualify as the activity of armed forces during an armed conflict? Do the circumstances involve action undertaken by military forces of a State in the exercise of their official duties? If they do qualify in either way and so are not within the scope of the Convention because of the military exclusion clause, what international instruments might permit remedial action and in what international tribunals?
Case study. German Air-Transport Security Act of 2004

Consider the appropriateness of a law such as the German Air-Transport Security Act of 2004. Section 14.3 of the Act allowed the Minister of Defence to order that a passenger aircraft be shot down if it could be assumed the plane would be used against the lives of others and no other alternative could be found. In 2006 the German Federal Constitutional Court concluded that Section 14.3 was unconstitutional. Its reasoning was that the principle of proportionality found in the law of war did not apply, as a terrorist incident is not an armed conflict as recognized by humanitarian law. Since shooting down the plane would result in the loss of innocent lives, under peacetime law it would violate the right to life guaranteed by article 1 (1) of the German Basic Law. The German Minister of Defence at the time indicated that he might nevertheless order the destruction of an aircraft being used as a weapon. His position may reflect the unfortunate reality that the passengers and crew of a seized aircraft are likely to die in any event, either by being shot down by the military or by perishing when the terrorists use the aircraft as an impact or incendiary weapon against a ground target, such as a crowded stadium containing tens of thousands of potential victims.

*Article 1.1 Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. Informal translation available at https://www.unodc.org/tldb/.

Case study. The United Airlines Flight 93 case

One of four aircraft hijacked on 11 September 2001 was United Airlines Flight 93 en route from Newark, New Jersey to San Francisco. Its departure was delayed. When it was seized by hijackers other seized planes had already been flown into the Pentagon in the Washington area and into the World Trade Center in New York. As a consequence, the hijacked passengers and crew had time to learn of these events over their mobile phones. The hijackers had stabbed a crew member and seized the cockpit and changed direction toward Washington D.C. The passengers were informed in those calls that other seized aircraft had been flown into ground targets. They therefore attempted to overpower the hijackers, who apparently flew the plane into the ground to avoid that result. The plane crashed approximately 20 minutes flying time from the United States Capitol, which subsequent investigation indicated as a likely target. At the time of the crash, military aircraft were en route to shoot down the commercial flight and would have been scheduled to intercept it just outside of Washington, D.C.


Unlike the reaction of the German Constitutional Court to the authority granted by the Air-Transport Security Act of 2004, there was no substantial criticism by the American public of the intended destruction of United Airlines flight 93. Russian law also contemplates the shooting down of a threatening aircraft, including an unlawfully seized one which would necessarily have innocent persons on board. The English translation of article 7, Suppressing Terrorist Acts in the Air, of Federal Law 35-FZ of 6 March 2006, found in the UNODC Terrorism Legislative Data Base, provides that:
1. The Armed Forces of the Russian Federation shall use their weapons and military equipment accordance with the procedure established by normative legal acts of the Russian Federation for the purpose of removing the threat of a terrorist act in the air or for the purpose of suppressing such terrorist act.

2. If there is reliable information about a probable use of an aircraft for committing an act of terrorism or about seizure of an aircraft and, with that, all measures required under the circumstances for its landing have been taken and there is a real danger of the loss of life or the onset of an ecological catastrophe, the Armed Forces of the Russian Federation shall use their weapons and military equipment for preventing the flight of the said aircraft by way of destroying it.

It should be noted that the German, United States and Russian positions do not in any way depend upon the aviation security instruments. Article 51 of the United Nations Charter reserves to each State the right to self-defence in emergency situations.

Case study. R. v. Khawaja

In the Canadian case of R. v. Khawaja (2012), Supreme Court of Canada, a defendant argued that his making bomb detonators was not an offence because it was done in connection with an armed conflict. The Court upheld a lower Court ruling that ordinary criminal law rather than humanitarian law applied because no armed conflict existed in Canada or in the countries where the detonators were to be used. Additionally, as a matter of raising a technical point, the Supreme Court found that the armed conflict exception functions as a defence and thus the burden was on the appellant to raise and establish a prima facie case that the exception should apply in the circumstances. The appellant could not raise the possibility of such an exception applying as he had insufficient evidence to support this claim.

2.8 Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft (2010, Beijing Protocol)

Simultaneously with their work on updating the 1971 Montreal Convention and its 1988 Airport Protocol, the Special Sub-Committee and the Legal Committee adopted a text on updating the 1970 Hague Convention. This text was considered by the 2010 Beijing Diplomatic Conference and adopted as the 2010 Beijing Protocol. Once the 2010 Beijing Protocol comes into effect between its States Parties, it will be read and interpreted together with the Hague Convention as one single instrument and will be formally known as The Hague Convention as amended by the Beijing Protocol, 2010.
2.8.1 Relationship of the 2010 Beijing Protocol to the 1970 Hague Convention

The 2010 Beijing Protocol Supplementary to the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft amends the Convention which it supplements. The drafting approach in the Beijing Protocol differs from the way the 1988 Airport Protocol amended the Montreal Convention. The Airport Protocol was supplementary not only in legal effect but in linguistic content to the Montreal Convention. The 1988 Protocol added a new offence and made conforming changes to the Montreal Convention but was not a comprehensive rewriting of the earlier agreement. The 2010 Protocol, on the other hand, completely rewrites the 1970 Hague Convention. Its articles not only add new provisions but completely replace articles 1, 2, 3, 4, 5 and 8 and replace paragraphs and terminology in other articles. A State cannot be a Party to the 2010 Beijing Protocol without being a Party to the 1970 Hague Convention.

A simple way to avoid any confusion over the numbering of the operative articles in the Beijing Protocol and the re-numbering of the resulting articles as they will appear in the amended 1970 Hague Convention is to recognize the coding system employed in the Beijing Protocol. Roman numerals are used to designate articles of the Beijing Protocol itself and Arabic numerals are used to designate the amended articles as they will appear after modification or replacement by the Protocol language. The effect is as shown in the following example:

Article II (of the 2010 Protocol)

Article 1 of the Convention (1970 Hague Convention) shall be replaced by the following:

Article I

1. Any person commits an offence ...

Article XIX of the Beijing Protocol provides, as did article 1 of the Airport Protocol to the Hague Convention, that the Protocol and the Convention being amended shall be read and interpreted together as a single agreement.41 Article XIX of the Beijing Protocol further provides that this single instrument “shall be known as The Hague Convention as amended by the Beijing Protocol, 2010.”

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41 Section 1 of the Airport Protocol (1988).
2.8.2 Changes in the offences criminalized

The 2010 Beijing Protocol modifies the offences criminalized to reflect modern dangers. Article II of the Protocol replaces article 1 of The Hague Convention with new language which criminalizes unlawfully and intentionally seizing or exercising control of an aircraft in service “by any technological means”.

Examples of “any technological means” could include sophisticated means of influencing an aircraft’s aviation electronics or its navigation information from a remote source during flight or the introduction of corrupted code or a destructive virus into the aircraft’s on-board computers.

The 1970 Hague Convention had only reached unlawful seizures by means of force, threat or any form of intimidation. Beijing Protocol article II creates additional language in article 1.2 of the resulting instrument known as the Hague Convention as amended by the Beijing Protocol. That new language establishes as offences the making of a threat to unlawfully seize or exercise control of an aircraft and unlawfully causing a person to receive such a threat.

Additionally, the Beijing Protocol establishes new ways in which persons may incur criminal liability for the above offences. The Hague Convention only reaches a person on board an aircraft who engages in, attempts to perform or is an accomplice of a person who performs or attempts to perform an unlawful seizure by force or threat thereof. The Beijing Protocol no longer requires that an offence be committed “on board”. New language in amended article 1.3 extends to the person physically committing the offence: a person who attempts the offence; one who organizes or directs another to commit an offence; one who participates as an accomplice; and any who unlawfully assists another to evade investigation, prosecution or punishment, knowing that the person has committed an offence or that the person is wanted for prosecution or has been sentenced for such an offence. New article 1.3 of the amended Convention also requires States Parties to establish as offences, whether or not any offence is actually committed, either a conspiracy or criminal association type of offence. These are the same expansions of criminal liability discussed in Module section 2.7.5 as having been introduced into the Beijing Convention. Similarly, article IV of the Beijing Protocol creates an article 2 bis in The Hague Convention as amended by the Beijing Protocol, which contains the same provision for legal liability of legal persons as appeared in article 4 of the Beijing Convention.42

See the Case study in Module section 2.4.4 concerning litigation of the dispute in the International Court of Justice concerning the Lockerbie aircraft bombing.

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42See Module section 2.7.6.
2.9 Protocol to the Convention on Offences and Certain Other Acts Committed on Board Aircraft (2014, Montreal Protocol)

While the 1963 Tokyo Convention has been regarded as successful in governing general offences committed on board aircraft, it began to appear that it required adjustments to take into consideration modern developments in the civil aviation industry. In 1997, the ICAO Council decided on the establishment of a Secretariat Study Group on Unruly Passengers. Later, in 2009, the International Air Transport Association (IATA) noted, during the Session of the ICAO Legal Committee, that incidents involving disruptive and unruly passengers had continued to rise steadily. Accordingly, the Secretariat Study Group on Unruly Passengers was reactivated in 2011 and it subsequently identified a number of legal issues which needed to be addressed, including a review of the jurisdictional clauses under the 1963 Tokyo Convention; the establishment of common standards and practices with regard to offences; the strengthening of international cooperation in harmonizing enforcement procedures; the powers of the aircraft commander and related immunity; and the status of In-Flight Security Officers (IFSOs). The Study Group concluded that the issue of unruly passengers needed to be addressed by the international community and, that ICAO was the proper forum for this purpose, recommending that the Tokyo Convention should be reviewed and the feasibility of its amendment examined. The 35th Session of the ICAO Legal Committee held in Montreal in May 2013 considered the text prepared by the Special Sub-Committee convened for the purpose of exploring the amendment process.

The draft text of the Protocol was further discussed, considered and adopted at the Diplomatic Conference held in Montreal between late March to early April 2014. The 1963 Tokyo Convention and the 2014 Montreal Protocol shall be read and interpreted together as one single instrument among Contracting States to this Protocol.

2.9.1 Relationship and application of the 2014 Montreal Protocol to the 1963 Tokyo Convention

The 2014 Montreal Protocol amends the 1963 Tokyo Convention in response to the requirements of the civil aviation industry in the modern era. The focus of the Protocol is to modernize the Tokyo Convention by, inter alia, introducing additional bases to exercise criminal jurisdiction and expressly extending legal recognition and protection to in-flight security officers (IFSOs).

The 2014 Montreal Protocol introduces two additional bases of mandatory jurisdiction consisting of the State of landing and State of the operator of the aircraft.

The new grounds for establishing jurisdiction also work to supplement the operation of article 9 of the Montreal Protocol which for purposes of extradition proceedings, deems offences
or acts to have been committed in the territory of any State that is required to establish jurisdiction on a mandatory basis. However, while this can be seen as an improvement to the 1963 Tokyo Convention by increasing the number of States that would be able to seek extradition, article 16.2 of the Tokyo Convention will continue to apply and thus States Parties remain under no obligation to extradite any persons suspected of involvement in the offences or acts in contravention of the Convention.

Similarly, while article 4 of the 2014 Montreal Protocol facilitates cooperation among Contracting States for investigative and/or prosecutorial purposes arising under the Convention, the text of the provision is such that the Contracting States retain the discretion to decide whether in fact to consult or cooperate with the other States with a view to coordinating their actions.

2.10 Non-criminal instruments relevant to the aviation counter-terrorism related treaties

2.10.1 Convention on Compensation for Damages to Third Parties Resulting from Acts of Unlawful Interference (2009)

In addition to the conventions and protocols examined in the preceding sections of this Module, there are other ICAO instruments relevant to the victims of aviation terrorism. In 2009, an International Conference on Air Law at ICAO Headquarters in Montreal, Canada adopted two legal instruments dealing with legal liability for damages to third parties. The Convention on Compensation for Damage Caused by Aircraft to Third Parties is sometimes called the General Risks Convention (GRC) and is the latest in a series of treaties dealing with damage caused by safety defects or other causes not involving unlawful interference. A new convention adopted at the same conference is the Convention on Compensation for Damages to Third Parties Resulting from Acts of Unlawful Interference, often called the Unlawful Interference Compensation Convention or UICC. Neither the GRC nor the UICC have yet to enter into force.

2.10.2 Annexes to the Chicago Convention on International Civil Aviation related to security

Module section 2.1 described how the Convention on International Civil Aviation of 1944 (also known as the Chicago Convention) created the International Civil Aviation Organization to:

... develop the principles and techniques of international air navigation and to foster the planning and development of international air transport.

Among the core functions of the ICAO under article 54 of the 1944 Chicago Convention is the development of international Standards and Recommended Practices (SARPs), designated as annexes to the Convention. Annex 17 - Security, first adopted in 1974,\(^4\) sets the baseline

\(^{4}\)In ICAO terminology, “safety” is a quality determined by airworthiness of equipment, effectiveness of navigation and other support systems, training, qualification and supervision of personnel and protection against potential hazards. Safety deals with risks such as negligence, acts of nature, design flaws, mechanical failures, accidents and other risks not resulting from malicious or intentional misconduct. “Security” deals with the management of intentional threats to the successful operation of civil aviation, including terrorism, and that kind of security risk management is the subject of annex 17.
security-related SARP's and constitutes the international regulatory framework for civil aviation security applicable to ICAO Member States. The annex 17 SARP's are regularly updated in order to maintain appropriate measures for addressing threats to civil aviation.

Annex 17 is complemented by the *Aviation Security Manual* (ICAO Doc 973), a restricted document that provides guidance on ways and means to implement security-related SARP's.

In all, there are 19 technical annexes to the Convention dealing with a wide range of aviation security subject matters. Other annexes that contain specific provisions for civil aviation security include annex 2 – Rules of the Air; annex 6 – Operation of Aircraft; annex 8 – Airworthiness of aircraft; annex 9 – Facilitation; annex 10 – Aeronautical Communications; annex 11 – Air Traffic Services; annex 13 – Aircraft Accident and Incident Investigation; annex 14 – Aerodromes; and annex 18 – Dangerous Goods. This annex sets minimum standards governing the operators of international civil aviation, to be administered and enforced by national governments. Prior to 1985 the Standards and Recommended Practices tended to concentrate on unlawful interference with emphasis on screening passengers and their carry-on articles. In 1989 an amendment to the Annex broadened the focus to checked baggage and cargo. Another amendment in 2001, after the aviation attacks in the United States in September of that year, including new provisions on access control, measures related to passengers and baggage, in-flight security, cooperation relating to intelligence concerning threats, and management of responses to acts of unlawful interference.

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### Assessment questions

- In which of the aviation security instruments did the obligation to extradite or prosecute first appear and were there any precedents in other universal instruments for such a provision? (See Module section 2.3).

- Is the political offence exception handled uniformly in all of the aviation and maritime security-related instruments? If not, what is the difference between the instruments? (See Module sections 2.2.5 and 2.7.7).

- Do any of the aviation-related instruments contain any guidelines for sequential prosecution for different offences arising out of the same incident? Can the State of registration prosecute first for the unlawful seizure and the State of nationality of the victim subsequently secure international cooperation from a third State Party in order to prosecute for the murder of a passenger? Is there any judicial decision that refers to the treatment of this question in the ICAO committee that prepared the draft convention? (See the Case study in Module section 2.3.1).

- What value is served by the requirement that an offence under the Hague and Montreal Convention endanger the safety of an aircraft in flight? Why do some of the offences in the 2010 Beijing Convention and Protocol no longer contain that requirement? (See Module section 2.2.3).

- What was Libya’s preferred solution to the extradition requests for its nationals in the Lockerbie case and what form of international cooperation did it request from the requesting States? (See Case study, *United States v. Yousef and Others*, in Module section 2.4.4).
• Is the obligation to extradite or prosecute under the Montreal Convention dependent upon the receipt and denial of an extradition request by the State where an offender is found? Is there any judicial guidance on this issue? (See Case study in Module section 2.4.4).

• Must a State Party criminalize a conspiracy to commit an offence under the Beijing Convention without the actual offence having been accomplished or an act in furtherance of the offence having been committed? (See Module sections 2.7.3 and 2.7.4, while distinguishing the offences of conspiracy and criminal association).

• Must States Parties provide for criminal liability for legal entities under the Beijing Convention of 2010? (See Module section 2.7.5).

Activity

A country which is a transit hub is preparing for the possible arrest of terrorists who have committed a recent airport attack in a North African country and may pass through the transit State using false passports. The transit country is willing to arrest the alleged offenders on false travel document and immigration charges but does not want to risk becoming a target of the terrorist group by prosecuting the terrorists for the airport attack or holding them during lengthy extradition proceedings. To minimize delay and publicity the officials try to make tentative arrangements with countries that would have jurisdiction to request extradition of the suspected offenders under the aviation security instruments and would be willing to do so expeditiously.

In the recent attack committed by the terrorists, who may arrive in the transit country, five participants assaulted the airport, killing three guards before seizing two aircraft. One plane held over a hundred passengers and crew and had completed the boarding process but the crew was forced to open its external door by threats to the ground crew. The other aircraft had been parked for several days awaiting delivery of a replacement part. The attacking group threatened to kill all hostages unless numerous demands were met, among them the payment of 10 million dollars by a particular government to a relief organization for orphans in the attackers’ home country and safe conduct out of the North African country to a Middle Eastern country willing to guarantee their safety. The demands were ultimately met and the hostages released, but not before a parked aircraft had been destroyed with explosives when the demands were not promptly accepted.


Considerations: Were one or both of the aircraft in flight for purposes of the application of the 1970 Hague Convention? See article 3 of the Hague Convention.

Were one or both of the aircraft in flight or in service for purposes of the application of the 1971 Montreal Convention? Does the period of time the destroyed aircraft was parked after arrival make a difference in the applicability of the Convention? Is the nationality of the passengers, crew or attackers relevant to the applicability of the Convention? Is the registration of the aircraft relevant? (See articles 2 and 5 of the Montreal Convention).
Does the 1988 Airport Protocol apply to all airports? Does it make a difference under the Airport Protocol whether the destroyed aircraft had landed more than 24 hours before it was destroyed? (See article 2 of the 1988 Airport Protocol).


What readily available open source contains the ratification status of all the universal terrorism-related conventions and protocols? (See the UNODC Terrorism Legislative Database at www.unodc.org/tldb).

What widely adopted universal legal instrument may be applicable because of the financial demands of the attackers, who represent a long existing, hierarchical terrorist group? What are the necessary elements for application of the United Nations Convention against Transnational Organized Crime?∗

What simple expedient would allow the transit hub country to avoid taking responsibility for the arrest of the alleged terrorists? Would not their use of false passports constitute a basis to refuse them entry or transit and to return the terrorists to the country of origin of the flight on which they arrive? Alternatively, could they be expelled to some other country willing to accept them, including a country desiring to prosecute them? Would this informal procedure pose any legal bar to prosecution? (See Tools and further reading below, Digest of Terrorist Cases on expulsions).


Tools and further reading

- The UNODC handbook, Digest of Terrorist Cases, chapter VII.C., Lures and expulsions, analyses precedents allowing return of fugitives by means other than extradition, including the cases of Ocalan (PKK leader) and Sanchez Ramirez (the terrorist Carlos). Available at www.unodc.org/documents/terrorism/09-86635_Ebook_English.pdf.


• ICAO Machine Readable Travel Document Technology Training Course.
• ICAO Administrative Packages for Ratification or Accession, including Model Instruments of Ratification or Accession for:
  • The 1970 Hague Convention
  • The 1971 Montreal Convention
  • The 1988 Airport Protocol
  • The 1991 Plastic Explosives Convention
• International Atomic Energy Agency Information Circular INFCIRC/209/Rev.2, Modifications, Corrections.
3. MARITIME COUNTER-TERRORISM RELATED LEGAL INSTRUMENTS

Like civil aviation conventions and protocols, maritime security instruments can be categorized as an older set of instruments (the 1988 SUA Convention and its Fixed Platform Protocol) that are relatively widely adopted and implemented, and newer instruments negotiated in this century (2005) that are less widely integrated into national legal systems. The Module can be a useful tool in capacity-building programmes intended to equip authorities to deal with the innovations introduced in the 2005 SUA Convention, which are particularly complex in the area of BCN materials and ship boarding procedures.

3.1 Convention of the Inter-Governmental Maritime Consultative Organization (1948) and its re-designation as the International Maritime Organization (1982)

The International Maritime Organization (IMO), a specialized agency of the United Nations, was established by a convention adopted at an international conference convened in Geneva in 1948 and initiated its activities in 1959 as the Inter-Governmental Maritime Consultative Organization (IMCO). One of the goals stated in article 1 of the Convention was to “encourage the general adoption of the highest practicable standards in matters concerning maritime safety ...”. Article 3 of the Convention provided that in order to achieve its goals one of the functions of the Organization would be “to provide for the drafting of conventions, agreements or other suitable instruments, and to recommend these to Governments and other inter-governmental organizations, and to convene such conferences as may be necessary”.

During the functioning of IMCO, a number of resolutions were adopted by its Council. Resolution A 461 (XI) of 1979 called attention to the threats of barratry and unlawful seizure of ships and their cargoes and called upon Member States of the Organization to take effective legislative, administrative or other counter-measures. Resolution A 504 (XII) of 1980 repeated the appeal of the prior year’s resolution with additional emphasis on measures to deter and prevent maritime fraud. In 1982 the Inter-Governmental Maritime Consultative Organization was renamed as the International Maritime Organization and given new powers and procedures designed to enable it to establish new standards more efficiently.

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44Barratry is a maritime law term referring to fraud or misconduct by the master or crew of a vessel that causes harm to the ship owner. Barratry may be punishable under national law but is not considered an international crime under customary maritime law.

IMO’s main objective is the adoption of treaties and recommendations containing rules and standards for the safety of navigation and the prevention of marine pollution from vessels. While “maritime safety” refers to the prevention and suppression of risks affecting maritime navigation in general, the notion of maritime security is associated with risks to navigation resulting from wilful misconduct, thereby including prevention and suppression of all intentional unlawful acts affecting maritime navigation.

IMO’s initial steps in the field of crimes at sea were not related to the suppression of terrorist acts but restricted rather to several resolutions containing recommendations to prevent and counteract barratry and maritime fraud. More recently the Organization has been particularly active in the adoption of guidelines to prevent and suppress piracy and armed robbery against ships.46

3.2 Distinguishing acts of terrorism from piracy and armed robbery against ships

The IMO Council adopted resolution A 545 (XIII) in 1983 on measures to prevent and suppress piracy and armed robbery against ships.47 In the years prior to 1985, terrorist-related incidents had occasionally involved seizure of maritime vessels. In January 1974, two members of the Japanese Red Army and two members of the Popular Front for the Liberation of Palestine attempted to blow up an oil installation on Singapore’s Pulau Bukom Besar island.48 After causing minor damage the attackers seized the crew of a ferry boat as hostages. The hostages were eventually released in exchange for safe transit for the attackers to Kuwait. In February 1974, a Greek freighter was hijacked off Karachi, Pakistan by persons who demanded the release of those convicted in Greece for the Athens airport attack described in section 2.5 of this Module. The crew members taken as hostages were released when the death sentences of those prisoners were reduced to life imprisonment.

Despite occasional acts of terrorism involving ships, the threats which received the greatest degree of attention after adoption of the Convention of the Inter-Governmental Maritime Organization in 1948 were piracy, fraud and misconduct by a master or crew. The seizure in 1985 of the Italian cruise ship Achille Lauro by terrorists brought the new concern of maritime terrorism to the centre of world and IMO attention.

On October 7, 1985, members of the Palestine Liberation Front (PLF), a faction of the Palestine Liberation Organization (PLO), hijacked the Achille Lauro while sailing from Alexandria to Port Said, Egypt. The hijackers had boarded the Achille Lauro in Genoa, Italy, managing to smuggle on board automatic weapons, grenades and other explosives, and intending to stay aboard as passengers until the cruise liner reached Ashdod, Israel. In Israel, they “planned either to shoot up the harbour or take Israelis hostage”. The Palestinians intended to hold the Israelis as hostages to bargain for the release of 50 Palestinians held in Israeli jails.

46 A 545, (XII) 1981; see also resolutions A 683 (17), 1991; A 738 (18), 1993; A 922 (22), 2001; A 979 (24), 2006; A 1002 (25), 2007; A 1025 and 1026 (26), 2009; and A 1044 (27), 2011.
47 Ibid.
48 This involvement of the Japanese Red Army on behalf of a Palestinian group had already been witnessed in the 1972 Lod, Israel airport attack, described in section 2.5 of this Module.
The four PLO members aborted their plans and seized the ship when the crew discovered their weapons after the Achille Lauro left Alexandria. Although it is not clear whether the initial seizure was on the high seas or within the territorial waters of Egypt, there is no doubt the ship was on the high seas while being held by the hijackers. While holding the ship’s crew and passengers hostage, the hijackers threatened to kill the passengers unless Israel released 50 Palestinian prisoners. They also threatened to blow up the ship if anyone attempted a rescue mission. On the afternoon of October 8, 1985, Israel not having met their demands, the hijackers killed an American passenger on board.

Some of the perpetrators of the Achille Lauro hijacking were brought to justice in Italian courts. However, they almost escaped prosecution. During negotiations for the release of the hostage passengers and crew, authorities allowed the hijackers to leave the ship at Port Said, Egypt. A number of them were apprehended when American military aircraft forced an Egyptian aircraft carrying them to land in Sicily after it had been refused permission to land in Tunisia. Some of the persons on board were taken into Italian custody and prosecuted in that country’s courts. The case involved numerous controversies concerning whether Italy and Egypt had agreed to forego prosecution, whether such a promise was conditioned on no one being harmed during the seizure, concerning the role of the Palestinian Liberation Organization, concerning the attempt by American authorities to take custody of the hijackers at a Sicilian air base after forcing the Egyptian plane to land, concerning the legal obligations of the States involved with regard to extradition and international cooperation, and concerning whether the hijacking was a universal offence under international customary law or only an offence depending on its definition by the national law of the various States involved. In order to analyse the legal rights, responsibilities and obligations of the States actually or potentially involved, a discussion of maritime law was necessary. The possibility of establishing universal jurisdiction was then related to the Convention on the High Seas provisions on piracy. However the Achille Lauro incident could not be characterized as piracy because the crimes were not committed for private ends and did not involve a pirate ship. Another controversial issue was related to the fact that as the terrorists with their weapons had freely boarded the Achille Lauro in Italy, the crimes could not be considered as entirely perpetrated on the high seas, thus creating a further impediment to the exercise of universal jurisdiction.

The High Seas Convention (HSC) had been adopted in 1958 and came into effect in 1962.\(^\text{49}\) It was eventually superseded by the United Nations Convention on the Law of the Sea (UNCLOS). The later Convention was adopted in 1982 in an effort to reach agreement in one instrument on a comprehensive regime dealing with all matters relating to the law of the sea. The intention of the drafter was to codify the customary law of the sea, much of which had been agreed upon in the HSC in relation to the high seas, as well as to develop new concepts which had not previously existed. This Convention provides for the peaceful uses of the sea and the area of the seabed, ocean floor and the subsoil thereof and sets out a legal framework within which all activities in the oceans and seas must be carried out. The provisions of UNCLOS establish different maritime zones, whose maximum breath is measured from a set of baselines along the coast of a State. These zones are relevant to both the SUA Conventions and the Fixed Platforms Protocols, as explained in Module sections 3.3.2 and 3.4.2. UNCLOS was adopted in 1982 and came into force in 1994. Although it was still in the ratification process in 1985, when the Achille Lauro hijacking occurred, both its provisions and those of the HSC were examined at that time for guidance concerning vessel hijacking and the murder of a passenger as international crimes.

The legal regime established in UNCLOS provides for different rights and duties of States in different “maritime zones” described in UNCLOS, whose maximum breadth is measured from a set of baselines along the coastline of a State. These include:

- Internal waters, on the landward side of the baseline of the territorial sea;
- A territorial sea of up to 12 nautical miles from the baselines;
- A zone contiguous to the territorial sea of up to 24 nautical miles from the baselines;
- An exclusive economic zone, beyond and adjacent to the territorial sea, of up to 200 nautical miles from the baseline;
- A continental shelf; and
- The high seas.

UNCLOS also establishes special regimes governing archipelagic States and their waters, as well as straits used for international navigation.

The legal framework for the repression of piracy under international law is set out in articles 100 to 107 of UNCLOS. These articles are based on articles 14 to 21 of the HSC and are generally considered to reflect customary law of the sea, applicable to all States. The definition of acts of piracy is contained in article 101 of UNCLOS.

Piracy consists of any of the following acts:

(a) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) Any act of inciting or of intentionally facilitating an act described in subparagraphs (a) or (b).

This legal definition of piracy must be distinguished from the concept of armed robbery against ships. This is a term used by the IMO in its Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships. This code, which has no legal status, defines armed robbery against ships as:
1. Any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea;

2. Any act of inciting or of intentionally facilitating an act described above.\textsuperscript{50}

While the significance of the phrase, “other than an act of piracy” in that definition is not completely clear, it appears that “armed robbery against ships” applies to what would be acts of piracy if committed on the high seas.

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**Case study. The City of Poros case**

Another case of maritime terrorism involved the Greek cruise ship City of Poros. In July 1988, three members of the Abu Nidal organization boarded the vessel at a resort island, posing as passengers bound for Athens. Once at sea they opened fire with firearms and grenades, killing nine persons and wounding nearly 100. They then jumped overboard and were picked up by a small vessel operated by an accomplice. Two elements of the definition of piracy found in the HSC and the UNCLOS were either missing or in doubt. The element of persons from one ship attacking another ship was absent. A small craft picked up the attackers after the attack but the attackers boarded from land at the departure port. Consequently, the attackers could not legitimately be said to have been passengers or crew of the small boat at the time of attacking persons on the cruise ship. In addition, the violence was indisputably committed for a political purpose and not for economic gain, so the element that the violence be “committed for private ends” also seems to be lacking.

When the Achille Lauro and City of Poros incidents were analysed, it was evident that they could not be classified as piracy. Neither customary maritime law nor the then-applicable CHS treated such incidents as international crimes and no universal instrument required their criminalization or dealt with issues of jurisdiction and criminal justice cooperation. Moreover, it was evident that this gap in international law would not be filled even when the UNCLOS came into effect, as its definition of piracy was the same as that in the HSC. Accordingly, consideration was given to the need for an additional international legal instrument to address this new manifestation of terrorist violence.

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**Case studies. United States vs. Dire and United States vs. Said**

Notwithstanding that the article 101 of the UNCLOS defines piracy as “any illegal acts of violence, detention or any act of depredation, committed for private ends . . .”, the interpretation of what constitutes “piracy” could still vary even within the same country.

In 2012, the United States Court of Appeals for the Fourth Circuit was tasked to determine whether the United States piracy statute encompasses attacks on vessels in international waters when the attackers do not seize or rob the vessels, as two district judges had reached divergent conclusions on the definition of piracy within two factually similar cases. In both cases, the defendants argued that their attack on the United States navy ships did not constitute piracy because they did not seize or rob the vessels.

In the *United States v. Dire*, five Somali defendants, who attacked a United States Navy ship disguised as a merchant vessel on the high seas between Somalia and the Seychelles, were convicted of piracy. It was held that the crime of piracy includes any violent acts perpetrated for private ends on the high seas.

In the *United States v. Said*, where the United States Navy ship got attacked in the Gulf of Aden, the district court granted the defendants’ motion to dismiss the piracy count, holding that robbery is an essential element of the crime of piracy.

The Court held that general piracy (customary law of piracy) includes acts of violence on the high seas, even in the absence of robbery.

In the *Hasan case* (*Dire* is the appeal of this case), the district court focussed on piracy as a crime defined by the “law of nations” and subject to universal jurisdiction. It recognizes the differences between “general piracy”, where the conduct can be prosecuted by any nation but is limited to offences that the international community agrees is piracy, and “municipal piracy”, where piracy can encompass any conduct as described by the law and can only be tried in the jurisdiction where the offence was committed.

The United States Fourth Circuit Court further recalled that the law of nations or “customary international law” evolves over time, and that it defined piracy to include acts of violence committed on the high seas for private ends without an actual taking. Moreover, the Court found that the definition of general piracy under modern customary international law is reflected in article 15 of the High Seas Convention and article 101 of the UNCLOS.

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In connection with the efforts to combat attacks upon maritime vessels, it is essential to understand the distinctions described in the Module section 3.2 between piracy, armed robbery within a State’s territorial waters, and offences defined in the maritime instruments.
Piracy is considered by many States to be subject to universal jurisdiction but usually must involve the traditional elements of an attack on the high seas from another vessel for private purposes. An offence of armed robbery within territorial waters exists only if its elements are established by national law. An offence under the counter-terrorism international instruments must be established by national law in conformity with the 1988 or 2005 SUA Conventions. SUA offences may have elements that differ from either piracy or armed robbery, such as a non-proliferation offence or use of a vessel to cause injury or damage, as well as different jurisdictional bases, such as a scheduled international destination.


3.3.1 Impetus for and development of the Convention

Within days of the resolution of the Achille Lauro hijacking in October 1985, the IMO Assembly took up consideration of “Measures to Prevent Unlawful Acts Which Threaten the Safety of Ships and the Security of Their Passengers and Crews”. On 20 November 1985, the IMO Assembly adopted resolution A. 584 (14), condemning the hijacking and directing the IMO Maritime Safety Committee to develop technical security measures. The United Nations General Assembly, on 9 December 1985, adopted resolution 40/61, which requested the IMO to “study the problems of terrorism aboard or against ships with a view to making recommendations on appropriate measures”. The Security Council also adopted resolution 579 of 18 December 1985 in which the Council:

Urges the further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of international terrorism.

As described by the former Legal Advisor to the Austrian Foreign Ministry, the governments of Austria, Egypt and Italy, supported by the International Transport Workers Federation, proposed an international maritime safety convention modelled on the Tokyo and Montreal Conventions and the 1979 Convention Against the Taking of Hostages. An Ad Hoc Preparatory Committee was created open to all States. The result of the Committee’s work was referred to a Diplomatic Conference held in Rome and on 10 March 1988 the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was adopted. It entered into force four years later in March 1992.

52 This agreement is often referred to as the SUA Convention. This is an acronym for the words “Suppression of Unlawful Acts” in its title. Even though the Montreal aviation convention originally used those same words in its title, the acronym SUA is widely understood as referring only to the 1988 maritime convention and its amendment, and not to the earlier aviation convention.
3.3.2 Scope of application of the Convention and the applicable provisions of the United Nations Convention on the Law of the Sea

The 1988 SUA Convention follows the practice of excluding certain type of vessels from its scope as described in Module section 1.1.2. It is similar to the aviation instruments in requiring an international element. The Legal Advisor to the Austrian Foreign Ministry has described its applications in the following terms:

“The SUA Convention applies to ships navigating or scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a single state, or beyond the lateral limits of its territorial sea with adjacent States, or when the offender is found in the territory of a State Party”.

One exception to that international navigation requirement is provided, as is the case with The Hague and Montreal aviation conventions. If an offender or alleged offender commits or attempts an act criminalized under article 3 on a domestic voyage but is found in the territory of another State Party the Convention’s provisions apply. This permits extradition and international evidentiary cooperation with respect to such offences without making domestic offences international crimes.

To understand the 1988 and 2005 SUA Conventions’ reference to ships “navigating or scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a single state, or beyond the lateral limits of its territorial sea with adjacent States”, one must consult the 1982 United Nations Convention on the Law of the Sea (UNCLOS). In Module section 3.2 it was explained that UNCLOS was still in the ratification process in 1985, when the Achille Lauro hijacking occurred. Nevertheless, its provisions were examined at that time for guidance. The Convention sets out the legal framework within which all activities in the oceans and seas must be carried out and defines different maritime zones, whose maximum breadth is measured from a set of baselines along the coastline of a State. The zone that is relevant to the application of the SUA Convention is the territorial sea extending up to 12 nautical miles from the baselines established by the articles in part II, section 2 of UNCLOS. Only ships navigating or scheduled to navigate into, through or from waters beyond the outer limits of a single State’s territorial sea or beyond the lateral limits of a territorial sea with adjoining States are within the scope of the SUA Convention.

3.3.3 The offences defined by the 1988 SUA Convention

In establishing the offences to be criminalized, the drafters of the 1988 SUA Convention were able to draw upon the experience gained in drafting and implementing prior instruments related to aviation terrorism. The 1970 Hague Convention addresses only unlawful seizure of aircraft and does not reach murders of crew or passengers or the destruction of aircraft. Such murders and destruction were not the dominant issues of concern when the Hague

Convention was negotiated in 1970. Those forms of violence became of greater concern when multiple aircraft were destroyed in September 1970, necessitating the 1971 Montreal Convention. This piecemeal development process was unnecessary when negotiators gathered to address maritime-related terrorism. Those negotiators could draw upon the historical experience of the aviation terrorism-related instruments and could anticipate multiple forms of maritime terrorism-related offences. Accordingly, article 3, paragraph 1 of the 1988 SUA Convention lists seven actions which constitute offences:

1. Any person commits an offence if that person unlawfully and intentionally:

   (a) Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

   (b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

   (c) Destroys a ship or causes damage to a ship or its cargo which is likely to endanger the safe navigation of that ship; or

   (d) Places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

   (e) Destroys or seriously damages maritime navigation facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

   (f) Communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

   (g) Injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

It is important to emphasize that the offences defined by the 1988 SUA Convention are not solely restricted to those illicit acts committed with terrorist motivation. No subjective element is required as part of the offences, so that their drafting is wide enough to include any illicit and wilful misconduct, independent of its motivation. Thus, the SUA Convention plays a significant role with respect to crimes which even if difficult to define as piracy or terrorism still merit adequate punishment.

These offences combine the unlawful seizure offence found in the Hague Convention as well as the violence against a person on board and the destruction or damage offences against a vessel or navigation facilities found in the Montreal Convention into subparagraphs 1 (a) through (f). With the benefit of the experience gained in the aviation field, the 1988 SUA Convention was able to capture all of these of transportation-related offences in one maritime convention. Similarly, the SUA Convention, in article 3, paragraph 1, criminalizes a number of means of participation in a listed offence. Whereas the 1970 and 1971 aircraft conventions only addressed direct commission of the prohibited conduct, attempts and accomplices, SUA Convention article 3.2 provides that a person commits an offence if that person performs the prohibited act, attempts to commit it, is an accomplice of the committer, abets its commission, or threatens to do an act prohibited by subparagraph 3.1 (b), (c) or (e) aimed at compelling a physical or juridical person to do or refrain from doing any act.
3.3.4 The endangerment of safe navigation element

A number of the violent, damaging or disruptive acts required to be criminalized under article 3, paragraph 1, of the SUA Convention include an element that the prohibited act must endanger the safe navigation of the ship in question or be likely to do so. Subparagraphs 1 (b) through 1 (g) of article 3 (f) the SUA Convention of 1988 require the creation of offences applicable to anyone who performs specified acts “likely to endanger the safe navigation of that ship” or comparable language.

This element of endangering safe navigation establishes a minimum level of potential harm to justify the application of an international convention. The 1988 SUA Convention was adopted as a response to the 1985 Achille Lauro hijacking and murder by terrorists, but all of the offences in paragraph 1 of its article 3 are general intent crimes which require no specific terrorist intent to coerce or intimidate a government or population. By avoiding the potential application of the Convention to unruly cruise ship passengers who damage an entertainment lounge or to vandals who destroy a harbour light, the “safe navigation” element ensures that the SUA Convention will not be applicable in inappropriate circumstances which lack the appropriate degree of gravity. Module section 2.4.2 raised the question whether slit-ting the throat of a passenger by the hijackers, on board but after an unlawful seizure has been accomplished, would violate article 1.1 (a) of the Montreal Convention, which applies only if the offender:

(a) Performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft;

The same issue exists with respect to the offence created in article 3, paragraph 1, subparagraph (b) of the SUA Convention, which applies to whoever:

(b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;

These offences in the Montreal Convention and the SUA Convention have very similar elements. However, the evidentiary task of satisfying those elements is different in the reality of the aviation context as opposed to the maritime environment. Seizure of an aircraft in flight inherently tends to endanger its safe navigation when the control of a highly sophisticated machine in flight passes from a qualified aircraft commander to a terrorist. Acts of violence involving guns and explosives are inherently dangerous to the safety of the aircraft.

The drafters of the SUA Convention were able to take into account the various factual scenarios provided by the unfortunately numerous terrorist attacks of the 1970s and 1980s, including the murder of the Achille Lauro passenger and of airline passengers killed on the ground during forced landings. In those circumstances it could be factually difficult to establish how those acts of violence were likely to endanger the safe navigation of the vessel or the safety of the aircraft in flight. That potential issue was dealt with by the inclusion in article 3, paragraph 1 of the SUA Convention of subparagraph (g), which does not require a danger to safer navigation and applies to anyone who unlawfully and intentionally:
Subparagraph 1 (g) extends to any injury or death committed in connection with the commission or attempted commission of any of the offences defined in subparagraphs (a) through (f) of article 1 and would apply to the murder of the Achille Lauro passenger. Subparagraph (g) dispenses not only with the requirement that the violence be “likely to endanger the safe navigation of that ship”, but also the requirement that the victim of the violence be on board that ship. The offence in subparagraph (g) will thus be applicable to more potential situations that do not occur on board the seized ship. Examples of this broader scope would be the murder or wounding of security guards in a ferry terminal who attempt to prevent hijackers from forcibly gaining access to a docked vessel or of law enforcement or military personnel on board another vessel seeking to board and re-establish control over a hijacked vessel.

3.3.5 Other forms of participation in a Convention offence

Paragraph 1 of article 3 of the SUA Convention establishes as offences the direct physical commission of various violent, damaging or disruptive acts. Paragraph 2 of the same article penalizes various forms of auxiliary conduct that also makes a person criminally responsible for an offence established in paragraph 1. Those forms of conduct are: to attempt to commit any offence in paragraph 1; to abet the commission of any of the offences perpetrated by any person or to otherwise be an accomplice of a person who commits such offence; or to threaten to commit such an offence for the purpose of compelling a physical or juridical person to do or refrain from doing any act.

The terms “attempt”, “abet” and “accomplice” are not defined in the SUA Convention. It may be helpful to observe that many legal systems consider an “attempt” to be conduct which would have resulted in the commission of an offence if not frustrated by an outside force or influence, such as the failure of a bomb placed on a vessel to explode because of a mechanical malfunction or because it is discovered and deactivated during a security control. Abetting an offence and being an accomplice are English language terms most often associated with common law legal systems. They must be translated into comparable concepts in other legal systems from one of the official languages of the United Nations. Abetting an offence commonly requires that the offence be accomplished, as suggested by the use of the past tense in the phrase in paragraph 2 of article 3 of the SUA Convention:

(b) Abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person ...

An accomplice normally can be found guilty of complicity in either an attempted or an accomplished offence.

See Module section 2.7.4 concerning aviation-related offences.
Case study. United States v. Shibin

In United States v. Shibin, Mohammad Shaiidi Shibin, a negotiator for Somali pirates, was convicted by a United States district court and sentenced to multiple terms of life imprisonment for aiding and abetting piracy.

In 2010, Shibin acted as a principal negotiator for ransom over a German merchant ship seized on the high seas, boarding the ship only after it was taken into Somali waters. In 2011, a United States sailing vessel was hijacked on the high seas and the pirates were planning to take the ship back to Somalia, where it was intended that Shibin would again negotiate a ransom. However, as the United States navy ship started following the vessel and eventually tried to block its access to Somali waters, the pirates killed the four Americans on board.

Shibin was later arrested in Somalia and transported to the United States, where he was charged with piracy and other offences, convicted and sentenced to multiple terms of life imprisonment.

Shibin contends that he did not “commit the crime of piracy” because “according to statutory text, legislative history, and international law, [he] could only be convicted of aiding and abetting piracy if the government proved that he was on the high seas, and while on the high seas, facilitated piratical acts.”

The appellate court observed that there was no dispute that the piracies in this case occurred on the high seas beyond the territorial waters of Somalia. It found that Shibin was liable for those piracies, even though he did not personally venture into international waters, because he “intentionally facilitated” and thereby aided and abetted the piracies. The court stated that liability for aiding and abetting piracy is not limited to conduct on the high seas.

The court analysed the domestic piracy statute and article 101 of the UNCLOS, together with Security Council resolutions 1976 (2011) and 2020 (2011) on piracy and concluded that:

These sources reflect, without ambiguity, the international viewpoint that piracy committed on the high seas is an act against all nations and all humankind and that persons committing those acts on the high seas, as well as those supporting those acts from anywhere, may be prosecuted by any nation under international law.

3.3.6 Commission of an offence by means of a threat

Whether or not a State Party must criminalize a threat to commit an offence even if it is accompanied by a condition which may permit the harm to be avoided is a matter left to domestic law. Subparagraph 2 (c) states that a person commits an offence if that person “... threatens, with or without a condition, as is provided under national law”. Some States may consider that a threat which is conditioned on an event that may never occur does not in itself constitute punishable conduct. Other States may regard a threat, even if subject to a condition not yet fulfilled, as an impermissible challenge to its sovereignty which merits prosecution.

Activity

Using the laws and jurisprudence of one’s own legal systems, consider whether a threat to destroy a passenger ferry at sea with a bomb at some unspecified future date should be immune from prosecution because the threat is conditioned on the occurrence of an event. That discussion should analyse three different conditional situations:
• The threat is to bomb the ferry if a revered revolutionary leader dies in prison rather than being released;
• The threat is to bomb the ferry if the revered revolutionary leader is convicted and executed. The country in question has had an executive moratorium on the death penalty for 15 years and the person in question is awaiting a trial which is at least a year in the future;
• The threat is to bomb the ferry if the President invites foreign troops into the country to combat the rebels, a proposal he has publicly opposed and has no legal power to implement.

Considerations: The ferry passengers, ferry operator and law enforcement and security forces would be irresponsible if they ignore a credible threat and so must prepare for a catastrophic attack at sea on an unknown date, which will cause considerable inconvenience and expense because of passengers rescheduling travel to avoid the threat and management and government authorities taking additional security precautions, searching luggage and persons, using sniffer dogs and profiling passengers to identify suspicious travellers for in-depth interviews. Even in a scenario in which the specified condition is objectively unlikely to be fulfilled or to occur in the immediate future, the potential victims and responders must prepare for the possibility of a misunderstanding or miscommunication by the group threatening the terrorist act, of an overreaction to a port visit by a foreign ship, or of a change without warning of the condition.

3.3.7 Jurisdictional grounds

All of the aviation instruments in force when the 1988 SUA Convention was negotiated required the establishment of jurisdiction based on an alleged offender's presence in the territory of a State Party. This basis for jurisdiction is necessary to implement the fundamental international cooperation concept underlying in the instruments, which is the obligation to extradite or prosecute.54 In its article 6.4, the SUA Convention recognized the jurisdiction over an alleged offender found in a State in order to implement the obligation to extradite or prosecute. In subparagraphs 1 (a) and (b) of article 6, the Convention also recognized jurisdictional grounds analogous to those in the prior aviation instruments but phrased them in terminology appropriate to a maritime rather than aviation context. Those subparagraphs provide for jurisdiction when a defined offence is committed:

(a) Against or on board a ship flying the flag of the State at the time the offence is committed; or
(b) In the territory of that State, including its territorial sea;

In addition, article 6.1 contains a subparagraph with a new basis for jurisdiction not found in the aviation conventions of 1970 and 1971. That additional basis is found in subparagraph 6.1 (c):

(c) By a national of that State.

This is a concept of criminal jurisdiction often referred to as the “active nationality” principle, which means the exercise by a State of the jurisdiction to prosecute and punish acts by its nationals, regardless of where they take place, if those acts would be violations of domestic

54Article 4.2 in the Hague Convention (1970); article 5.2 in the Montreal Convention (1971).
law if they took place on the State’s territory and are criminal where they take place. The “active nationality” principle was not referenced in the 1970 and 1971 aviation conventions but it was introduced into the series of terrorism-related treaties developed by the United Nations and its affiliated agencies soon thereafter. In 1973 article 5.1 (b) of the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons designated nationality of the alleged offender as a basis of jurisdiction which each State Party to the Convention was required to establish. In 1979 this innovation was accepted as a basis for jurisdiction in the International Convention against the Taking of Hostages and in the Convention on the Physical Protection of Nuclear Material, in articles 5.1 (b) and 8.1 (b), respectively, establishing a trend which was continued in the 1988 SUA Convention. The active nationality principle was also adopted in article 3.1 (b) of the 1988 Fixed Platform Protocol.

The SUA Convention also provides three optional grounds of jurisdiction. Article 6.2 provides that:

2. A State Party may also establish its jurisdiction over any such offence when:

(a) It is committed by a stateless person whose habitual residence is in that State; or
(b) During its commission a national of that State is seized, threatened, injured or killed; or
(c) It is committed in an attempt to compel that State to do or abstain from doing any act.

Subparagraph 6.2 (a) deals with the option by a State Party to establish jurisdiction over crimes committed by a stateless person who is a habitual resident of that State. Statelessness was a condition which was relatively common after the boundary and population shifts associated with conflicts such as the First and Second World Wars, but had become less widespread in the 1970s with one exception. As reported by the United Nations Relief and Works Agency, over 700,000 Palestinians lost their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict. With their descendants this number had reached over 4 million persons registered with the United Nations Relief Works Administration, many living in refugee camps in a number of countries in the Middle East. This number does not count those dispossessed after another conflict in 1967. Many do not have citizenship either in Israel or in their country of refuge and constitute a large population of stateless persons, some of whom have been recruited for aviation and maritime attacks and hijackings. Alleged offenders in a number of transport hijacking cases, including that of the Achille Lauro cruise ship, included persons with this status.

Subparagraph 6.2 (b) recognizes the possibility of a State Party adopting what is called the “passive personality” principle of jurisdiction. Whereas the “active personality” principle asserts jurisdiction over an offence based on the nationality of the perpetrator, the “passive personality” principle asserts jurisdiction over an offence based on the nationality of the victim, wherever the crime may occur.

Subparagraph 6.2 (c) deals with what is called the “protective principle” of jurisdiction, meaning that a country may establish jurisdiction to prosecute offences that threaten its interests, no matter where committed. The passive personality principle may be thought of as protective.  

of a natural or legal person, whereas the protective principle is the exercise of a sovereign’s power to protect its own interests. When this optional ground of jurisdiction is adopted, the language of subparagraph 6.2 (c) introduces a specific terrorist purpose element for the first time in a transport-related offence. The Hague Convention and the Montreal Convention provide for general intent crimes, in which the requisite mental state is simply that the prohibited act be done “unlawfully, by force or threat thereof” in the case of article 1 of the Hague Convention, or “unlawfully and intentionally” in the case of article 1 of the Montreal Convention. Subparagraph 2 (c) of article 6, however, requires what may be characterized as an additional “terrorist” purpose. It creates jurisdiction only over acts which are committed “in an attempt to compel that State to do or abstain from doing any act”. Consequently, even land-locked States may have occasion to engage in international cooperation under the 1988 SUA Convention and its Fixed Platform Protocol with regard to their own nationals, as well as with regard to foreign offenders found on the State’s territory and to acts directed against its nationals or to compel that State to do or abstain from doing any act.

Paragraph 3 of article 6 requires any State Party that has established any of the optional grounds of jurisdiction listed in paragraph 2 of article 6 to notify the Secretary-General of the IMO, and to also notify the Secretary-General if the State rescinds that jurisdiction. That notification requirement allows the IMO to serve as a central registry of States which recognize the various grounds of optional jurisdiction listed in paragraph 2 of article 6. The ability to access such a registry is important to a State which seeks international cooperation based upon one of the optional grounds of jurisdiction under paragraph 2 of article 6 of the 1988 Convention. The reason is the widely applied requirement of dual criminality for the granting of extradition or for forms of evidentiary cooperation which require coercive measures, such as a search warrant. Some legal systems interpret dual criminality as requiring not only that the alleged offence conduct be punishable in both the State requesting cooperation and in the State from which cooperation is requested, but also that the basis upon which jurisdiction is asserted must be recognized in both States. Allowing the IMO to serve as a registry of notifications of what optional grounds have been established provides a research resource that a State seeking assistance can consult before committing itself to a formal cooperation request and experiencing possible delay and both causing and suffering embarrassment if that request is refused.

Case study. Dual criminality, the Abu Daoud case

In 1974 a leader of the Black September organization known by the name Abu Daoud was arrested in France after he entered using a false passport. Israel requested his extradition on the ground that he was involved in the hostage-taking and deaths of Israeli athletes at the 1972 Munich Olympics. Israel asserted jurisdiction on the passive personality theory of jurisdiction, which was recognized under its law. France did not recognize that theory of jurisdiction at the time. The Court refused extradition on the ground that the dual criminality requirement necessary for extradition had not been established at the time of the offence and a subsequent law establishing such jurisdiction could not be applied retroactively.

3.3.8 Adoption of other provisions from the 1970 and 1971 aviation instruments and additional human rights protections

An extended discussion of the general nature of the means of international cooperation provided in the maritime security conventions and protocols need not be repeated in this Module. As indicated in section 1.5, those mechanisms are comprehensively examined and analysed in Module 3 of the UNODC Counter-Terrorism Legal Training Curriculum, International Cooperation in Criminal Matters: Counter-Terrorism (http://www.unodc.org/documents/terrorism/Publications/Training_Curriculum_Module2/English.pdf), with accompanying practical guidance, case studies, assessment questions, tools and further readings.

In a number of articles the 1988 SUA Convention adopted provisions developed in the aviation conventions of 1970 and 1971. Articles 7 and 10 of the SUA Convention contained obligations to take an offender into custody, to allow that person to communicate without delay with a representative of his or her protecting State, and to extradite or prosecute, phrased in similar language to counterpart articles found in the Hague and Montreal Conventions.56

There are only a few references in the SUA Convention that are peculiar to maritime law. Whereas the Tokyo Convention describes the powers of “an aircraft commander” and both it and the Hague Convention refer to restoring control of an unlawfully seized aircraft to the “lawful commander of an aircraft”, the SUA Convention uses the equivalent maritime language, the “master of a ship”.57 Otherwise, the language of the operative paragraphs of the 1988 SUA Convention is virtually indistinguishable from counterpart paragraphs in the preceding aviation conventions. The prevailing expression of maritime law, UNCLOS, is not mentioned. The texts of the maritime and of the civil aviation instruments, as updated in 2005 and 2010 respectively, contain provisions much more specific to the maritime and aviation contexts.

A point of difference between the SUA Convention and the preceding aviation conventions involves recognition of human rights. Articles 7 and 10 of the SUA Convention contain protections for an alleged offender taken into custody which are not found in any of the preceding aircraft security conventions of 1963, 1970 or 1971. Article 7, subparagraph 3 (b) provides that an alleged offender who is taken into custody has a right of visitation by a representative of the alleged offender’s country of nationality or habitual residence in the case of a stateless person. The right of visitation was introduced in article 6, subparagraph 2 (b) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons in 1973 and was included as subparagraph 3 (b) of article 6 of the International Convention against the Taking of Hostages of 1979 before being adopted in the 1988 SUA Convention.

Paragraph 1 of article 10 of the SUA Convention establishes the obligation to either extradite or to prosecute “... as in the case of any other offence of a grave nature under the law of that State”. Paragraph 2 of the same article requires that an alleged offender be:

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Paragraph 2 of article 10 represents another protection for alleged offenders that is not found in the aircraft security conventions of 1963, 1970 or 1971 but was introduced in subsequent terrorism-related instruments. Article 9 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons of 1973 required that an alleged offender “... be guaranteed fair treatment at all stages of the proceedings”. Article 12 of the Convention on the Physical Protection of Nuclear Material of 1979 required a similar guarantee for alleged offenders in custody for an offence under that terrorism-related agreement. Paragraph 2 of article 8 of the International Convention against the Taking of Hostages of 1979 incorporated that protection and added the phrase “… including enjoyment of all the rights and guarantees provided by the law of the State in the territory of which he is present”. Paragraph 2 of article 10 of the SUA Convention is typical of the gradual accretion of human rights protections in the terrorism-related conventions and protocols developed by the United Nations and its affiliated agencies. A protection considered suitable for one instrument will often be maintained in subsequent treaties and perfected as international recognition of the value and importance of criminal justice procedural protections expands.

3.3.9 International cooperation provisions

Article 7 of the 1988 SUA Convention requires States Parties to ensure the presence of an alleged offender in order to permit criminal proceedings or extradition, conduct or report the results of a preliminary enquiry and indicate whether their intent is to exercise jurisdiction. Articles 10 and 11 deal with the obligation to extradite or prosecute. Articles 13 and 14 establish a duty to cooperate in prevention of conventional offences. The 1988 SUA Convention does not contain any boarding provisions. These provisions were introduced in the 2005 SUA Convention and reflect the non-proliferation aspect of that instrument.


3.4.1 Historical context

The concerns to be addressed by the 1988 Fixed Platform Protocol were anticipatory in nature. No terrorist incident had ever been experienced on an offshore platform at the time the Protocol was adopted. However, a 1979 film known as North Sea Hijack (and by other
titles) had raised public consciousness about a possible illegal seizure of an oil drilling ocean platform. These platforms typically are isolated, vulnerable installations. In addition to concerns about violence to persons on the platform, damage to a costly facility and disruption of an important energy source, a major concern was the possibility of environmental damage. Several incidents not involving terrorism or intentional damage had shown the immense environmental impact that could result from an uncontrolled flow from a drilling or pumping platform. In 1979 the Ixtoc 1 platform in the Gulf of Mexico suffered a blowout. The oil ignited, causing the rig to collapse and a massive underwater leak of tens of thousands of barrels of crude oil daily to continue for almost a year before it could be capped. In 1983 a ship collided with an oil rig in the Nowruz oil field in the Persian Gulf, causing an oil spill of an estimated 80 million gallons. So, in addition to the fictional cinematic depiction of an unlawful seizure in the film *North Sea Hijack*, the negotiators of the 1988 Fixed Platform Protocol to the SUA Convention had very real examples before them of massive environmental harm resulting from damage to or destruction of fixed platforms dealing with petroleum extraction.

3.4.2 Scope of application

Article 3 of the Fixed Platform Protocol requires each State Party to establish its jurisdiction over the offences defined in Protocol article 2 when the offence is committed:

(a) Against or on board a fixed platform while it is located on the continental shelf of that State; or

(b) By a national of that State.

A fixed platform is defined in paragraph 3 of Protocol article 1 as:

... an artificial island, installation or structure permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purpose.

The term “continental shelf” is not defined in the 1988 Fixed Platform Protocol or the SUA Convention. However, article 4 of the Protocol provides that:

Nothing in this Protocol shall affect in any way the rules of international law pertaining to fixed platforms located on the continental shelf.

As was the case with the 1988 SUA Convention’s reference to ships “navigating or scheduled to navigate into, through, or from waters beyond the outer limit of the territorial sea of a single State, or beyond the lateral limits of its territorial sea with adjacent States”, one must consult the 1982 UNCLOS to understand the Fixed Platforms Protocol’s reference to “the continental shelf”. In Module sections 3.2 and 3.3.2 it was explained that UNCLOS was still in the ratification process when the 1988 SUA Convention and Fixed Platforms Protocol were being negotiated. Nevertheless, its provisions were examined for guidance. UNCLOS sets out the legal framework within which all activities in the oceans and seas must be carried out and defines different maritime zones, whose maximum breath is measured from a


59A predecessor instrument, the 1958 Convention on the Continental Shelf, has been superseded by UNCLOS.
set of baselines along the coastline of a State. The zone that is relevant to the application of the 1988 and 2005 Fixed Platforms Protocols SUA Convention is a continental shelf as defined in Part VI of UNCLOS and particularly article 76, paragraph 1:

1. The continental shelf of a coastal State comprises the seabed and subsoil of the submarine area that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

As noted in connection with Module section 1.1, dealing with the international element necessary for application of the transport-related conventions and protocols, when a situation requires definition of the “continental shelf”, careful analysis must be made of the relevant provisions of the UNCLOS.

Paragraph 1 of article 1 of the Fixed Platform Protocol provides that the jurisdictional and international cooperation mechanisms established in the SUA Convention apply to the offences defined in the Protocol “where such offences are committed on board or against fixed platforms located on the continental shelf”.

Oil drilling and pumping platforms are often used to illustrate scenarios involving application of the 1988 Fixed Platform Protocol. It would be incorrect to assume that all such platforms are within the scope of application of the 1988 Fixed Platform Protocol or that all platforms subject to the Protocol are actually on the continental shelf. Article 1, paragraph 3 of the Protocol requires that a platform, artificial island, installation or structure be permanently attached to the seabed for the purpose of exploration or exploitation or resources or other economic purposes. It cannot be assumed that all platforms are permanently attached. Dynamic positioning ships use GPS (global positioning systems) devices and thrusters and other position control devices to maintain a position at a work site without being permanently attached to the seabed. Moreover, the “continental shelf” as defined in UNCLOS does not correspond to the scientific understanding of the term continental shelf. According to UNCLOS, the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend to that distance. Thus, if geography allows, a State’s continental shelf extends up to 200 nautical miles from the baselines even if the submerged prolongation of the land mass does not extend that far. Conversely, UNCLOS provides for a maximum breadth of the continental shelf over which a State has rights. Thus, a fixed platform within the defined distance may be fixed to the deep sea floor beyond the point where the shelf physically slopes or abruptly ends and still be considered as lying on the continental shelf of the coastal State or on the physical shelf but beyond the outer limit of a coastal State’s continental shelf. Nevertheless, under international law as reflected in UNCLOS, which guides the application of the Fixed Platform Protocols, the installation would legally be on the coastal State’s continental shelf.
MODULE 5—TRANSPORT-RELATED (CIVIL AVIATION AND MARITIME) TERRORISM OFFENCES

3.5 2002 Amendment to the Convention on the Safety of Life at Sea (SOLAS) and the International Ship and Port Facility Security Code (ISPS)

The IMO Assembly’s first step in reacting to the new dimension of transport-related terrorism after the attacks of 11 September 2001 in the United States was resolution A.924 (22) in November 2001. This resolution called for a review “... of the existing international legal and technical measures to prevent and suppress terrorist acts against ships at sea and in port and to improve security, aboard and ashore, in order to reduce any associated risk to passengers, crew and port personnel ...” Technical measures were introduced almost immediately.

IMO’s Diplomatic Conference on Maritime Security in December 2002 adopted new regulations to enhance maritime security through amendments to SOLAS, chapter XI. Chapter XI has been split into two chapters, where chapter XI-1, “Special measures to enhance maritime safety”, has been expanded to include additional requirements to Ship Identification Numbers and the carriage of a Continuous Synopsis Record. Chapter XI-2, “Special measures to enhance maritime security”, addresses the mandatory requirements such as the provision of a Ship Alert System and the mandatory requirement that States Parties require compliance with the new International Ship and Port Facility Security Code (ISPS Code). The code contains detailed security-related requirements for Governments, port authorities and shipping companies in a mandatory section (Part A), together with a series of guidelines about how to meet these requirements in a second, non-mandatory section (Part B).


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

3.6.1 The expanded strategic purpose of the SUA Protocol of 2005 to the 1988 SUA Convention

The 2005 SUA Protocol is a more complex document than the SUA Convention. The 2005 Protocol is nearly double the length of the 1988 instrument which it amends. The greater length reflects the fact that the 2005 SUA Protocol significantly expands the strategic purpose of the resulting 2005 SUA Convention. It also provides for practical enforcement measures to implement that expanded purpose, including procedures for ship-boarding (article 8 bis).

The SUA Convention incorporated repressive and procedural concepts and mechanisms from two principal sources, the Hague Convention and the Montreal Convention (1971). Those concepts and mechanisms were primarily reactive in nature. They enabled the investigation, prosecution and punishment of persons who committed, attempted or threatened some physically harmful act. Moreover, the aviation and maritime offences created prior to 2005 were narrowly focused on the protection of the users, operators and facilities involved in international transportation.

As will be described hereafter, the 2005 SUA Convention drew upon not only predecessor transportation security-related instruments but also upon non-proliferation concepts
embodied in treaties dealing with biological, chemical and nuclear weapons. These concepts are preventive in nature. The additional offences introduced by the 2005 SUA Convention require the punishment of non-violent conduct, such as prohibited forms of transport, in order to prevent violence being accomplished with the substances being transported. Moreover, the 2005 SUA Protocol introduced detailed cooperation and enforcement mechanisms, particularly relating to inspection and boarding, designed to implement this preventive purpose. This proactive approach is consistent with the innovation in United Nations terrorism instruments introduced by the 1999 International Convention for the Suppression of the Financing of Terrorism. That Convention sought to reduce the incidence of violent terrorism by criminalizing the non-violent financial provision and collection of funds intended or known to be used for terrorist purposes. Similarly, the 2005 SUA Convention seeks to reduce the availability of BCN weapons to terrorists and other non-State actors and the risk of their ultimate use. It does this by making it an offence to unlawfully and intentionally transport such weapons or any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapons, and by establishing procedures for cooperative deterrence and enforcement.

Establishment of preventive non-proliferation offences broadens the universe which benefits from the capacity of the 2005 SUA Convention to deter, interrupt and repress terrorist incidents. Previous transport security-related instruments protected passengers, crew, cargo and the ship or aircraft. The 2005 SUA Convention continues to protect those beneficiaries. It also contributes to the protection of the general public and the environment by its criminal and administrative provisions designed to reduce the risk of BCN attacks and of damage caused by the discharge of hazardous or noxious substances.

3.6.2 Relationship of the 2005 SUA Convention to humanitarian law instruments and a military exclusion clause

Article 1, paragraph 4 of the 1963 Tokyo Convention excluded from its scope aircraft used in military, customs or police services. The same exclusion appears in article 3, paragraph 2 of the Hague 1970 Convention and in article 4, paragraph 1 of the 1971 Montreal Convention. Article 2, paragraph 1 of the 2005 SUA Convention provides that the Convention does not apply to a warship, a ship owned or operated by a State when used as a naval auxiliary or for customs or police purposes.

The new article 2 bis:

1. Nothing in this convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the United Nations and international human rights, refugee and humanitarian law.

2. This convention does not apply to the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that body of law, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law.

3. Nothing in this convention shall affect the rights, obligations and responsibilities under the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London and Moscow on 1 July, 1968, the Convention on the Prohibition of the Development,
Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, done at Washington, London and Moscow on 10 April 1972 or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993, of States Parties to such treaties.

Paragraph 2 of the above article 2 bis can be traced to the 1997 International Convention for the Suppression of Terrorist Bombings. This language is sometimes called a “military exclusion” clause.

See Module section 2.7.8 concerning humanitarian law, arms control agreements and military exclusion language in the aviation-terrorism instruments.

3.6.3 Relationship of the 2005 SUA Convention to non-proliferation instruments

Paragraph 3 of article 2 bis deals with three widely accepted multilateral treaties. The paragraph makes clear that nothing in the 2005 SUA Convention shall affect the rights, obligations and responsibilities under those three instruments. Those instruments are:

- The Treaty on the Non-Proliferation of Nuclear Weapons of 1968. This instrument entered into force in 1970;

A reason for specifically mentioning these three multilateral instruments is that a number of provisions of the 2005 SUA Convention dealing with BCN weapons potentially interact with provisions of those three treaties. The 2005 SUA Convention seeks to prevent and suppress the proliferation of BCN weapons and related materials to non-State actors by means of international maritime transport. The 2005 SUA Convention language makes clear that the application of those disarmament instruments to their States Parties is in no way weakened, amended or superseded by the 2005 SUA Convention.

3.6.4 The context of efforts to control BCN weapons during development of the 2005 SUA Convention

The 2005 SUA Convention was adopted at a time when the control of BCN weapons was the subject of attention by the Security Council and several diplomatic conferences. The Security Council took a number of actions addressing the risks of terrorist use of BCN weapons. In resolution 1540, the Council:
1. Decides that all States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery;

2. Decides also that all States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes, as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;

3. Decides also that all states shall take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery, including by establishing appropriate controls over related materials and to this end shall:

   (a) Develop and maintain appropriate effective measures to account for and secure such items in production, use, storage or transport:

   (b) Develop and maintain appropriate effective physical protection measures:

   (c) Develop and maintain appropriate effective border controls and law enforcement efforts to detect, deter, prevent and combat, including through international cooperation when necessary, the illicit trafficking and brokering in such items in accordance with their national legal authorities and legislation and consistent with international law:

   (d) Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.

In operative paragraph 8 of resolution 1540 the Security Council also called upon Member States:

   (a) To promote the universal adoption and full implementation, and where necessary, strengthening of multilateral treaties to which they are parties, whose aim is to prevent the proliferation of nuclear, biological or chemical weapons.

Resolution 1540 was a decision under mandatory chapter VII of the United Nations Charter requiring States to adopt BCN non-proliferation measures aimed at non-State actors. The obvious concern was the acquisition of BCN weapons by terrorists. Among the obligations imposed are the duty to maintain effective measures to account for transport of BCN weapons and delivery systems and related materials and national export and trans-shipment controls, including appropriate laws and regulations to control export, transit and trans-shipment.

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61 A non-State actor is defined in the resolution as an individual or entity, not acting under the lawful authority of any State in conducting activities within the scope of Resolution 1540 (2004).
A cautionary paragraph in resolution 1540 decides that none of the resolution’s obligations shall be interpreted as in conflict with or altering the rights and obligations under the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention and the Biological and Toxin Weapons Convention.

The resolutions preceding the negotiation of the 2005 SUA Convention reflect a context in which the possibility of weapons of mass destruction coming into the hands of terrorists was a continuing concern of the Security Council.62 This concern was similarly reflected in two terrorism-related instruments negotiated at diplomatic conferences in 2005 which preceded the conference which adopted the 2005 SUA Protocol and the Protocol to the Fixed Platform Protocol.

In July 2005, an Amendment to the Convention on the Physical Protection of Nuclear Material was adopted at a conference convened by its depositary, the International Atomic Energy Agency (IAEA). The original 1979 agreement covers the physical protection of nuclear material used for peaceful purposes during international transport, establishes the obligation to criminalize certain conducts and provides for international cooperation. The Amendment expands the scope of the Convention to also cover the physical protection of nuclear material used for peaceful purposes while in domestic use, storage and transport, and of nuclear facilities. It further provides for expanded international cooperation and introduces new offences (e.g. the intentional carrying, sending or moving of nuclear material into or out of a State without lawful authority).

In September 2005 a diplomatic conference convened by the Ad Hoc Committee of the United Nations General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism. This instrument required the establishment of offences involving the use of radioactive material, a nuclear explosive device or a radioactive material dispersal device or radiation emitting device to cause injury or damage or to coerce a natural or legal person, an international organization or a State.

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

3.6.5 The structure of the expanded criminalization provisions found in the 2005 SUA Convention

The 2005 SUA Convention makes a number of significant additions to the offences established in article 3 of the 1988 SUA Convention. Paragraph 1 of article 3 of the 1988 SUA Convention established seven offences which resembled the offences previously developed to

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62 See also the Proliferation Security Initiative, adopted by the G-8 Group in 2003 and open to participation by all countries under a set of common principles, the Statement of Interdiction Principles adopted in Paris in 2003 after a North Korean freighter was stopped on a voyage toward Yemen and found to contain 15 Scud missiles, http://www.state.gov/t/isn/c27726.htm.
deal with aviation-related terrorism in the Hague Convention and the Montreal Convention. The 2005 SUA Convention carried forward the offences first developed in the aviation context and adapted to the maritime context in the 1988 SUA Convention. Other offences added by the 2005 SUA Protocol implement an entirely new strategic orientation not previously found in the aviation or maritime terrorism-related instruments.

The 2005 SUA Convention makes substantive changes to paragraph 2 of article 3 of the SUA Convention. That article had previously established as offences several means of participation in a prohibited act other than by its direct commission. It also established as an offence the making of a threat to commit any of the offences in subparagraph 1 (b), (c) or (e) if the threat is likely to endanger the safe navigation of the ship in question. A new text to article 3 to 1988 SUA Convention eliminates other means of participating in an offence, which are moved to new article 3 quarter. The threat offence that formerly was subparagraph 2 (c) of SUA Convention article 3 is revised to provide that:

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

### 3.6.6 Article 3 bis in the 2005 SUA Convention—use of a ship to cause injury or damage and the unlawful and intentional transport of BCN materials

The strategic focus of article 3 bis of the 2005 SUA Convention is a significant departure from the previous transport-related instruments. The numerous accidental discharges of hydrocarbons from ships in transit have demonstrated the immense environmental and economic damage that could be inflicted by an intentional discharge. Several incidents not involving terrorism or intentional damage have shown the immense environmental impact that could result from an uncontrolled flow from a damaged drilling or pumping platform. In addition to the incidents involving oil platforms described in Module section 3.4.1, the Exxon Valdez incident demonstrated the potential damage if an oil tanker under the control of terrorists were deliberately used to pollute the environment. In 1979 the Exxon Valdez struck a reef off Alaska’s coast. Approximately 11 million gallons of oil were released and over 2,000 kilometres of coast were polluted.
Accordingly, a number of offences are created in article 3 bis, four of which require a specific terrorist intent established in the article’s *chapeau*, article 3 bis, subparagraph (a):

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

   (a) When the purpose of the act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or to abstain from doing any act:

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

**Subparagraphs 1 (a) (i) through (iii) of article 3 bis, attacks from or against a ship**

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

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

The 1988 SUA Convention provisions, carried over in article 3, subparagraphs 1 (c) and 1 (d) of the 2005 SUA Convention, criminalize acts of destruction or damage to a ship or its cargo or placing on board a ship a device or substance likely to cause destruction or damage if the safe navigation of the ship would thereby be endangered. Subparagraph 1 (a) of new article 3 bis of the 2005 SUA Convention specifically criminalizes the use from or against a ship, or the discharge from a ship, of an explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage.63 This formula of criminalization in new article 3 bis does not include the requirement carried over in other subparagraphs of article 3 to the 2005 SUA Convention that the destruction or damage must endanger the safe navigation of that ship.

Subparagraph 1 (a) (ii) criminalizes the act of whomever, with the requisite specific intent and purpose:

   (a) (ii) Discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a) (1), in such quantity or concentration that causes or is likely to cause death or serious injury or damage;

Subparagraph 1 (a) (iii) reflects the recognition that, just as fuel-laden passenger aircraft were used as fearsome impact and incendiary weapons on 11 September 2001, ships could be so used against targets within their reach, such as crowded ferries, a cruise ship, a bridge, or harbour or dockside facilities. The offence required to be created must punish anyone who:

   (a) (iii) Uses a ship in a manner that causes death or serious bodily injury or damage;

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63 References to BCN weapons and materials occur in a number of subparagraphs in article 3 bis, and that technical terminology will be discussed after this introductory description of the new offences established in article 3 bis, subparagraphs 1 (a) and (b).
Activity
Identify vulnerable targets in the participants’ national territory or elsewhere that could be harmed by terrorists in control of various types of vessels. Consider what measures could serve to harden the defences of those targets or make it more difficult for terrorists to gain access to a vessel, or if they gain access, to effectively control the vessel and its navigation.

Subparagraph 1 (a) (iv) applies to whoever:

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

Another threat offence was carried over from the 1988 SUA Convention, which appears as article 3, paragraph 2 of the 2005 SUA Convention. However, subparagraph 1 (a) (iv) of article 3 bis does not include the old threat requirement that the threat be “likely to endanger the safe navigation of the ship”. The benefits and costs of that element were discussed in Module section 3.3.4 and the threat offence in article 3 bis does not include it.

It should be noted that the specific intent established in the chapeau of subparagraph (a) of paragraph 1 of article 3 bis may be either to intimidate a population or “to compel a government or international organization to do or abstain from doing any act”. Accordingly, not only a threat by an ideological group to create environmental damage in order to compel the release of incarcerated colleagues but also a threat by criminals to create such damage in order to compel a government to make a multimillion dollar payment would be punishable under subparagraph 1 (a) (iv).

Subparagraphs 1 (b) (i) through (iv) of article 3 bis, transport of dangerous materials intended to intimidate or coerce, of BCN weapons and of material intended for nuclear activity without IAEA safeguards or for use in a BCN weapon.

Subparagraph 1 (b) of article 3 bis of the 2005 SUA Convention deals with cases of transport of certain materials on board a ship. It must be read together with the mental state required by the chapeau of paragraph 1 of article 3 bis, that a person performs a prohibited act “unlawfully and intentionally”. However, the offences in subparagraph 1 (b) do not include as an element the intent to intimidate or coerce, which is found in subparagraph 1 (a). That specific intent only applies to the offences in subparagraph 1 (a) (i) through (iv) of article 3 bis. The offences in subparagraph 1 (b) of article 3 bis are instead characterized by elements of knowledge and intent that vary between the offences created in subparagraphs 1 (b) (i) through (iv), all of which apply to a person who transports on board a ship:

(b) (i) Any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act.
This offence contains within itself the same specific intent to intimidate or coerce, often referred to as a terrorist intent (although it can apply to non-terrorist extortion demands), that applied to all the offences in subparagraphs 1 (a) (i) through (iv) of article 3 bis. That specific intent element is lacking in the other offences in subparagraph (b), which require only knowledge or intent with regard to the nature of the prohibited act. A reason for this is that subparagraph 1 (b) (i) deals with the transport of explosive or radioactive materials, such as dynamite and commercial explosives for mining and infrastructure projects and radioactive medical materials. These are more common and have more innocent uses than do the BCN materials dealt with in subparagraphs 1 (b) (ii), (iii) and (iv). In fairness to the maritime industry and individual mariners, it is therefore appropriate to require a specific criminal purpose as an element of the offence in subparagraph 1 (b) (i) of transporting explosives or radioactive materials which may be intended for wholly innocent uses.

Subparagraph 1 (b) (ii) criminalizes the transport of a BCN weapon, a term that will be explained in the following Module subsection.

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

Mere knowledge that the object transported is a BCN weapons is sufficient to impose criminal liability on the transporter. Subparagraph 1 (b) (iii) proscribes the transport of:

(b) (iii) Any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement;

The definitional article of the 2005 SUA Convention, article 2, states that the terms “source material” and “special fissionable material” have the same meaning as in the Statute of the International Atomic Agency (IAEA). The IAEA was formed by the adoption of a multilateral treaty under United Nations auspices in 1956 to encourage the peaceful use and control of atomic energy and technology. This treaty, or Statute, defines “source material” as uranium or thorium or other material designated by the IAEA. “Special fissionable material” is defined as designated plutonium and uranium isotopes and such other material as may be designated by the IAEA Board of Governors, but not including “source material”.

Subparagraph 1 (b) (iv) of article 3 bis requires the criminalization of the transport of:

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

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**Case study. The BBC China case**

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


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


See the Report by the IAEA Director General cited in Module footnote in the BBC China Case study above.

Use of the term “BCN” in the offence definitions of subparagraphs 1(a) and (b) of article 3 bis

An extensive definition of a BCN weapon is provided in article 1 of the 2005 SUA Convention which defines a BCN weapon in the following terms:

(d) “BCN weapon” means:

(i) “Biological weapons”, which are:

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

(2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.
(ii) “Chemical weapons”, which are, together or separately;

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

(A) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; or

(B) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; or

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

(D) Law enforcement including domestic riot control purposes, as long as the types and quantities are consistent with such purposes;

(2) Munitions and devices specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (ii)(1), which would be released as a result of the employment of such munitions and devices;

(3) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (ii) (2).

(iii) Nuclear weapons and other nuclear explosive devices.

**Biological weapons**

With respect to “biological weapons”, the definition in article 1 (d) (i) of the 2005 SUA Convention is a verbatim reproduction of paragraphs 1 and 2 of article 1 of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (1972), which came into effect in 1975.

**Activity**

Consider examples of how biological weapons could be delivered in a maritime context and the environmental and human losses that might occur. Examples might include marine life forms that would be particularly vulnerable, confined areas or conditions where a biological weapon might be particularly dangerous; and existing natural conditions, such as “red tides” and other forms of abnormal and toxic algae growth that could be manipulated by scientists affiliated with a terrorist group or willing to support them for ideological, religious or monetary reasons.

**Chemical weapons**

The definition of “chemical weapon” found in article 1 (d) (ii) of the SUA Convention as amended in 2005 is derived from article II of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention of 1993), which came into force in 1997. One difference
is that the Chemical Weapons Convention article 2, paragraph 1 (a) exempts toxic chemicals and their precursors “... where intended for purposes not prohibited under this Convention”, whereas the 2005 SUA Convention specifies those exempted uses. Subdivisions (A), (B), (C) and (D) of the 2005 SUA article 1 (d) (ii) list exempted uses for industrial, agricultural, research, medical, pharmaceutical, protective, certain limited military purposes, and law enforcement including riot control purposes, so long as the types and quantities are consistent with such purposes.

**Toxins and toxic chemicals**

A reader analysing the 2005 SUA Convention may notice that article 1 subparagraph 1 (d) (i) defines “biological weapons” as including “toxins” whatever their origin or method of production, whereas chemical weapons are defined in article 2, subparagraph 1 (d) (ii) (1) as “toxic chemicals” which through their chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. In ordinary speech “toxic chemicals” and “toxins” are both used to mean poisonous or harmful substances, so there may appear to be some overlap or duplication between subparagraphs 1 (d) (i) (1) and 1 (d) (ii) (1).

The reason for this apparent redundancy in terminology is that “toxins” as they were defined in the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction would appear to exclude many of the most dangerous chemical weapons that have been or could be used in warfare. As explained by the World Health Organization, despite the phrase “whatever their origin or method of production”, “toxin” has a limited meaning in the 1972 Convention.

The 1972 Biological and Toxin Weapons Convention covers “toxins whatever their origin or method of production”. It does not define toxins, but its travaux preparatoires show that the term is intended to mean toxic chemicals produced by living organisms. Toxins that are produced by living organisms are substances such as botulism and anthrax bacteria or ricin, a deadly protein found in castor beans. These are dangerous bacteriological agents, with potential use as weapons of mass destruction. However, they do not include the chemical weapons most widely used in the First World War and in subsequent conflicts. Those substances, such as chlorine, phosgene and mustard gasses, were synthesized from industrial chemicals or other non-living sources and are therefore not “toxins” as defined in the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction. Similarly, the nerve gas sarin used by the Aum Shinrikyo cult in a terrorist attack on the Tokyo Metro in 1995, is produced by combining what is commonly called rubbing alcohol and other industrial chemicals and so is not a “toxin”.

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The limited scope of the definition of “toxins” in the 1972 Bacteriological and Toxin Weapons Convention was overcome by the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, article 2, paragraph 2, which defined a “toxic chemical”:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

The same World Health Organization Guidance previously cited in footnote 64 pointed out that:

Inasmuch as toxins are both toxic and chemical in nature, they also automatically fall within the scope of the 1993 Chemical Weapons Convention ...

By including both “toxins” and “toxic chemicals” in its coverage and using the definitions from both the Biological and Toxin Weapons Convention and the Chemical Weapon Conventions, the 2005 Protocol to the SUA Convention ensured that there would be no gap in its scope of application to dangerous chemicals and avoided the confusion that might have resulted from introduction of new definitions or the omission of a definition familiar from a related international instrument.

Nuclear weapons

Subparagraph 1 (d) (iii) of article 1 of the SUA Convention as amended in 2005 treats the terms “nuclear weapons and other nuclear explosive devices” as words of common understanding which require no further definition. This is the same approach employed in the Treaty on the Non-Proliferation of Nuclear Weapons of 1968, which entered into force in 1970. The International Convention for the suppression of Acts of Nuclear Terrorism (2005) uses the same term “nuclear explosive device in its article 1, paragraph 4, without a definition. The term “nuclear material” is defined in terms of plutonium and uranium isotopes with particular atomic weights. The 1985 South Pacific Nuclear Free Zone Treaty of the South Pacific Forum (Treaty of Rarotonga) and the African Nuclear Free Zone Treaty of the Organization of African Unity (Treaty of Pelindaba) both define “nuclear explosive device” as including the term “nuclear weapon”, meaning:

... any nuclear weapon or other explosive device capable of releasing nuclear energy, irrespective of the purpose for which it could be used. The term includes such a weapon or device in unassembled and partly assembled forms, but does not include the means of transport or delivery of such a weapon or device if separable from and not an indivisible part of it.

The 1980 Convention for Physical Protection of Nuclear Material defines “nuclear material” as:

... plutonium, except that with isotopic concentration exceeding 80 per cent in plutonium-238; uranium-233; uranium enriched in the isotope 235 or 233; uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore residue; or any material containing one or more of the foregoing.
A nuclear weapon or other explosive device releases nuclear energy as a result of nuclear fission or fusion. The atomic bombs used in World War II were fission devices in which conventional chemical explosives propelled neutrons into a mass of uranium or plutonium, causing atoms in the target mass to split in a simultaneous chain reaction and release immense amounts of energy. A fusion bomb relies upon an initial fission explosion to create heat and compress isotopes of hydrogen so that they fuse and in the process release hundreds of times as much energy as did the World War II atomic weapons. Although both of these bombs use conventional explosives to begin their internal processes, their distinguishing feature as “a nuclear weapon or other explosive device” is that the shock wave, heat and radiation they release on the external environment derives from the nuclear reaction rather than the initial chemical explosion.

Radiological dispersal devices and radiation emitting devices

Subparagraph 1 (a) (i) of article 3 bis of the 2005 SUA Convention requires the criminalization of the use against a ship or the discharge from a ship of “any explosive, radioactive material or BCN weapon”.

The International Convention for the Suppression of Acts of Nuclear Terrorism (2005) defines “radioactive material” as:

... nuclear material and other radioactive substances which contain nuclides which undergo spontaneous disintegration (a process accompanied by emission of one or more types of ionizing radiation, such as alpha-, beta-, neutron particles and gamma rays) and which may, owing to their radiological or fissile properties, cause death, serious bodily injury or substantial damage to property or the environment.

Some examples of what can be covered by article 3 bis of the 2005 SUA Convention besides BCN weapons include:

A radiological dispersal device (RDD) which is an explosive device packaged with a quantity of radioactive material intended to be dispersed in the environment by the blast effect and shock waves generated by a chemical explosion, with the residue then further dispersed by air currents and physical movement. Radioactive materials used in industry, medicine, agriculture and research are the most readily available. Those materials vary widely in their half-life (durability in emitting radiation), the type of radiation emitted, its harmfulness, and other qualities.

Without knowing what type and quantity of radioactive material would be available for the construction of a radiological dispersal device, what type of explosive device would be used to disperse the materials, and in what circumstances the device would be exploded, it is impossible to estimate its potential for damage. However, there is no doubt that even a small bomb with enough material to create measurable radioactivity would be likely to create public fear within a considerable geographic radius. Widespread panic and flight might easily result.

A radiation emission device (RED) utilizes a radioactive source to emanate radiation and does not use explosives.65

Activity

Consider situations or conditions in which terrorist use of a radioactive dispersal device bomb would be particularly effective because of the number of victims in relative proximity to a crowded stadium or other explosion site, because of the broad dispersal of the radioactive material, or because of the confusion, uncertainty and insecurity that could be created, e.g. use of multiple bombs and disinformation techniques. What counter-measures by the authorities are likely to be most effective?

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

Article 3 ter provides that:

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


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

In its resolution 1267 (1999), the Security Council decided that Member States should deny permission to aircraft owned, leased or operated by the Taliban to take off or land on their territory. Resolution 1333 (2000) expanded this partial embargo to require Member States to deny permission to any aircraft to take off from, land in or over-fly its territory if the aircraft originated in or is destined to land in territory in Afghanistan controlled by the Taliban. After the attacks of September 2001, resolution 1373 required Member States to prevent the movement of terrorist or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents. Resolution 1390 of 2002 decided that Member States must prevent their flag vessels or aircraft being used to transfer to Al Qaida and the Taliban arms and related weapons ammunition, military vehicles and equipment, and technical advice, assistance or training.
The specific language with which the Security Council demonstrated its concern with the mobility of terrorists is found in the following mandatory paragraphs of resolution 1373, decided under chapter VII of the Charter:

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

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

(g) Prevent the movement of terrorist or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents;

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

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

In operative paragraph 2, subparagraph (b) of its resolution 1390 (2002), the Security Council decided that States shall:

(b) Prevent the entry into or the transit through their territories of these individuals (Osama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them) ...

This decision was renewed in subsequent resolutions.

The importance of travel and transportation to terrorist movements is also being emphasized at the police level. The ability of terrorists to travel, plan and commit terrorist acts internationally has long been facilitated by use of false travel documents. The International Criminal Police Organization (INTERPOL) responded to this phenomenon by the creation of its Lost and Stolen Travel Document Database in the year 2002. By 2013 the database contained over 35 million documents reported lost or stolen by 166 countries.66 Taken together with

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66 Drop and Stolen Travel Document Database available at www.interpol.int/en, drop down menu Interpol Expertise/Databases.
INTERPOL’s modification of its former observance of a political offence exception with regard to issuance of Red Notices for terrorist offences, this database has helped to diminish the ease with which terrorists and other criminals cross borders and evade tracing and apprehension. National governments are increasingly moving toward machine readable and biometric passports and identity documents linked with sophisticated computerized entry systems and databases, thereby greatly diminishing the ease with which terrorists can move with false identity documentation. Thus, an offence related to the knowing transportation of a person who has committed a Convention offence is consistent with an international political and law enforcement trend. The importance of isolating and quarantining terrorist groups is increasingly being recognized and measures are being implemented to deny their members the opportunity to travel internationally and to effectively track them if they do.67

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

Article 3, paragraph 1 of the 1988 SUA Convention establishes the physical commission of various violent, damaging or disruptive acts as offences which must be criminalized by States parties. Paragraph 2 of the same article establishes various auxiliary types of conduct that also make a person criminally responsible for an offence in paragraph 1. That conduct includes an attempt, abetting or otherwise being an accomplice of a physical perpetrator of a paragraph 1 offence and threatening to commit such an offence to compel a physical or juridical person to do or abstain from doing any act. Module sections 3.3.5 and 3.3.6 analyse these provisions of the 1988 SUA Convention.

Article 4 of the 2005 SUA Convention introduces what will become article 3 quater of the 2005 SUA Convention. Article 3 quater lists five means which must be established as constituting the commission of an offence in addition to the physical commission defined in article 3, 3 bis or 3 ter of the Convention. All of article 3 quater’s subparagraphs are traceable to the 1988 SUA Convention or to more recent United Nations crime or terrorism conventions. A person commits an offence within the meaning of the 2005 SUA Convention if that persons:

(a) Unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences set forth in article 4, paragraph 1, article 3 bis, or article 3 ter; or

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

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

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

67 See the Stolen/Lost Travel Document Initiative of the International Criminal Police Organization (Interpol). “Bearing in mind that terrorists and other serious criminals regularly use false documents to travel, INTERPOL established its Stolen/Lost Travel Documents (SLTD) database in 2002. This database has subsequently proven to be an effective tool for intercepting such individuals when attempting to cross borders”, Interpol, Best Practices in Combating Terrorism, www.un.org/en/sc/ctc/docs/bestprac-interpol.pdf.
(e) Contributes to the commission of one or more offences set forth on article 3, article 3 bis, article 3 ter, or subparagraph (a) or (b) of this article, by a group of persons acting with a common purpose, intentionally and either:

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

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

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

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

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

Subparagraph (d) makes it an offence to organize or direct others to commit other Convention offences, with one exception.68 This form of committing an offence can be found in prior counter-terrorism conventions. Article 2, subparagraph 3 (b) of the 1997 International Convention for the Suppression of Terrorist Bombings; subparagraph 5 (b) of article 2 of the 1999 International Convention for the Suppression of the Financing of Terrorism; subparagraph 4 (b) of article 2 of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism; and subparagraph 1 (j) of article 9 of the 2005 Amendment to the Convention on the Physical Protection of Nuclear Materials all use similar language to punish those who organize and direct others to commit the offences established in the respective instruments. The need for imposition of criminal liability on those who instigate and direct the acts of others is a particularly important lesson learned in the struggle against terrorism. Those who are willing to give their lives for an ideological, religious or political cause are difficult if not impossible to deter. Those who remain in the shadows and indoctrinate, organize and direct others to commit acts of violent terrorism are more calculating and therefore more subject to deterrence. The danger that a group of persons willing to die for a cause may cause catastrophic damage makes it essential to impose criminal responsibility on the organizers and directors of such groups.

68Subparagraph (d) of article 3 quater does not apply to subparagraph (c) of article 3 quater, participation as an accomplice.
Moreover, formal mechanisms must be established which will permit criminal justice authorities to intervene preventively, before a tragedy results from a terrorist bombing or other attack. Subparagraph (d) of article 3 quater furthers this preventive purpose by criminalizing acts of organizing or directing others to commit an offence. Understood in their literal meaning, neither of those types of conduct necessarily requires the actual commission of the intended offence. Organizing others to commit an offence is inherently a prospective offence. A leader organizes a group to carry out an action before that action takes place. “Directing” others to commit an offence is a more ambiguous term. A leader can give directions to others during the actual commission of the offence, but that leader can also give directions in advance of the action. With the assistance of special investigative techniques that reveal a terrorist group’s internal planning and preparation such prospective acts of organizing and directing others can be proved even before another group member attempts or commits the offence.69 However, as will be discussed in the next Module section, this seems to be the only offence in the 2005 SUA Convention which authorizes prosecution for preparatory actions before an offence is attempted or accomplished. Moreover, the “organizes or directs” language has limited effect in that it addresses actions taken only at the leadership level.

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

Subparagraph (e) of article 3 quater in the 2005 SUA Convention creates an offence not found in the 1988 SUA Convention. That new offence is contributing to the commission of an offence by a group when the contribution is done either with the aim of furthering the group’s criminal purpose or with knowledge of the group’s criminal intention. A predecessor to this offence was introduced in the 1997 International Convention for the Suppression of Terrorist Bombings, article 2, subparagraph 2 (c). Similarly worded offences are found in the 1999 International Convention for the Suppression of the Financing of Terrorism, article 2, subparagraph 5 (c); in the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, article 2, subparagraph 4 (c); and in the 2005 Amendment to the Convention on the Physical Protection of Nuclear Materials in article 9, subparagraph 1 (k).

Some explanation may be helpful with regard to the alternative mental states with which this offence may be committed. The chapeau of subparagraph (e) of article 3 quater categorizes a contribution to the commission of an offence as punishable if it is done intentionally and with either of two further elements. An act done intentionally without one of the two additional mental elements is not an offence. Assuming that the offence language is not intended to be redundant or meaningless, the word “intentionally” in the chapeau cannot be equivalent to the mental state in subparagraph (e) (i) “… with the aim of furthering the criminal activity or criminal purpose of the group”. So, in the context of the chapeau of subparagraph (e) this word “intentionally” must be understood to mean only that the physical act is done consciously and deliberately, not necessarily with any understanding or purpose that it is a contribution to the commission of an offence.

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The difference between an act done intentionally and an act done with the intent to accomplish a criminal purpose or with knowledge of such a purpose can be illustrated by the following example. A taxi driver who transports persons and their luggage from a hotel to the ferry terminal has “intentionally” helped to load luggage into his vehicle and has “intentionally” driven his passengers to their announced destination, in the sense of intending to do what seemed to be completely innocent acts. If once on board, those persons produce weapons from their luggage, unlawfully seize the ship and kill crew members and passengers, the taxi driver will come under suspicion because he or she has physically contributed to the commission of the crime by furnishing transportation. However, once it becomes apparent that the taxi driver was simply the driver of the next taxi waiting in a line of vehicles to pick up passengers at the hotel, that he had no knowledge of his passengers’ plans and no intention to facilitate their crimes, his lack of criminal responsibility will be indisputable because he neither intended to further their criminal purpose nor did he know of their intention to commit an offence.

Case study. Criminal responsibility

If instead of using a commercial taxi, the persons who committed the unlawful seizure had asked a friend to drive them to the ferry terminal and had divulged their intended purpose, that friend could be criminally responsible. In fact, the friend could be criminally responsible even if she or he had expressed reservations about the proposed conduct or had tried without success to dissuade the hijackers from their intended course of action. That is because once the friend becomes aware of the group’s intended activity or purpose, that knowledge transforms an innocent act of assistance into a knowing contribution if it facilitates the actual commission of a Convention offence. Once a person learns of the criminal purpose of an action, any further contribution to that purpose or action is in itself an offence, at least if the offence is ultimately committed. In concrete terms, if the friend learned while driving to the ferry terminal of the intended unlawful seizure, criminal responsibility for the ultimate offence could be avoided only by refusing to transport the intended hijackers to the terminal. National law and jurisprudence might further require the friend to immediately inform the police so that they might prevent or interrupt the planned attack, but the Convention offence could be avoided by simply refusing to make any further contribution once the criminal purpose of the action is known.

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

In its focus on an association with “... a group of persons acting with a common purpose ... where such activity or purpose involves the commission of an offence” subparagraph (e) of article 3 quater is reminiscent of the civil law concept of an association de malfaiteurs.70 However, the French Penal Code sections referenced in footnote 70 make criminal the act of association itself. The language of subparagraph (e) of article 3 quater applies to a person who:

70See article 450-1 of the French Penal Code, criminalizing participation in a criminal association, and article 421-2-1, criminalizing participation in an association formed to commit terrorist offences. (Loi du 22 juillet 1996): “Constitue également un acte de terrorisme le fait de participer à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d’un des actes de terrorisme mentionnés aux articles précédents.”
(e) Contributes to the commission of one or more offences set forth on article 3, article 3 bis, article 3 ter, or subparagraph (a) or (b) of this article, by a group of persons acting with a common purpose, internationally and either:

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

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

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

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

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

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

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

followed by the conspiracy offence described in Module section 2.7.4 and by an offence of contributing to the commission of an offence by a criminal group, phrased in language virtually identical to the offence in subparagraph (e) of article 3 quater.
Relatively few countries have yet implemented either or both the 2005 SUA Convention and the Beijing Convention. Therefore the opportunity is still available for those States to choose whether to consider the ratification and implementation of the two instruments separately or jointly. As is evident from the analysis in this Module, considerable overlap exists between the offences required to be established by the two sets of instruments. Inconsistent criminalization language could therefore cause legal risks and confusion. In the interest of legislative efficiency, it also might be advantageous to combine offences directed against maritime and air transport in the same legislative provisions. However, practical considerations will vary, and it certainly it not necessary that the 2005 SUA Convention or the Beijing Convention and Protocol be adopted at the same time.

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

3.6.9 Liability of legal entities

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

None of the terrorism-related legal instruments of the United Nations or its affiliated organizations had addressed the issue of the criminal responsibility of legal entities before 1999.
In that year the International Convention for the Suppression of the Financing of Terrorism required its States Parties to criminalize the provision or collection of funds with the intention or in the knowledge that such funds are to be used to carry out a terrorist offence as defined in the 1999 Convention and its annex. The provision or collection of funds on a significant scale are activities that are inherently likely to involve banks, financial institutions, non-government organizations and other legal entities. Accordingly, article 5 of the 1999 Terrorism Financing Convention required the Convention’s States Parties to take the measures necessary to hold a legal entity liable for acts of its representatives in specified circumstances. The type of legal liability was left to the national discretion of the individual States Parties.

The 2005 SUA Convention will contain new offences in articles 3 ter and 3 quater (added by article 4 of the 2005 Protocol) which are likely to involve shipping companies, freight forwarders, manufacturers and other legal entities, and masters of vessels or other responsible persons. Some of those persons may act with criminal intent or knowledge. Article 3 ter in the 2005 SUA Convention criminalizes transport of a person knowing that the person has committed a specified offence and intending to assist that person’s escape. That article could apply to a ship company which permits fugitives to escape on its vessels after a terrorist attack because of sympathy for their ideological or other cause. Article 3 quater lists various means by which Convention offences may be committed by persons other than the physical perpetrators. This would include the use of legal entities to facilitate commission of an offence established in the Convention, for example a freight forwarding firm that provides false packaging and documentation for a shipment of nuclear material, equipment and technology knowing and intending that it will be used in violation of an IAEA safeguard agreement for the manufacture of a nuclear weapon.

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

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

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

3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

3.6.10 Boarding and search provisions concerning BCN weapons and other offences in the 2005 SUA Convention

As indicated in Module section 3.6.1, the 2005 SUA Convention added boarding and search rules and safeguards related to BCN weapons and related materials to the 1988 SUA Convention. Article 8 bis establishes possibilities for boarding and search similar to those provided in
the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. Article 8 bis provides detailed procedures and safeguards to be followed in cases of suspicion of violations of the offences established in article 3 of the 1988 SUA Convention or added by the 2005 SUA Convention. The grounds for and contents of a request for boarding are specified.

The following paragraphs explain the main operative features of the boarding provisions contained in article 8 bis.

Paragraph 5 defines the right of authorized officials of a State Party (the requesting Party) to request information from another State Party (the first Party) in connection with a ship flying the flag or displaying marks of this last one, encountered seaward of any State’s territorial sea. The request for information should be based on reasonable grounds to suspect that the encountered ship or a person on board that ship has been, is or is about to be involved in the commission of any of the offences regulated by SUA.

The request, which should be motivated by the “desire” (sic) of the requesting Party to board the ship, should be made in two steps, first the confirmation of nationality. Only upon confirmation of nationality will the requesting Party ask for authorization to board and take appropriate measures, including stopping, boarding and searching of the ship, cargo and persons on board, and the questioning of the latter.

The request must follow certain formalities. If a request is made orally, a confirmation in writing should follow as soon as possible.

The Convention regulates the duty of the first Party to acknowledge immediately its receipt of any written or oral request. Acknowledgment does not mean the provision of the information requested. In principle, lack of acknowledgment or lack of confirmation of nationality may lead to actions governed by the law of piracy rather than the SUA. Legitimate action against the ship could obviously be taken in self-defence, in the face of imminent danger. In other cases the requesting State may prudently decide not to act, and keep a prudent distance from the ship it wants to board while insisting on obtaining an acknowledgment to its request.

Confirmation of nationality by the first Party becomes the source of a complex set of rights and obligations. It is only after confirming nationality that the first Party becomes, in accordance to paragraph 5 (b), formally “the flag State”, and assumes its rights and obligations as such.

The request for authorization to board and take consequential measures can be answered by the flag State in different ways indicated in paragraph 5 (c) (i) to (iv). It can simply decline to authorize boarding and other appropriate measures, with or without conditions (iv), or indicate that it will conduct the boarding and search with its own law enforcement or other officials (iii). It can also propose to conduct boarding and search together with the requesting Party (ii) or authorize this one to do so on its behalf (i).

Since under paragraph 8 of article 8 bis the flag State retains the right in all cases for the flag State to exercise its jurisdiction throughout the whole process of boarding, the requesting State is considered to be acting on behalf of the flag State. The flag State can only surrender its jurisdiction in favour of another State if the latter can establish its own jurisdiction over the case in accordance with the provisions of article 6. Article 6 regulates which States can establish jurisdiction in connection with SUA offences affecting them, such as crimes
committed against ships flying their flag, in their territory or by one of their nationals. It also regulates the optional right to establish jurisdiction for the benefit of those States whose nationals have been particularly affected by an offence, or when this offence has been committed in an attempt to compel those States to do, or abstain from doing, any act.

Article 8 bis conditions the application of the boarding provisions to a comprehensive set of conditions and safeguards. Most of them are basically guidelines, although some could have a decisive weight in the consideration of whether an authorization for boarding should, or not, be granted. First and foremost is the need to consider whether, on account of the dangers and difficulties involved in the boarding of ships at sea, it would not be more appropriate to take measures at the next port of call or elsewhere (paragraph 3). This preliminary guideline on how to act should be considered with some important safeguards contained in paragraph 10 according to which, when a State Party takes boarding measures it should take into due account the need not to endanger the safety of life at sea, the safety and security of the ship and its cargo and the safety of the marine environment.

Paragraph 10 (b) provides that States shall be liable for any damage, harm or loss attributable to measures taken in the course of boarding if these measures were unfounded, unlawful or exceed those reasonably required, depending on the circumstances of the case. A careful distinction is made here: authorization to board per se, cannot be considered a source of liability. Liability only arises in the case of damage, harm or loss caused by boarding measures taken as a consequence of the authorization.

If the flag State grants permission for boarding, conditions may be imposed and the following precautions must be followed:

Nine safeguards:

(a) Where a State Party takes measures against a ship in accordance with this article, it shall:

   (i) Take due account of the need not to endanger the safety of life at sea;

   (ii) Ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law;

   (iii) Ensure that a boarding and search pursuant to this article shall be conducted in accordance with applicable international law;

   (iv) Take due account of the safety and security of the ship and its cargo;

   (v) Take due account of the need not to prejudice the commercial or legal interests of the flag State;

   (vi) Ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;

   (vii) Ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in articles 3, 3 bis, 3 ter or 3 quater are afforded the protections of paragraph 2 of article 10, regardless of location;\(^71\)

\(^71\) Paragraph 2 of article 10 requires States Parties to guarantee fair treatment, including enjoyment of all the rights and guarantees in conformity with the law of the State in which the person is present and applicable provisions of international law, including international human rights law.
(viii) Ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship’s owner and the flag State at the earliest opportunity; and

(ix) Take reasonable efforts to avoid a ship being unduly detained or delayed.\textsuperscript{72}

In an article cited in footnote 51 by Helmut Tuerk of the International Tribunal for the Law of the Sea, mention is made of an interesting contrast. A 1995 international fishing convention\textsuperscript{a} allows boarding and inspection of a fishing vessel on the high seas based upon grounds to believe a serious violation of fishing regulations has been committed. This boarding and inspection is permitted without a contemporaneous authorization by the flag State, whereas permission of the flag State is required when there is reason to believe the cargo being transported includes weapons of mass destruction. Helmut Tuerk suggests that States are reluctant to cede sovereignty and agree in advance to inspections of ships flying its flag in highly political matters such as the fight against terrorism.

\textsuperscript{a} The Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995, implementing the United Nations Convention on the Law of the Sea.

Boarding requests and granting of permission are often governed by anticipatory agreements. The United States, as an example, has ship boarding agreements with a number of States, such as Cyprus, Liberia and Panama. Such treaties will often provide a standard procedure for handling boarding requests, such as a “no objection” procedure under which permission is deemed to have been granted to a request for boarding if not denied with two hours.\textsuperscript{a}


3.6.11 Rejection of the political offence exception in article 11 bis of the 2005 SUA Convention

In analysing the provisions of the Beijing Convention Module section 2.7.7 described how the political offence exception came to be regarded as inappropriate in counter-terrorism instruments. The reference in article 2 of the Tokyo Convention that the Convention did not apply to offences against penal laws of a political nature was omitted from subsequent terrorism-related instruments. In 1997 the International Convention for the Suppression of Terrorist Bombings expressly excluded the possibility of a State Party applying the political offence exception to offences established by that instrument. Article 11 of that 1997 Convention contains comprehensive language which clearly was designed to apply to all the various permutations of the exclusion.\textsuperscript{73} That formulation has become standard in subsequent terrorism-related instruments. Article 11 bis of the 2005 SUA Convention follows the language developed in the 1997 Terrorist Bombing Convention and provides that:

\textsuperscript{72} Paragraph 10, article 8.

None of the offences set forth in article 3, 3 bis, 3 ter or 3 quater shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

3.6.12 Effect of the non-discrimination article 11 ter of the 2005 SUA Convention on the obligation to extradite or prosecute

The inadmissibility of the political offence exception established in the 2005 SUA Convention is balanced by article 11 ter, added by article 12 of the Protocol of 2005 to the Convention, which provides that:

Nothing in this convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 3, 3 bis, 3 ter or 3 quater or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person’s position for any of these reasons.

Article 11 ter, establishing discrimination as a ground for refusal of international cooperation, and article 9 guaranteeing fair treatment, must be read together with the obligation in article 10, paragraph 1 of both the 1988 and 2005 SUA Conventions. Article 10.1 requires application of the “extradite or prosecute” rule previously described in Module section 1.4.1, which is the obligation “... without exception whatsoever and whether or not the offence was committed on its territory, to refer the case without delay to its competent authorities for the purpose of prosecution ...” The Tokyo Convention had simply excluded political offences from its scope of application. Under the 2005 SUA Convention and the Protocol to the Fixed Platform Protocol, offences done with a political motive are within the scope of the instruments but are subject to their non-discrimination provisions. This creates a need to balance the two imperatives of applying the extradite or prosecute rule “without exception whatsoever” and the protection provided by the guarantee that nothing in the Convention constitutes an obligation to afford international cooperation that facilitate a discriminatory prosecution or result.

3.7 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005

This Protocol updates the original Fixed Platform Protocol, to the extent appropriate to its more limited subject matter, in some of the same ways the 2005 SUA Protocol updates the SUA Convention. Editorial changes are made in a number of articles. Additional offences are created in a new article 2 bis dealing with BCN weapons.

Any person commits an offence within the meaning of this Protocol if that person unlawfully and intentionally, when the purpose of the act, by its nature or context, is to intimidate a
population, or to compel a government or an international organization to do or to abstain from doing any act:

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

(b) Discharges, from a fixed platform, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or

(c) Threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a) or (b).

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

See Module section 3.6.8 and its subsections or a description and analysis of the additional means for committing an offence introduced in the 2005 SUA Protocol to the SUA Convention and to the Protocol to the Fixed Platform Protocol.

Assessment questions

- Why is piracy, as defined under customary international law, the CHS and UNCLOS not applicable to a situation like the unlawful seizure of the Achille Lauro cruise ship? (See Module section 3.2).

- If an inland country has no access to the sea and no fixed platforms on the continental shelf, why should it adopt the maritime security instruments? (See Module section 3.3.7).

- Considerations: UNSC Resolution 1373 (2001), operative paragraph 2, requires Member States to deny safe haven to those who finance, plan, support, or commit terrorist acts or provide safe havens. The decision whether or not to ratify the maritime counter-terrorism instruments whose ratification UNODC is mandated to encourage is always a matter of choice by a Member State. However, a State that does not ratify and implement the maritime instruments may find itself involuntarily providing safe haven to terrorists. The grounds of jurisdiction in the SUA instruments include nationality of the offender. If an alleged offender is present in a State and that State is not a member of the SUA instruments and has no treaty relationship or implementing law that permits it to extradite or prosecute for a foreign crime, that State may be unable to take legal action against the alleged offender. Is the applicability of the Fixed Platform Protocols of 1988 and 2005 determined by whether a platform is positioned over the shallow extension of the continental landmass before it declines to the deep ocean floor?

- Considerations: factors relating to the nature of the platform and the definition of continental shelf in UNCLOS must be considered. (See Module section 3.4.2).
• Can a threat to release harmful chemical substances if a government does not make an extortion payment be considered an offence under the 2005 SUA Convention? (See article 3 bis 1 (iv) of the 2005 SUA Convention).

• What significance does an IAEA comprehensive safeguards agreement have with respect to the transportation of nuclear materials under the 2005 SUA Convention? (See article 3 bis 1 (iii) of the 2005 SUA Convention and Module section 3.6.6).

• In what way is article 3 ter of the 2005 SUA Convention consistent with political and law enforcement emphasis on the travel mobility of terrorists? (See Module section 3.6.7).

• What innovation with respect to the political offence exception to international cooperation was introduced in the 2005 SUA Convention? Does the new non-discrimination article introduced by 2005 SUA Convention cancel the effect of the elimination of the political offence exception or can the two be reconciled? (See Module section 3.6.11).

• Does a military vessel of a State that suspects a ship of another State of carrying BCN weapons have the authority to stop that ship on the high seas, board it and search for weapons and evidence? Are there any conditions that must be observed prior to or during such a boarding? If weapons are found, which State has the right to exercise jurisdiction over the ship and cargo? (See Module section 3.6.10).

• Assume that the flag State consented to your country’s request to board a vessel pursuant to the 2005 SUA Convention. Who, (police, coastguard) may have domestic legal authority to conduct the search, evidentiary seizure or arrest for an offence committed on board a foreign vessel outside of your country’s territorial waters? Consideration: This is a matter of domestic law that may require specific legislation to establish procedures governing such boarding and the admissibility of resulting evidence.

Tools and further reading

## Comparison between 1988 and 2005 SUA Conventions with regard to the selected elements

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<td><strong>I. Scope of application</strong></td>
<td>- The Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single state, or the lateral limits of its territorial sea with adjacent States; &lt;br&gt; - In other cases, the Convention nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State mentioned in the first paragraph (this regulation applies mainly to situations when a crime was committed within borders/waters of a single state but an offender managed to escape to a different country); &lt;br&gt; - The Convention does not apply to vessels used for military, customs or police purposes and to ships which are withdrawn from navigation or laid up.</td>
<td>- The Convention applies in the same manner as the 1988 SUA Convention, with the following additional elements;                                                                                      &lt;br&gt; - The Convention does not apply to the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law;                                                                 &lt;br&gt; - The Convention does not apply to the activities undertaken by military forces of a State in the exercise of their official duties (inasmuch as they are governed by other rules of international law).</td>
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<tr>
<td><strong>II. Jurisdiction</strong></td>
<td>Each State Party shall establish its jurisdiction over the offences mentioned in the Convention when the offence is committed: &lt;br&gt; - Against or on board a ship flying the flag of the State at the time the offence is committed; or &lt;br&gt; - In the territory of that State, including its territorial sea; or &lt;br&gt; - By a national of that State. &lt;br&gt; A State Party may also establish its jurisdiction over an offence when: &lt;br&gt; - It is committed by a stateless person whose habitual residence is in that State; or &lt;br&gt; - During its commission a national of that State is seized, threatened, injured or killed; or &lt;br&gt; - It is committed in an attempt to compel that State to do or abstain from doing any act.</td>
<td>Each State Party shall or may establish its jurisdiction according to the same rules as contained in the 1988 SUA Convention, taking into account the extended list of crimes in the 2005 SUA Convention (see part III, “Criminalization”). &lt;br&gt; Moreover, each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence set forth in the Convention. Such liability may be criminal, civil or administrative.</td>
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### Comparison between 1988 and 2005 SUA Conventions with regard to the selected elements

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<tr>
<td>II. Jurisdiction (continued)</td>
<td>Each State Party shall establish its jurisdiction when the alleged offender is present in its territory and it does not extradite him.</td>
<td>Within the meaning of the 2005 SUA Convention, any person commits an offence if that person unlawfully and intentionally: 1. Commits one of the offences mentioned in paragraphs (a) to (f) in the column on the left regarding the 1988 SUA Convention; 2. Threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs (b), (c) and (e) in the column on the left, if that threat is likely to endanger the safe navigation of the ship in question; 3. When the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act: (A) Uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN (biological, chemical or nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage; or (B) Discharges, from a ship, oil, liquefied natural gas or other hazardous or noxious substance (other than mentioned in point (A)), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or (C) Uses a ship in a manner that causes death or serious injury or damage; or</td>
</tr>
<tr>
<td>III. Criminalization</td>
<td>According to the Convention, any person commits an offence if that person unlawfully and intentionally: (a) Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (b) Performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or (c) Destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or (d) Places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) Destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or (f) Communicates information which that person knows to be false, thereby endangering the safe navigation of a ship; or (g) Injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in paragraphs (a) to (f). The following actions also constitute an offence under the Convention:</td>
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### Comparison between 1988 and 2005 SUA Conventions with regard to the selected elements

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<tr>
<td>III. Criminalization (continued)</td>
<td>An attempt to commit any of the offences set forth in paragraphs (a) to (f); Abetting the commission of any of the offences set forth in paragraphs (a) to (f) perpetrated by any person; Acting as an accomplice of a person who commits such an offence; Threat, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.</td>
<td>(D) Threatens, with or without a condition, as is provided for under national law, to commit one of the offences mentioned in points (A), (B) and (C); 4. Transports on board a ship: • Any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or • Any BCN weapon, knowing it to be a BCN weapon; or • Any source material, special fissionable material or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or • Any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.</td>
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Comparison between 1988 and 2005 SUA Conventions with regard to the selected elements

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<tr>
<td>III. Criminalization (continued)</td>
<td></td>
<td>5. Transports another person on board a ship knowing that the person has committed an act that constitutes one of the above- and below-mentioned offences or an offence set forth in any treaty listed in the annex to the 2005 SUA Convention and intending to assist that person in the evasion of criminal prosecution; 6. Injures or kills any person in connection with the commission of any of the offences mentioned in points 1, 3 (A), (B) and (C), 4 and 5. Any person also commits an offence within the meaning of the Convention if that person: 7. Attempts to commit any of the offences mentioned in points 1, 3, 4 and 6; 8. Participates as an accomplice in any of the above mentioned offences; 9. Organizes or directs others to commit any of the offences mentioned in points 1, 2, 3, 4, 5, 6 and 7; 10. Contributes to the commission of one or more offences mentioned in points 1, 2, 3, 4, 5, 6 and 7 by a group of persons acting with a common purpose, intentionally and either: • With the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of any of the offences mentioned in points 1, 2, 3, 4 and 5; or • In the knowledge of the intention of the group to commit any of the offences mentioned in points 1, 2, 3, 4 and 5.</td>
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### Comparison between 1988 and 2005 SUA Protocols with regard to the selected elements

|---------|-------------------------------------------------------------------------------------------------------------------------------- |--------------------------------------------------------------------------------------------------------------------------------|
| I. Scope of application and jurisdiction | Each State Party shall establish its jurisdiction over the offences mentioned in the Protocol when the offence is committed:  
- Against or on board a fixed platform while it is located on the continental shelf of that State; or  
- By a national of that State.  
A State Party may also establish its jurisdiction over any such offence when:  
- It is committed by a stateless person whose habitual residence is in that State; or  
- During its commission a national of that State is seized, threatened, injured or killed; or  
- It is committed in an attempt to compel that State to do or abstain from doing any act.  
Each State Party shall establish its jurisdiction when the alleged offender is present in its territory and it does not extradite him. Moreover, the Protocol applies in every case in which the offender or alleged offender is found in the territory of a State Party other than the State in whose internal waters or territorial sea the fixed platform is located. | Each State Party shall or may establish its jurisdiction according to the same rules as contained in the 1988 SUA Protocol, taking into account the extended list of crimes in the 2005 SUA Protocol (see part II, "Criminalization"). Moreover, each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence set forth in the Protocol. Such liability may be criminal, civil or administrative.  
The Protocol applies in the same manner as the 1988 SUA Protocol, with the following additional elements:  
- The Protocol does not apply to the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law;  
- The Protocol does not apply to the activities undertaken by military forces of a State in the exercise of their official duties (inasmuch as they are governed by other rules of international law). |
### Comparison between 1988 and 2005 SUA Protocols with regard to the selected elements

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<td>II. Criminalization</td>
<td>According to the Protocol, any person commits an offence if that person unlawfully and intentionally: (a) Seizes or exercises control over a fixed platform by force or threat thereof or any other form of intimidation; or (b) Performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety; or (c) Destroys a fixed platform or causes damage to it which is likely to endanger its safety; or (d) Places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance which is likely to destroy that fixed platform or likely to endanger its safety; or (e) Injures or kills any person in connection with the commission or the attempted commission of any of the offences set forth in paragraphs (a) to (d). The following actions also constitute an offence under the Protocol: An attempt to commit any of the offences set forth in paragraphs (a) to (d); Abetting the commission of any of the offences set forth in paragraphs (a) to (d) perpetrated by any person; Acting as an accomplice of a person who commits such an offence;</td>
<td>Within the meaning of the 2005 SUA Protocol, any person commits an offence if that person unlawfully and intentionally: 1. Commits one of the offences mentioned in paragraphs (a) to (d) listed in the column on the left regarding the 1988 SUA Protocol; 2. Threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs (b) and (c) in the column on the left, if that threat is likely to endanger the safety of the fixed platform; 3. When the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act: (A) Uses against or on a fixed platform or discharges from a fixed platform any explosive, radioactive material or BCN (biological, chemical or nuclear) weapon in a manner that causes or is likely to cause death or serious injury or damage; or (B) Discharges, from a fixed platform, oil, liquefied natural gas or other hazardous or noxious substance (other than mentioned in point (A)), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or</td>
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### Comparison between 1988 and 2005 SUA Protocols with regard to the selected elements

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<tr>
<td>II. Criminalization (continued)</td>
<td>Threat, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs (b) and (c), if that threat is likely to endanger the safety of the fixed platform.</td>
<td>(C) Threatens, with or without a condition, as is provided for under national law, to commit one of the offences mentioned in points (A) and (B); 4. Injures or kills any person in connection with the commission of any of the offences mentioned in points 1 and 3. Any person also commits an offence within the meaning of the Protocol if that person: 5. Attempts to commit any of the offences mentioned in points 1, 3 (A) and (B) and 4; 6. Participates as an accomplice in any of the above mentioned offences; 7. Organizes or directs others to commit any of the offences mentioned in points 1, 2, 3, 4 and 5; 8. Contributes to the commission of one or more offences mentioned in points 1, 2, 3, 4 and 5 by a group of persons acting with a common purpose, intentionally and either: • With the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of any of the offences mentioned in points 1, 2 and 3; or • In the knowledge of the intention of the group to commit any of the offences mentioned in points 1, 2 and 3.</td>
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4. CONCLUSION

The continuing threat of terrorist activities involving aviation and maritime transport dictated the necessity for this capacity-building Module. To successfully counter acts of terrorism, the authorities responsible for national legislation must create criminal justice regimes that are effective not only at the national level but also enable cooperative action at the international level based upon the aviation and maritime security instruments. Individual investigators, prosecutors and judges must acquire knowledge and skills enabling them to utilize the resources for international cooperation found in the conventions and protocols analysed in this publication. This Module is designed as a resource to facilitate both individual self-learning and group capacity-building among the authorities who bear the grave responsibility of organizing their legal systems to effectively prevent and counter acts of terrorism.

Because the international response to transport-related terrorism has developed in an incremental fashion in the years since 1963, the current legal environment can best be understood in its historical context. This means that examining a single treaty or convention outside of its historical setting may lead to an incomplete or flawed understanding of its meaning and potential application. To avoid those risks, the Module both analyses the technical legal provisions of the relevant instruments and places them in their historical and comparative context, including the interactive process by which the early aviation conventions served as models for subsequent maritime instruments, which in turn were adapted and elaborated in the most recent aviation security instruments. This comprehensive approach is intended to facilitate the use of the Module for capacity-building among general audiences desiring an introduction to the advantages, structure and requirements of the aviation and maritime security instruments, as well as among specialized audiences prepared to examine the technical application of either the aviation or maritime security conventions and protocols, or both those categories.

4.1 Combined legislative consideration of the 2005 maritime and 2010 aviation instruments

States Parties to the 2005 maritime security instruments or to the 2010 aviation security instruments must consider whether to treat those two sets of legal instruments separately or together in the analytical, drafting and legislative process of implementation. Some provisions of the agreements may require relatively little legislative action. The means of international cooperation provided in those treaties are relatively standard, mirroring those found in the United Nations instruments discussed in Module section 1.4 and in many regional and bilateral treaties. If the appropriate mechanisms for extradition and mutual assistance are already provided in national law, implementation of the maritime and aviation conventions and protocols may be achieved simply by ratification of the particular instruments and conforming amendments adding it as an agreement for which cooperation can be provided.
If jurisdictional grounds not previously existing in national law must be adopted to conform to the 2005 or 2010 instruments, it would seem appropriate to consider them in the broader policy context of what forms of extra-territorial jurisdiction a State considers it appropriate to adopt and recognize. While differences in terminology between the aviation and maritime instruments would have to be harmonized (for example, references to the State of registration of an aircraft or its lessee as opposed to a ship flying the flag of a State) a consistent policy with regard to the politically sensitive area of the exercise of extraterritorial jurisdiction would appear desirable. Such consistency would require that the maritime and aviation instruments be analysed and any necessary legislation drafted in a unified fashion.

Certain enforcement provisions, such as those related to ship boarding, and some substantive offences in the various conventions might require statutory provisions unique to a particular instrument. However, in the case of offences, what is required by a particular aviation or maritime instrument in one context may actually be worth considering as desirable both in maritime and aviation settings. The 2005 SUA Convention contains article 3 ter, establishing as an offence the act of unlawfully and intentionally transporting another person on board a ship knowing the person has committed an offence established by any of the listed instruments and intending to assist that person to evade prosecution. No counterpart offence is established in the 2010 Convention for the Suppression of Unlawful Acts Relating to Civil Aviation. However, security and criminal justice officials of a State Party implementing the 2005 and 2010 instruments may believe that unlawfully and intentionally assisting a fugitive to flee by air is conduct which should be punishable just as is assisting that fugitive to flee by ship. In that case the responsible officials may wish to draft a legislative proposal that does not distinguish between methods of transport. In the case of the offences dealing with BCN weapons, the mere length and complexity of the definitions that would have to be repeated for separate offence implementing both the 2005 SUA Convention and the 2010 Beijing Convention suggest the efficiency of establishing the unlawful use and transport of BCN weapons and materials in statutory provisions applicable to both the maritime and aviation context.

4.2 Implementation of the universal civil aviation and maritime legal instruments against terrorism

The Convention and three Protocols74 adopted in 2005 and 2010 to update the maritime and civil aviation counter-terrorism legal instruments are complex and have significant legislative consequences. As is often the case, adoption of such complex international commitments has proceeded slowly for a multitude of reasons. Consequently, for some time in the future practitioners in States Parties will need to be familiar with the older aviation and maritime instruments while those instruments continue in force. At the same time officials in States Parties considering ratification of the updating instruments will need to prepare themselves, their institutions and their national laws and regulations for the implementation of the recent instruments, including their non-proliferation provisions. Among the questions to be faced during this interim period is the impact on domestic legislative implementation of the draft comprehensive convention on terrorism, which has been in the process of development since

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2000. Should a State that is analysing the legislative and administrative changes that will be necessary to implement the 2005 and 2010 maritime and aviation instruments consider them now, without regard to possible future adoption of a comprehensive convention on terrorism? Alternatively, would it be wiser and more efficient for the process of analysis and implementation to be delayed for however long is required for the draft comprehensive convention to be elaborated and adopted? Discussion of those questions will benefit from a factual understanding of the background and contents of the draft comprehensive convention in its latest form.

In December 1996 the United Nations General Assembly\textsuperscript{75} adopted a resolution in which it decided to establish an Ad Hoc Committee open to all States Member of the United Nations or of its specialized agencies, such as the ICAO and IMO, or of the IAEA. The Committee was tasked with first elaborating an international convention for the suppression of terrorist bombings, then an international convention for the suppression of acts of nuclear terrorism, and thereafter to address means of further developing a comprehensive legal framework of conventions dealing with international terrorism. The Committee produced a draft that was adopted as the International Convention for the Suppression of Terrorist Bombings by a diplomatic conference at the end of 1997.

The General Assembly decided in resolution 53/108 (1999) that the Ad Hoc Committee should continue to elaborate an international convention for the suppression of acts of nuclear terrorism, should elaborate a draft convention for the suppression of terrorist financing and:

... subsequently shall address further means of developing a comprehensive legal framework of conventions dealing with international terrorism, including considering, on a priority basis, the elaboration of a comprehensive convention on international terrorism.

All of the objectives established by the General Assembly have been accomplished except for elaboration of a comprehensive convention. Work on a draft instrument has been underway since 2000, and still continues as of 2014, but no speedy consensus has been possible.

Accordingly, delaying consideration of the 2005 maritime and 2010 aviation updating instruments in anticipation that a future diplomatic conference will adopt a comprehensive convention on international terrorism would be a speculation on an indefinite date. Moreover, the available indicators suggest that if the draft comprehensive convention now under consideration were to be adopted, its provisions would leave significant gaps in criminalization and enforcement compared to the 2005 maritime and 2010 aviation instruments. The Sixth Committee Working Group published a report in November 2010\textsuperscript{76} reflecting a text of nearly all articles of the draft under consideration at that time. All work is conducted on the basis that nothing is agreed until everything is agreed. Nevertheless, the points of continuing disagreement regarding the draft comprehensive convention are known and do not involve several aspects of the text which have been unchanged since a prior text was circulated by the coordinator of the Ad Hoc Committee discussions in 2005.\textsuperscript{77}


\textsuperscript{77}Document A/59/894, Measures to eliminate international terrorism (2005).
Article 2 of the draft comprehensive instrument requires a specific intent to intimidate or coerce. Many of the offences in the 2005 maritime and 2010 aviation instruments that are likely to threaten the safety of an aircraft in flight or the safe navigation of a ship are punishable if done unlawfully and intentionally, without any need of a specific terrorist intent to intimidate or coerce. The 2005 and 2010 instruments prohibit the transport of BCN weapons and related materials. These non-proliferation matters are not mentioned in the text of the draft comprehensive convention to date. Administrative and enforcement measures, such as the boarding of ships and which State to consider the State of registry in the case of aircraft subject to joint or international aircraft registration are simply not addressed in the draft text of the comprehensive convention, and it would seem inappropriate to do so.


4.3 Relationship of the aviation and maritime security instruments to other multilateral and bilateral instruments

In addition to the aviation and maritime security instruments described in this Module, there are other bilateral and multilateral instruments for international cooperation available in particular terrorism-related situations. Other universal treaties developed by the United Nations and its affiliated agencies that are not focused on aviation or maritime-related terrorism may provide useful means of achieving international cooperation if their particular requirements are satisfied. Not all of those relate to terrorism. The United Nations Convention on Transnational Organized Crime (UNTOC) has potential application to a broad range of offences committed by a group for a material or financial benefit.

Case study. Immediate financial benefit requirement

If a terrorist group seizes hostages in an aircraft or ship hijacking and makes a monetary ransom demand, the Transnational Organized Crime Convention presents a possible vehicle for international cooperation requests if the offence is punishable by a maximum penalty of four or more years of imprisonment in both the Requesting and Requested States. The elements to be considered are whether three or more persons are involved, whether they act in concert in a structured group existing for a period of time, and whether an international element, such as cross-border travel is present. A Convention requirement is that the crime be committed “to obtain, directly or indirectly, a financial or other material benefit”. Consequently, a defence argument that the ransom demand was made to finance the group’s ideological struggle rather than some individual’s luxury lifestyle would not be relevant. The demand is made to obtain an immediate financial benefit, regardless of who or what cause may ultimately be the recipient of that benefit.

UNODC’s Counter-Terrorism Legal Training Curriculum, Module 2, The Universal Legal Framework against Terrorism contains section 3.1. addressing terrorist acts through the UNTOC. It describes two basic conditions which, if present, may allow that Convention to be applied to a terrorist act. Section 3.1 of Module 2 provides concise explanations of those conditions, that is when offences can be regarded as “transnational” and what are the characteristics of “organized crime”. The section also provides citations to tools and activities that can assist in an understanding of the Convention against Transnational Organized Crime. UNODC Counter-Terrorism Legal Framework against Terrorism Module 3, International Cooperation in Criminal Matters, in section 2.2, Legal bases for extradition, describes how the UNTOC’s detailed provisions on international cooperation are referred to as a “mutual legal assistance mini-treaty”.

The 1999 International Convention for the Suppression of the Financing of Terrorism may apply if a particular situation involves the provision or collection of funds for terrorist purposes, with the word “funds” being broadly defined in that Convention. The International Convention for the Suppression of Terrorist Bombings (1997) applies to explosive and incendiary devices placed or used against all public transportation system and against a government aircraft, not only those aircraft or ships engaged in international civil aviation or maritime travel, although some other international element, such as the foreign nationality of an offender will be necessary. The International Convention against the Taking of Hostages (1979) can easily apply to many of the same situations as the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft. The International Convention for the Suppression of Acts of Nuclear Terrorism (2005) and the Convention on the Physical Protection of Nuclear Material (1979) and the Amendment of 2005 to that Convention should be consulted whenever an issue involving nuclear material arises. The disarmament agreements described in Module sections 3.6.3 through 3.6.6 may also be relevant for interpretation of the BCN non-proliferation provisions of the 2005 maritime and 2010 aviation instruments, although the disarmament agreements do not contain any criminal provisions.

80 All of the universal counter-terrorism conventions are available in the open-access Terrorism Legislative Data Base maintained by UNODC at https://www.unodc.org/tldb/ and the other United Nations conventions can be found at www.unodc.org through links under the appropriate subject matter heading.
In some situations alternative instruments may be preferable to the agreements examined in this Module. Bilateral and regional extradition and mutual assistance treaties often specify time limits and other helpful details that are not feasible in universal instruments open to all States, which must be adaptable to a variety of legal systems.

**Assessment questions**

- When a State implements the aviation and maritime security instruments in domestic legislation, are there any areas in which provision could efficiently be adopted together or combined with existing penal code or procedural provisions?
- **Consideration:** extradition and mutual assistance procedures are generally applicable to all categories of serious offences and are not segregated by type of crime. Offences such as intentionally assisting a fugitive to escape prosecution do not necessarily need to be made applicable to different modes of international transportation.
- What United Nations criminal convention with wide membership could be applicable to a terrorist hostage accompanied by a demand for a monetary ransom? (See Module section 4.3).

**Tools and further reading**

- UNODC Counter-Terrorism Legal Training Curriculum, Module 2, *The Universal Legal Framework against Terrorism*, contains section 3.1. Addressing terrorist acts through the UNTOC. Section 2.2, Legal bases for extradition, describes how the UNTOC’s detailed provisions on international cooperation are referred to as a “mutual legal assistance mini-treaty”.
- Regional conventions against terrorism are available at www.unodc.org/tldb/en/regional_instruments.html.
Annex I. Training workshop

Sample agenda for three-day capacity-building workshop on the implementation of civil aviation and maritime counter-terrorism instruments. The programme is designed for legislative drafters, and criminal justice and international cooperation officials. The Module would serve as the principal training resource, which would be made available to participants in advance.

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<tr>
<th>Day 1</th>
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<tr>
<td>8.30 – 9.00</td>
<td>Registration of participants</td>
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<td>9.00 – 9.30</td>
<td>Opening ceremony and welcoming remarks</td>
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<td>9.30 – 10.00</td>
<td>Objectives of the workshop and explanation of the Module structure</td>
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<td>Introduction of participants and experts</td>
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<tr>
<td>10.00 – 11.00</td>
<td>The international legal framework against terrorism (19 legal instruments and UNSC resolutions) and the 12 transport-related conventions and protocols</td>
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<td>11.00 – 12.30</td>
<td>Presentation of Module section 1: Common themes in the transport-related offences instruments</td>
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<tr>
<td>12.30 – 13.30</td>
<td>Lunch</td>
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<tr>
<td>13.30 – 15.30</td>
<td>Separation into working groups—suggested topics for discussion:</td>
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<tr>
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<td><em>Group 1</em>: The scope of application of the instruments, including the necessary international element, aircraft “in flight” and “in service”, “territorial seas” and the sphere of humanitarian law.</td>
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<td><em>Group 2</em>: Issues concerning jurisdiction, including the necessity in many States for legislation to establish jurisdiction based upon the presence an alleged offender, the absence of any recognized hierarchy of jurisdictional claims by different States and the evolving treatment of the political offence exception.</td>
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<td><em>Group 3</em>: Criminalization, including the innovative concept of establishing an offence in an international instrument that can be punished only under domestic law and lack of any specific terrorist intent in the transport-related instruments.</td>
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<td><em>Group 4</em>: International cooperation matters, including application in specific circumstances of the “extradite or prosecute” obligation, the exercise of prosecutorial discretion and beneficial practices.</td>
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<td>15.30 – 16.30</td>
<td>Presentations of the working groups</td>
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<td>Discussion and comments by participants and moderator</td>
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<td>16.30 – 17.00</td>
<td>Closing of the day</td>
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<th>Day 3</th>
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<tr>
<td></td>
<td>9.00 – 9.30</td>
<td>Presentation of Module section 4 The maritime security instruments</td>
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<td>Time</td>
<td>Session Description</td>
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<td>11.30 - 13.00</td>
<td>Investigation and prosecution of maritime terrorist cases</td>
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<td>13.00 - 14.00</td>
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<td>14.00 - 15.30</td>
<td>Separation into working groups—suggested topics for discussion:</td>
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<td>Group 1: Definitional issues in BCN terminology and concerning fixed platforms on the continental shelf.</td>
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<td>Group 2: Enforcement procedures involving boarding, search and eventual prosecution and the distinction between SUA offences and piracy.</td>
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<tr>
<td>15.30 - 16.30</td>
<td>Presentations of the working groups</td>
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<td>Discussion and comments by the participants and moderator</td>
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<tr>
<td>16.30 - 17.00</td>
<td>Discussions on capacity-building and recommendations for the way forward</td>
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<tr>
<td>17.00 - 17.15</td>
<td>Evaluation of the workshop (questionnaires)</td>
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<tr>
<td>17.15 - 17.30</td>
<td>Concluding remarks</td>
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Agendas for specialized civil aviation or maritime security capacity-building can be elaborated by modifying the above agenda, presenting both the aviation and maritime instruments. Discussion of chapter 1 would be shortened for such specialized groups, although it would be desirable to convey the overall context of the 18 counter-terrorism related instruments and the historical interaction in the development of the 12 transport-related instruments. Additional explanatory presentations and issues and questions for discussion can be drawn from the relevant Module text, case studies, activity boxes and assessment questions. Those materials can also be used to expand the above joint agenda if a four- or five-day workshop is desired.
Annex II. Links to the CT legal instruments

Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963
Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970
Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971
Beijing Convention on the Suppression of Unlawful Acts Relating to Civil Aviation, 2010
Beijing Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, 2010
Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 2005
Montreal Protocol to the Convention on Offences and Certain Other Acts Committed on Board Aircraft, 2014