

# CTED Analytical Brief: A commentary on the codification of the terrorism offence







In its resolution 1373 (2001), the Security Council decided that Member States shall ensure “that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice”. This requires States to ensure that terrorist acts are established as serious criminal offences in domestic laws and regulations.

Criminalizing acts of terrorism in a clear and precise manner in accordance with relevant Security Council resolutions, human rights, the rule of law, and the provisions of the international counter-terrorism conventions and protocols serves to stop impunity and strengthen international cooperation on bringing terrorists to justice. It also serves to ensure compliance by States with international human rights law, including the principle of legality enshrined in article 15 of the International Covenant on Civil and Political Rights. Overly broad or vague criminalization of terrorist offences creates a risk of human rights violations. It also creates a risk that the resources of law enforcement agencies – especially those dedicated to counter-terrorism – will be stretched thin by being overly tied up with conduct of lesser seriousness than terrorist violence.

Yet, the Counter-Terrorism Committee’s assessments show that Member States continue to develop and implement counter-terrorism legislation using different approaches, including many that are not clear or precise. This may complicate international cooperation, especially formal cooperation such as mutual legal assistance and extradition, which are premised upon the principle of dual criminality.

This Analytical Brief identifies the elements of the terrorist offence that are required by international law. It provides examples of the most common structures that States have employed in criminalizing terrorist acts. The brief then highlights the most frequent recommendations made by the Counter-Terrorism Committee stemming from its country visit assessments and how they aim to improve the clarity and precision of offences.

This brief focuses only on the criminalization of terrorist acts. Other offences, such as the financing of terrorism, incitement to terrorism, and travel for the purposes of terrorism, are not addressed, but the clarity of the terrorist offence itself is important for those other supporting offences.

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In 2021, the Counter-



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In domestic criminal law, most penal codes will specify a mental element (the *mens rea*) as well as a proscribed act (the *actus reus*) as elements of an offence.

The proscribed acts forming the offences in the counter-terrorism instruments adopted from 1963 through the 1990s were all specific acts of violence described quite precisely. Some examples of the offences include the following:<sup>7</sup>

Using force or threat to hijack an aircraft<sup>8</sup>

The destruction or damage of an aircraft while in flight<sup>9</sup>

The seizure, detention, or threat to kill or injure another person (hostage-taking)<sup>10</sup>

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The [use or threat of force](#) to take control of a ship, an [act of violence](#) against a person on a ship, or [destruction or damage](#) of a ship<sup>11</sup>

The [detonation of an explosive](#) with intent to cause [death or bodily injury](#), or [extensive destruction](#).<sup>12</sup>

The commonality across all these offences is that they proscribe violent acts, and none of the treaties criminalize non-violent acts.

A second point of commonality among the offences created by the international instruments is that they include an outcome element to make it clear that the conduct being criminalized has a threshold of serious violence. This means the *actus reus* essentially forms two parts. For example, the 1980 Convention on the Physical Protection of Nuclear Material requires States parties to criminalize the following:

The intentional commission of an act without lawful authority which constitutes the receipt, procession, use, transfer, alteration, disposal or dispersal of nuclear material and [which causes](#) or [is likely to cause death](#) or [serious injury to any person](#) or [substantial damage to property](#).<sup>13</sup>

The *mens rea* element of criminal offences is the state of mind required to convict a person accused of the crime. With one exception, the international instruments use the *mens rea* of intent consistently throughout.<sup>14</sup> For example:



..wilfully collect funds "...with the [intention](#)



In resolution 1373 (2001), the Security Council has affirmed its commitment to the fight against terrorism and to the promotion of the rule of law.

There is no error in the resolution of the Council.



(2004), the Council indicated broad agreement with the structure and elements of a terrorist act set out in article 2, paragraph 1(b) of the Terrorist Financing Convention. The

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Model one is a self-contained general offence of terrorism, with the formula of [intent] + [violent act] + [outcome] + [terrorist purpose]. These offences broadly follow the definition of a terrorist act outlined in the Terrorist Financing Convention but often with embellishments. For example:

Terrorism:

- (1) Committing a violent act against a person intending to cause death or bodily injury, or against the environment intending to endanger life or health, the production, distribution or use of a prohibited weapon, or the illegal seizure or destruction of property to a significant extent, if committed with the aim of forcing a State or an international organization to do or not do something, or to seriously disturb the political, constitutional, economic or social organization of the State, or to destroy it, or to seriously disrupt the activities of an international organization, or to destroy it, or seriously intimidate the population,
- (2) shall be punished by 5 to 20 years or life imprisonment.<sup>31</sup>

Model two is a structure where the proscribed act is cross-referenced to other specified violent crimes, with the addition of the terrorist purpose. In this structure there is no new offence per se, but the addition of terrorist purpose to a list of pre-existing crimes creates the terrorist offence. The formula is [intent] + [terrorist purpose] + [violent crimes elaborated elsewhere in the criminal code], and there is no need for an outcome element because that is contained within each of the listed crimes. The list of crimes will sometimes include the treaty-based offences. For example:

Terrorism:

- (1) A person who intentionally commits one of the following offences as specified in:
  - (a) section vv (homicide);
  - (b) section ww (wounding with intent);
  - (c) section xx (hostage-taking);
  - (d) section yy (arson);
  - (e) section zz (hijacking of aircraft)
  - (f) [etc.]
- (2)









- (j) serious acts against [moral integrity](#);
- (k) [possessing property](#) for the commission of acts of terrorism;
- (l) arranging for the [retention or control of property](#) belonging to a terrorist;
- (m) [knowingly dealing](#) in property owned or controlled by terrorist organizations;



(2) shall be punished by 5 to 20 years or life imprisonment.

Or:

Terrorism:

(1) Any criminal act subject to the penalty of deprivation of at least five years, committed against a person, or that causes damage to property, for the purpose of breaching the security situation or national unity, or to force a State or an international organization to do or not do something, or seriously intimidate the population,

(2) shall be punished by 5 to 20 years or life imprisonment.

In the first example, the Committee was concerned that “any criminal act” could include non-violent acts or petty crimes. In the second example, while the act is at least limited to serious offences punishable by at least five years imprisonment, it does not specify that violent crimes are required.

In a second problem with the above examples, “damage to property” is lacking any qualifiers such as “serious” or “significant” or “extensive”, or “destruction”. This could then see the offence used, for example, to prosecute those who have spray-painted slogans on buildings during protest actions.

In the Committee’s dialogue with States during assessment visits, officials of some States have noted that a broad definition is useful because it allows the offence to be applied to evolving terrorist methodologies. Although the Committee has noted the need to take into account evolving terrorist methods, it has nonetheless noted that the international instruments specifically envisage the prohibition of acts or threats of violence.

When addressing such an argument the Committee responded as follows:

This definition is not consistent with international best practice, because, although it clearly defines terrorist purpose, it does not clearly proscribe the acts that fall within the definition. While the acts are restricted to serious



In this example, the outcome element of the offence includes a phrase similar to the “intimidate a population” part of the terrorist purpose element, but it is used in the outcome element, which in the international instruments is limited to death, injury or destruction of property or critical infrastructure.

The Committee identified in this case two problems. First, anything could cause “discord” or a “disturbance”, including legitimate political activity or protest. Second, its inclusion in the outcome element is confusing because intimidating the population is already in the terrorist purpose element – and so the criminalized conduct is an act that causes discord for the purposes of intimidation.

In its reports the Committee has cautioned States against using such overly broad terms so that terrorist offences could potentially apply to non-violent actions or threats thereof and has encouraged States to clarify them. It has also recommended that States stick closely to the outcome element used in the international instruments. One such example reads:

Many States have elaborated the terrorist purpose element beyond what is contained in the international instruments and







The Committee has recommended in such cases that the definition be revised to correct the problem. Examples of how to avoid this problem are below:

Terrorism:

- (1) Any act intended to cause death or serious bodily injury to a person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an 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; or
- (2) Any act which constitutes an offence under one of the listed international counter-terrorism instruments to which [the State] is a party,

shall be punishable with deprivation of liberty for a term of 10 to 13 years.

Or for States that define terrorist acts in a separate definition section:

Definition of terrorist act:

- (1) A terrorist act is an act that:
  - (a) falls within subsections (2) and (3), but not subsection (4); or
  - (b) is an act against one of the counter-



Offences require an act of violence that is sufficiently grave if they are to be consistent with the State's obligation to protect human rights, such as freedom of speech and freedom of assembly. The Committee has identified as a good practice a savings clause that specifically excludes non-violent acts not intended to cause grave outcomes such as death or serious bodily injury.

The terrorist purpose element should be consistent with the formulation used in the international instruments, in particular the Terrorist Financing Convention and resolution 1566 (2004). Where alternative formulations are added, such as "disturbing the peace", "undermining the social order" or "undermining the Constitution", the offence risks criminalizing protest or advocacy and is therefore not consistent with the State's obligations to criminalize terrorist acts consistently with their obligations under



