

# Section 11: Offenses against the State, Public Safety, and Security

## General Commentary to Articles 147–157

In Security Council Resolution 1373 of 2001, paragraph 2(b), the Security Council declared that United Nations member states should take all necessary steps to prevent the commission of terrorist acts. Member states were called upon to become parties to the relevant international conventions and protocols relating to terrorism. These conventions and protocols are the Convention on Offenses and Certain Other Acts Committed on Board Aircraft; the Convention for the Suppression of Unlawful Seizure of Aircraft; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the Convention on the Prevention and Punishment of Offenses against Internationally Protected Persons, Including Diplomatic Agents; the International Convention on the Taking of Hostages; the Convention on the Physical Protection of Nuclear Material; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation; the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; the Convention on the Marking of Plastic Explosives for the Purpose of Detection; the International Convention for the Suppression of Terrorist Bombing; and the International Convention for the Suppression of the Financing of Terrorism.

As stated in the United Nations Office on Drugs and Crime’s *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, at page 4, full implementation of the antiterrorism conventions “has many aspects, including national security doctrine, budgetary allocations and administrative and personnel measures. The development of legislation is, however, the initial practical obstacle to compliance by a State party with resolution 1373(2001) and to ratification of the global anti-terrorism conventions.” Articles 147–157 seek to domestically implement the penal provisions of the antiterrorism conventions through the creation of criminal offenses. It must be noted that two of the twelve international conventions, namely, the Convention on the Marking of Plastic Explosives for the Purpose of Detection and the Convention on Offenses

and Certain Other Acts Committed on Board Aircraft, do not contain requirements to domestically enact criminal offenses. Therefore, there are only ten offenses related to terrorist acts in the MCC. Reference is made in the relevant provisions of the MCC to other obligations, outside the scope of penal law, that each convention imposes upon states parties, including issues such as extradition, international cooperation, mutual legal assistance, and jurisdiction (to ensure that there is no safe haven for terrorists). It is also worth noting that conventions, being international in nature, require some international element to the offense before they will apply. An example would be Article 151, which applies only to airports serving international civil aviation. Of course, a state could go beyond the scope of the provision and apply the substantive criminal offense to airports serving domestic civil aviation. The international element of each offense is defined in its governing convention or protocol.

To ensure that a post-conflict state has fulfilled its international obligations on terrorism, reference should be made to Security Council Resolution 1373 (2001), the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, and the United Nations Office on Drugs and Crime's *Checklists For the 12 Universal Anti-Terrorism Conventions and for Security Council Resolution 1373 (2001)*. Reference should also be made to the Security Council's counterterrorism committee, whose mandate is to monitor states' compliance with Resolution 1373 (2001). The counterterrorism committee also facilitates the provision of technical assistance to states through various means, including maintaining a directory of technical-assistance providers. The International Monetary Fund has also developed the *Handbook on Legislation Drafting*, which deals with drafting legislation on antiterrorism offenses.

There was considerable debate during the drafting of the MCC about whether or not to include the offense of terrorism in the MCC in addition to the terrorist offenses already defined under internationally agreed-upon conventions and protocols. Given the occurrence of terrorism in many post-conflict environments, such as Iraq, Afghanistan, and Kosovo (where the United Nations Mission in Kosovo needed to promulgate Regulation No. 2001/12 on the Prohibition on Terrorism and Related Offenses), many argued that terrorism should be included in the MCC. At one stage in the consultation and vetting process for the MCC, the drafters considered a draft terrorism provision. But there was considerable disagreement, first about whether or not it should be in the codes in the first place, and second about its substantive content. A definition that was agreeable and satisfactory to the drafters and the experts consulted in the course of the codes, vetting and consultation period was elusive, and given the amount of opposition, the offense was omitted. International efforts are currently under way to draft a convention that deals specifically with terrorism. As yet, a definition has not been agreed upon. The Council of Europe has adopted the Council of Europe Convention on the Prevention of Terrorism (2005). However, the convention does not define terrorism except in relation to terrorist acts listed in preexisting international conventions. It contains a number of offenses related to terrorism, including public provocation to commit terrorism (Article 5), recruitment for terrorism (Article 6), and training for terrorism (Article 7), which a state may wish to consider implementing whether or not it is bound by the convention. Reference should be made to the explanatory report to the convention. The Inter-American Convention against Terrorism (2002) defines terrorism in a similar manner to the Council of Europe Convention on the Prevention of

Terrorism. The only international instrument with a self-standing definition of terrorism is the Arab Convention on the Suppression of Terrorism 1998, Article 2. Many states when referring to terrorism in domestic legislation refer to discrete acts of terrorism defined in international law rather than creating a self-standing definition of terrorism. It should be noted that just because there is no definition of terrorism per se in the MCC, a person will not go unpunished for acts that may be viewed as terrorism. The predicate, or underlying, offenses, such as bombing, are criminalized in the MCC (as well as aiding, abetting, and financing these underlying offenses), and a person who commits these offenses can be prosecuted accordingly.

## Article 147: Financing Terrorism

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### *Article 147.1: Definition of Offense*

1. A person commits the criminal offense of financing terrorism when he or she:
  - (a) unlawfully;
  - (b) by any means, directly or indirectly;
  - (c) provides or collects funds;
  - (d) with the intention that they should be used, or in the knowledge that they are to be used, in full or in part, to carry out:
    - (i) the criminal offenses of terrorist bombing (Article 148), unlawful seizure of an aircraft (Article 149), unlawful acts against the safety of civil aviation (Article 150), unlawful acts of violence at airports serving international civil aviation (Article 151), offenses against internationally protected persons (Article 152), taking of hostages (Article 153), offenses relating to nuclear material (Article 154), unlawful acts against the safety of maritime navigation (Article 155), unlawful acts against the safety of fixed platforms (Article 156), piracy (Article 157), or
    - (ii) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such 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 an act.

2. For the purposes of Article 147, *funds* mean assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to bank credits, traveler's checks, bank checks, money orders, shares, securities, bonds, drafts, and letters of credit.

## Commentary

**Paragraph 1:** The criminal offense of financing terrorism is derived from Article 2(1) of the International Convention for the Suppression of the Financing of Terrorism. This is also the definition used in the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Article 1(h). For a discussion of the drafting of this convention and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime. The ratification and implementation of the convention is an international obligation under Security Council Resolution 1373 (2001), as discussed above.

Article 2(1)(a) of the International Convention for the Suppression of the Financing of Terrorism refers to the financing of “an act within the scope of and as defined in one of the treaties listed in the annex [to the convention].” Instead of retaining this reference, Paragraph 1(d)(i), above, makes specific reference to the offenses contained in these treaties as they are contained in the MCC. Also included in this reference is the offense of piracy, which is not referenced in Article 2(1)(a) of the International Convention for the Suppression of the Financing of Terrorism. Piracy is however included as a terrorist offense in the Council of Europe Convention on the Prevention of Terrorism.

Article 2(4) of the United Nations convention requires that any person who attempts the financing of terrorism or, under Article 2(5), any person who participates as an accomplice, organizes or directs another, or contributes to the commission of financing of terrorism through a common purpose also be liable to criminal prosecution. While these grounds of liability are not specifically enumerated in Article 147, attempt is covered under Article 27 of the MCC, and accomplice liability is covered under Article 31. Organizing or directing a criminal offense is dealt with in Article 29, and common purpose liability is covered in Article 28.

Article 7 of the convention further requires that jurisdiction over the financing of terrorism be asserted where the act is committed in the territory of the state, on board an aircraft registered in that state, on board a vessel flying the flag of that state, or by a national of the state. The convention also provides for a number of discretionary grounds of jurisdiction: when the offense is directed toward or carried out in the territory of the state; when the offense is committed in an attempt to compel the state to do or abstain from doing any act; when the offense is committed on board an aircraft operated by the government of that state; when the offense is directed toward or carried out in a state or government facility of that state abroad (including an embassy or

other diplomatic or consular premises of that state); when the offense is committed by a stateless person who has his or her habitual residence in the territory of that state; and when the offense is directed toward or carried out against a national of the state. The mandatory grounds of jurisdiction provided for in the convention are covered in Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extraterritorial Jurisdiction”) of the MCC. The latter two discretionary grounds of jurisdiction are also provided for in Article 5 of the MCC. Furthermore, the convention requires that jurisdiction be asserted over legal persons (Article 5). This requirement is covered under Article 19 (“Criminal Responsibility of Legal Persons”).

Finally, the convention contains provisions on seizure and forfeiture of funds (Article 8), investigation (Articles 9, 16, and 17), prosecution (Article 10), extradition (Articles 1, 13, 14, and 15), mutual assistance (Articles 12–15), and prevention of terrorism (Article 18). These provisions should also be examined when domestically implementing the provisions of the convention. Reference should be made to Chapter 14, Parts 1 and 2, of the MCCP, on extradition and mutual legal assistance, respectively. Reference should also be made to Articles 70–73 of the MCC on confiscation of the proceeds of crime (the equivalent of forfeiture) and Chapter 8, Part 3, Section 4, of the MCCP on seizure.

For a more in-depth discussion on the drafting of this convention and its substantive content, including the provisions just mentioned, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime.

**Paragraph 2:** This paragraph is taken from Article 1(1) of the International Convention for the Suppression of the Financing of Terrorism.

## Article 147.2: Penalty

The applicable penalty range for the criminal offense of financing of terrorism is three to fifteen years’ imprisonment.

## Article 148: Terrorist Bombing

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### Article 148.1: Definition of Offense

1. A person commits the criminal offense of terrorist bombing when he or she:
  - (a) unlawfully;
  - (b) delivers, places, discharges, or detonates an explosive or incendiary weapon or device;

- (c) in, into, or against a place of public use, a state or governmental facility, a public transportation system, or an infrastructure facility;
- (d) with the intent to cause death or serious bodily injury or extensive destruction of such a place, facility, or system, where such destruction results in or is likely to result in major economic loss.

2. For the purposes of Article 148:

- (a) *explosive or incendiary weapon or device* means:
  - (i) dynamite and all other forms of explosives;
  - (ii) any explosive, incendiary, or poison gas:
    - (a) bomb;
    - (b) grenade;
    - (c) rocket;
    - (d) missile;
    - (e) mine; or
    - (f) similar device, including any device that can be carried or thrown by one individual acting alone and consisting of or including a breakable container containing flammable liquid or compound and a wick composed of any material that, when ignited, is capable of lighting the flammable liquid or compound;
  - (iii) any type of firearm, by whatever name known, that will, or that may be readily converted to, expel a projectile by the action of an explosive or other propellant; and
  - (iv) any combination of parts either designed or redesigned for use in converting any device into one of those described in subparagraphs (ii) and (iii) and from which such a device may be readily assembled;
- (b) *place of public use* means those parts of any building, land, street, waterway, or other location that are accessible or open to members of the public, whether continuously, periodically, or occasionally, and encompasses any commercial, business, cultural, historical, educational, religious, governmental, entertainment, recreational, or similar places that are so accessible or open to the public;
- (c) *state or governmental facility* means any permanent or temporary facility or conveyance used or occupied by representatives of a state; members of government, the legislature, or the judiciary; or by officials or employees of a state, any other public authority or entity, or by employees or

- officials of an intergovernmental organization in connection with their official duties;
- (d) *public transportation system* means all facilities, conveyances, and instrumentalities, whether publicly or privately owned, that are used in or for publicly available services for the transportation of persons or cargo; and
  - (e) *infrastructure facility* means any publicly or privately owned facility providing or distributing services for the benefit of the public, such as water, sewerage, energy, fuel, or communications.
3. The criminal offense of terrorist bombing does not apply to activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, and the activities undertaken by military forces of a state in the exercise of their official duties, inasmuch as they are governed by other rules of international law.

## Commentary

The criminal offense of terrorist bombing is derived from the International Convention for the Suppression of Terrorist Bombing. For a discussion of the drafting of this convention and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime. The ratification and implementation of the convention is an international obligation under Security Council Resolution 1373 (2001), as discussed above.

The wording of Article 148 is taken from Article 2(1) of the convention. In addition to the criminal acts listed above in Article 148, Articles 2(2) and 2(3) of the convention require that attempts to commit any of the acts mentioned in Article 1, or being an accomplice to, organizing, directing, or “in any other way contributing ... by a group of persons acting with a common purpose” to any of these acts, should also be criminalized in domestic legislation. While these grounds of liability are not specifically enumerated in Article 148, attempt is covered under Article 27 of the MCC and accomplice liability is covered under Article 31. Organizing or directing a criminal offense is dealt with in Article 29 and common purpose liability in Article 28.

Article 6 of the convention further requires that jurisdiction over terrorist bombing be asserted where the act is committed in the territory of the state; on board an aircraft registered in that state; on board a vessel flying the flag of that state; or by a national of the state. The convention also provides for a number of discretionary grounds of jurisdiction: when the offense is committed against a state or government facility of that state abroad (including an embassy or other diplomatic or consular premises of that state); when the offense is committed in an attempt to compel that state to do or abstain from doing any act; where the offense is committed on board an aircraft operated by the government of that state; when the offense is committed against a national of that state; or when the offense is committed by a stateless person

who has his or her habitual residence in the territory of that state. The mandatory grounds of jurisdiction provided for in the convention are covered in Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extraterritorial Jurisdiction”) of the MCC. The latter two discretionary grounds of jurisdiction are also provided for in Article 5 of the MCC. Finally, the convention contains provisions on investigation (Articles 7, 13, and 14), prosecution (Article 8), extradition (Articles 9, 11, and 12), and mutual assistance (Articles 10–12). These provisions should also be looked at when domestically implementing the provisions of the convention. Reference should be made to Chapter 14, Parts 1 and 2, of the MCCP, on extradition and mutual legal assistance.

**Paragraph 2(a):** Article 1(3) of the International Convention for the Suppression of Terrorist Bombing defines “explosive or other lethal device.” The definition of explosive, incendiary, or other lethal device used in the MCC differs slightly from the definition used in the convention. The MCC definition was altered to make it more detailed and illustrative, thus specifying more individual explosive or incendiary weapons or devices rather than having them fall under broad wording such as “similar device” that is used in Article 1(3) of the convention. That said, it is impossible to enumerate every explosive, incendiary, or other lethal device, so it was still necessary to retain “other similar device” in the definition to cover new or novel explosive, incendiary, or other lethal devices that may be used by the perpetrators of terrorist bombings.

With regard to Paragraph 2(a)(ii), it is important to note that it makes specific reference to any device that can be carried or thrown by one individual acting alone and consisting of or including a breakable container containing flammable liquid or compound and a wick composed of any material that, when ignited, is capable of lighting the flammable liquid or compound. This definition covers the Molotov cocktail. This homemade explosive is commonly used and consequently merits specific reference in the definition of explosive, incendiary, or other lethal device.

Paragraph 2(a)(iii) covers all manner of firearms that may be used in terrorist bombings. In some domestic jurisdictions, certain firearms, such as shotguns used for sporting purposes, are excluded from the definition of explosive, incendiary, or other lethal device. This is not the case in the MCC, but a post-conflict state introducing legislation on terrorist bombing or bombing may wish to make such exclusions.

Paragraph 2(a)(iv) covers combinations of parts that have been designed or redesigned for use as an explosive, incendiary, or other lethal device. It is important to cover this concept, as sometimes an explosive, incendiary, or other lethal device will be stored in parts rather than fully assembled. This provision is important, for example, when a person is being prosecuted for delivery or placing of an explosive, incendiary, or other lethal device into a place of public use, rather than for discharging or detonating it. It is also important when a person is prosecuted for an attempt to commit terrorist bombing. Paragraph 2(a)(iv) does not cover a situation where a person possesses only some of the parts necessary for use as an explosive, incendiary, or other lethal device, for example, where the person possesses only the firing circuits and the bomb containers. Thus, where different components are held in different places (one or more of which has not been discovered), a person cannot be prosecuted under this paragraph. A state wishing to address this scenario could create a separate criminal offense (that would carry a lesser penalty) penalizing a person who unlawfully



possesses any substance, material, or combination of substances or materials with the intention to make a destructive device or explosive.

It is important to note that in some domestic jurisdictions and under international conventions such as the Protocol against Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (Article 3[1]), certain items that could technically fall within the definition of explosive, incendiary, or other lethal device are excluded from the definition, including antique firearms or their replicas, devices used for signaling (signaling flares), and pyrotechnics. With regard to antique firearms or replicas, Article 3(1) of the Protocol against Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition provides that “in no case, however, shall antique firearms include firearms manufactured after 1899.” A state should consider what items, if any, it wishes to exclude from the definition.

**Paragraph 2(b):** This paragraph is taken from Article 1(5) of the International Convention for the Suppression of Terrorist Bombing.

**Paragraph 2(c):** This paragraph is taken from Article 1(1) of the International Convention for the Suppression of Terrorist Bombing.

**Paragraph 2(d):** This paragraph is taken from Article 1(6) of the International Convention for the Suppression of Terrorist Bombing.

**Paragraph 2(e):** This paragraph is taken from Article 1(2) of the International Convention for the Suppression of Terrorist Bombing.

**Paragraph 3:** The wording of Paragraph 3 comes from Article 19(2) of the International Convention for the Suppression of Terrorist Bombing. The term *military force*, referred to in Article 19(2) of the convention, is defined in Article 1(4) of the convention as “the armed forces of a State which are organized, trained and equipped under its internal law for the primary purpose of national defense or security and persons acting in support of those armed forces who are under their formal command, control and responsibility.”

## Article 148.2: Penalty

The applicable penalty range for the criminal offense of terrorist bombing is five to twenty years’ imprisonment.

## Article 149: Unlawful Seizure of Aircraft

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### *Article 149.1: Definition of Offense*

1. A person commits the criminal offense of unlawful seizure of aircraft when he or she:
  - (a) being on board an aircraft in flight;
  - (b) unlawfully;
  - (c) by force or threat of force or any other form of intimidation;
  - (d) seizes or exercises control of that aircraft.
2. An aircraft is considered to be in flight at any time from the moment all its external doors are closed following embarkation until the moment any door is opened for disembarkation. In the case of forced landing, the flight is deemed to continue until the competent authorities take over responsibility for the aircraft and for persons and property on board.

### Commentary

The criminal offense of unlawful seizure of aircraft is derived from the Convention for the Suppression of Unlawful Seizure of Aircraft. For a discussion of the drafting of this convention and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime. The ratification and implementation of the convention is an international obligation under Security Council Resolution 1373 (2001), discussed above.

The wording of Article 149 is taken from Article 1 of the convention. In addition to the criminal acts listed above in Article 149, Article 1(b) requires that attempts to commit any of the acts mentioned in Article 1, or being an accomplice to any of these acts, be criminalized in domestic legislation. While these grounds of liability are not specifically enumerated in Article 149, attempt is covered under Article 27 of the MCC and accomplice liability is covered under Article 31. Article 4 of the convention further requires that jurisdiction over unlawful seizure of aircraft be asserted where the act is committed in the territory of the state; on board an aircraft registered in that state; or on board an aircraft leased, without crew, to a lessee who has his or her principal place of business or his or her permanent residence in that state. These grounds of jurisdiction are covered in Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extra-territorial Jurisdiction”) of the MCC. The convention also contains provisions on the investigation of unlawful seizure of aircraft (Article 6), prosecution (Article 7), extradition (Article 8), and mutual assistance (Article 10). These provisions should be

looked at when domestically implementing the provisions of the convention. Reference should be made to Chapter 14, Parts 1 and 2, of the MCCP, on mutual legal assistance and extradition.

Article 2(1) of the convention provides that the convention does not apply to aircraft used in military, customs, or police services.

**Paragraph 2:** This paragraph is taken from Article 3(1) of the Convention for the Suppression of Unlawful Seizure of Aircraft.

## *Article 149.2: Penalty*

The applicable penalty range for the criminal offense of unlawful seizure of aircraft is five to twenty years' imprisonment.

# **Article 150: Unlawful Acts against the Safety of Civil Aviation**

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## *Article 150.1: Definition of Offense*

1. A person commits the criminal offense of unlawful acts against the safety of civil aviation when he or she:
  - (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;
  - (b) destroys an aircraft in service or causes damage to such an aircraft that renders it incapable of flight or is likely to endanger its safety in flight;
  - (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance that is likely to destroy that aircraft, cause damage that renders it incapable of flight, or cause damage that is likely to endanger its safety in flight;
  - (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
  - (e) communicates information that the person knows to be false, thereby endangering the safety of an aircraft in flight.
2. An aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any door is opened for disembarkation. In the case of forced landing, the flight

is deemed to continue until the competent authorities take over responsibility for the aircraft and for persons and property on board.

3. An aircraft is considered to be in service from the beginning of the preflight preparation of the aircraft by ground personnel or by the crew for a specific flight until twenty-four hours after any landing. The period of service, in any event, extends for the entire period during which the aircraft is in flight as defined in Paragraph 2.

## Commentary

The criminal offense of unlawful acts against the safety of civil aviation is derived from the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. For a discussion of the drafting of this convention and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime. The ratification and implementation of the convention is an international obligation under Security Council Resolution 1373 (2001), discussed above.

The wording of Article 150 is taken from Article 1 of the convention. In addition to the criminal acts listed above in Article 150, Articles 1(2)(a) and 1(2)(b) of the convention require that attempts to commit any of the acts mentioned in Article 1, or being an accomplice to any of these acts, should also be criminalized in domestic legislation. While these grounds of liability are not specifically enumerated in Article 150, attempt is covered under Article 27 of the MCC, and accomplice liability is covered under Article 31. Article 5 of the convention further requires that jurisdiction over unlawful acts against civil aviation be asserted where an act is committed in the territory of the state; where an act is committed on board an aircraft registered in that state; when an aircraft upon which unlawful acts against civil aviation have been committed lands in the territory of a state with the perpetrator still on board; and when the offense is committed on board an aircraft leased, without crew, to a lessee who has his or her principal place of business or his or her permanent residence in that state. These grounds of jurisdiction are covered in Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extraterritorial Jurisdiction”) of the MCC. The convention also contains provisions on investigation of unlawful acts (Article 6), prosecution (Article 7), extradition (Article 8), and mutual assistance (Article 11). These provisions should be looked at when domestically implementing the provisions of the convention. Reference should be made to Chapter 14, Parts 1 and 2, of the MCCP, on extradition and mutual legal assistance.

Article 4(1) of the convention provides that the convention does not apply to aircraft used in military, customs, or police services. The MCC makes no statement on whether Article 150 should apply to the aircraft of military, customs, or police services; this decision should be made by the individual post-conflict state.

**Paragraph 2:** This paragraph is taken from Article 2(a) of Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

**Paragraph 3:** This paragraph is taken from Article 2(b) of Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.

## *Article 150.2: Penalty*

The applicable penalty range for the criminal offense of unlawful acts against the safety of civil aviation is five to twenty years' imprisonment.

# **Article 151: Unlawful Acts of Violence at an Airport Serving International Civil Aviation**

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## *Article 151.1: Definition of Offense*

A person commits the criminal offense of unlawful acts of violence at an airport serving international civil aviation when he or she, unlawfully, and using any device, substance, or weapon:

- (a) performs an act of violence against a person at an airport serving international civil aviation that 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 there, or disrupts the services of the airport, if such an act endangers or is likely to endanger safety at the airport.

## **Commentary**

The criminal offense of unlawful acts of violence at airports serving international civil aviation is derived from the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, which supplements the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. For a discussion of the drafting of this protocol and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime. The ratification and implementa-

tion of the convention is an international obligation under Security Council Resolution 1373 (2001), discussed above.

The wording of Article 151 is taken from Article II(1) of the protocol. The provisions on jurisdiction that apply to the Convention for the Suppression of Unlawful Acts against Civil Aviation also apply to the protocol. The provisions of the convention on investigation, prosecution, extradition, and mutual assistance also apply to unlawful acts of violence at airports serving international civil aviation and should be looked at when domestically implementing the provisions of the protocol. Reference should be made to the commentary under Article 150. Reference should also be made to Chapter 14, Parts 1 and 2, of the MCCP, on mutual legal assistance and extradition.

## *Article 151.2: Penalty*

1. The applicable penalty range for the criminal offense of unlawful acts of violence at an airport serving international civil aviation is five to twenty years' imprisonment.
2. Where an unlawful act of violence at an airport serving civil aviation results in a loss of life, the applicable penalty range is ten to thirty years' imprisonment.

## **Article 152: Offenses against Internationally Protected Persons**

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### *Article 152.1: Definition of Offense*

1. A person commits an offense against an internationally protected person when he or she:
  - (a) commits the criminal offense of unlawful killing under Article 89, the criminal offense of kidnapping under Article 106, or another attack upon the person or liberty of an internationally protected person;
  - (b) commits a violent attack upon the official premises, private accommodations, or means of transport of an internationally protected person such that the attack is likely to endanger his or her person or liberty; or
  - (c) threatens to commit any such attack.
2. For the purposes of Article 152, *internationally protected person* means:

- (a) a head of state, including any member of a collegial body performing the functions of a head of state under the constitution of the state concerned, a head of government, or a minister of foreign affairs, whenever any such person is in a foreign state, as well as family members who accompany him or her;
- (b) any representative or official of a state or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a criminal offense against him or her, his or her official premises, his or her private accommodations, or his or her means of transport is committed, is entitled pursuant to international law to special protection from any attack on his or her person, freedom, or dignity, as well as on family members forming part of his or her household.

## Commentary

The criminal offense of offenses against internationally protected persons is derived from the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons. For a discussion of the drafting of this protocol and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime. The ratification and implementation of the convention is an international obligation under Security Council Resolution 1373 (2001), discussed above.

The wording of Article 152 is taken from Article 2(1) of the convention. In addition to the criminal acts listed above in Article 152, Articles 2(d) and 2(e) of the convention require that attempts to commit any of the acts mentioned in Article 1, or being an accomplice to any of these acts, should also be criminalized in domestic legislation. Attempt is covered under Article 27 of the MCC and accomplice liability is covered under Article 31. Article 3 of the convention further requires that jurisdiction over crimes against internationally protected be asserted where the act is committed in the territory of the state; on board an aircraft or ship registered in that state; by a national of the state; or against an internationally protected person who enjoys his or her status by virtue of functions he or she exercises on behalf of the state. These grounds of jurisdiction are covered in Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extra-territorial Jurisdiction”) of the MCC. The convention also contains provisions on prosecution (Articles 3, 5, and 7), extradition (Article 8), and mutual assistance (Articles 4 and 10) in relation to this criminal offense. These provisions, should be looked at when domestically implementing the provisions of the convention. Reference should be made to Chapter 14, Parts 1 and 2, of the MCCP, on mutual legal assistance and extradition.

**Paragraph 2:** This paragraph is taken from Article 1(1)(a) and Article 1(1)(b) of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons.

## *Article 152.2: Penalty*

1. The applicable penalty range for an offense against an internationally protected person is five to twenty years' imprisonment.
2. Where an offense against an internationally protected person involves unlawful killing, the applicable penalty range is ten to thirty years' imprisonment.

## **Article 153: Taking of Hostages**

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### *Article 153.1: Definition of Offense*

1. A person commits the criminal offense of taking of hostages when he or she:
  - (a) seizes or detains another person; and
  - (b) threatens to kill, injure, or continue to detain the person;
  - (c) in order to compel a third party, namely, a state, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.
2. Insofar as the Geneva Conventions of 1949 for the protection of war victims or the Additional Protocols to those conventions are applicable to a particular act of hostage-taking, and in so far as states parties to this convention are bound under those conventions to prosecute or hand over a hostage-taker, Article 153 does not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the protocols thereto, including armed conflicts mentioned in Article 1, paragraph 4, of Additional Protocol I of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.



## Commentary

The criminal offense of taking of hostages is derived from the International Convention against the Taking of Hostages. For a discussion of the drafting of this protocol and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime. The ratification and implementation of the convention is an international obligation under Security Council Resolution 1373 (2001), discussed above.

The wording of Article 153.1(1) is taken from Article 1(1) of the convention. In addition to the criminal acts listed above in Article 153, Article 1(2) requires that attempts to commit any of the acts mentioned in Article 1, or being an accomplice to any of these acts, also be criminalized in domestic legislation. While these grounds of liability are not specifically enumerated in Article 153, attempt is covered under Article 27 of the MCC and accomplice liability is covered under Article 31. Article 5 of the convention further requires that jurisdiction over taking of hostages be asserted where the act is committed in the territory of the state or on board an aircraft or ship registered in that state; where the act is committed by nationals of the state or by a stateless person who has habitual residence in the territory of the state (where the state considers it appropriate); where the hostage is a national of the state (where the state considers it appropriate); and when the act of hostage taking is done to compel the state to do or abstain from doing any act. These grounds of jurisdiction, except for the final ground, are covered in Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extraterritorial Jurisdiction”) of the MCC. The convention also contains provisions on investigation (Article 6), prosecution (Article 8), extradition (Articles 9 and 10), and mutual assistance (Article 11), and these should be looked at when domestically implementing the provisions of the convention. Reference should be made to Chapter 14, Parts 1 and 2, of the MCCP, on mutual legal assistance and extradition.

**Paragraph 2:** The Convention against the Taking of Hostages, as articulated in Article 12, does not apply to activities of armed forces during an armed conflict. When an act of hostage taking occurs during an armed conflict, the act is covered under Article 88 of the MCC on war crimes.

### *Article 153.2: Penalty*

The applicable penalty range for the criminal offense of taking of hostages is five to twenty years’ imprisonment.

## Article 154: Offenses Related to Nuclear Material

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### *Article 154.1: Definition of Offense*

1. A person commits a criminal offense related to nuclear material when he or she unlawfully:
  - (a) receives, possesses, uses, transfers, alters, disposes of, or disperses, without lawful authority, nuclear material that causes or is likely to cause death or serious injury to any person or substantial damage to property;
  - (b) commits a theft or robbery of nuclear material;
  - (c) embezzles or obtains nuclear material through fraud;
  - (d) demands nuclear material by threat, use of force, or any other form of intimidation;
  - (e) threatens to use nuclear material to cause death or serious injury to any person or to cause substantial property damage; or
  - (f) threatens to commit a theft or robbery of nuclear material in order to compel a natural or legal person, international organization, or state to do or refrain from doing any act.
2. For the purposes of Article 154:
  - (a) *nuclear material* means:
    - (i) plutonium, except that with isotopic concentration exceeding 80 percent in plutonium-238;
    - (ii) uranium-233;
    - (iii) uranium enriched in the isotope 235 or 233;
    - (iv) uranium containing the mixture of isotopes as occurring in nature other than in the form of ore or ore residue; or
    - (v) any material containing one or more of the foregoing.
  - (b) *uranium enriched in the isotope 235 or 233* means uranium containing isotope 235 or 233 or both in an amount such that the abundance ratio of the sum of these isotopes to the isotope 238 is greater than the ratio of the isotope 235 to the isotope 238 occurring in nature.

## Commentary

The offenses related to nuclear material are derived from the Convention on the Physical Protection of Nuclear Material. For a discussion on the drafting of this convention and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime. The ratification and implementation of the convention is an international obligation under Security Council Resolution 1373 (2001), discussed above. The convention is mainly regulatory in nature, but it does contain one penal provision in Article 7.

In addition to the criminal acts listed above in Article 154, Articles 7(f) and 7(g) of the convention require that attempts to commit any of the acts mentioned in Article 7, or participation in any of these acts, should also be criminalized in domestic legislation. While these grounds of liability are not specifically enumerated in Article 154, attempt is covered under Article 27 of the MCC and participation is covered under Article 31. Article 8 of the convention further requires that jurisdiction over offenses related to nuclear materials be asserted where the act is committed in the territory of the state; against or on board a ship registered in that state; or by a national of that state. These grounds of jurisdiction are covered in Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extraterritorial Jurisdiction”) of the MCC. The convention also contains provisions on fair treatment in the investigation of unlawful acts (Article 12), extradition (Articles 9–11), and mutual assistance (Article 13). These provisions should be looked at when domestically implementing the provisions of the convention. Reference should be made to Chapter 14, Parts 1 and 2, of the MCCP, on mutual legal assistance and extradition.

**Paragraph 2:** The definitions of nuclear material and uranium-enriched isotope 235 or 233 are taken from Articles 1(a) and 1(b) of the Convention on the Physical Protection of Nuclear Material.

### *Article 154.2: Penalty*

The applicable penalty range for offenses related to nuclear material is five to twenty years’ imprisonment.

## Article 155: Unlawful Acts against the Safety of Maritime Navigation

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### *Article 155.1: Definition of Offense*

1. A person commits the criminal offense of unlawful acts against the safety of maritime navigation when he or she unlawfully:
  - (a) seizes or exercises control over a ship by force, threat of force, or any other form of intimidation;
  - (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;
  - (c) places or causes to be placed on a ship, by any means whatsoever, a device or substance that is likely to destroy or cause damage to that ship or its cargo or is likely to endanger the safe navigation of that ship;
  - (d) 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 the ship;
  - (e) communicates information that the person knows to be false and thereby endangers the safe navigation of a ship;
  - (f) threatens, with or without a condition, to commit an act described in Paragraphs (a) to (e), aimed at compelling a physical or juridical person to do or refrain from doing any act, if the threat is likely to endanger the safe navigation of the ship in question; or
  - (g) injures or kills any person in connection with the commission of the offenses set out in Paragraphs (a) to (f).
2. For the purposes of Article 155, *ship* means a vessel of any type whatsoever, including dynamically supported craft, submersibles, or any other floating craft.

### Commentary

The criminal offense of unlawful acts against the safety of maritime navigation is derived from the Convention for the Suppression of Unlawful Acts Committed against the Safety of Maritime Navigation. For a discussion of the drafting of this convention and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations

Office on Drugs and Crime. The ratification and implementation of the convention is an international obligation under Security Council Resolution 1373 (2001), discussed above.

The wording of Article 155 is taken from Article 2 of the convention. Articles 3(2)(a) and 3(2)(b) of the convention also require that attempts to commit any of the offenses mentioned in Article 3 of the convention, or abetting or being an accomplice to a person who commits such offenses, be criminalized in domestic legislation. While these grounds of liability are not specifically enumerated in Article 155, attempt is covered under Article 27 of the MCC and abetting and accomplice liability are covered under Article 31. The convention further requires that jurisdiction over unlawful acts committed against the safety of maritime navigation be asserted where the act is committed in the territory of the state; against or on board a ship flying the flag of the state; or by a national of that state. These grounds of jurisdiction are covered in Article 4 (“Territorial Jurisdiction”) and Article 5 (“Extraterritorial Jurisdiction”) of the MCC. Article 6(2) of the convention further provides that a state may consider asserting jurisdiction over a stateless person whose habitual residence is in the state; where during commission of a criminal offense a national of that state is seized, threatened, injured, or killed; or where the criminal offense is committed in an attempt to compel that state to do or abstain from doing any act. The first two grounds of jurisdiction are covered in Article 5 (“Extraterritorial Jurisdiction”) of the MCC. The third ground is not. The Convention for the Suppression of Unlawful Acts Committed against the Safety of Maritime Navigation also contains provisions on the investigation of unlawful acts (Articles 7 and 10), the delivery of an alleged perpetrator to the authorities of a state (Article 8), extradition (Article 11), and mutual legal assistance and international cooperation (Articles 12 and 13), and these should be looked at when domestically implementing the provisions of the convention. Reference should be made to Chapter 14, Parts 1 and 2, of the MCCP, on mutual legal assistance and extradition.

**Paragraph 3:** The definition of ship is taken from Article 1 of the Convention for the Suppression of Unlawful Acts Committed against the Safety of Maritime Navigation. Article 2 provides that warships, ships owned or operated by a state when being used as naval auxiliaries or for customs or police purposes, and ships that have been withdrawn from navigation or laid up do not fall under the scope of the convention.

## *Article 155.2: Penalty*

1. The applicable penalty range for the criminal offense of unlawful acts against the safety of maritime navigation is five to twenty years’ imprisonment.
2. When unlawful acts against the safety of maritime navigation involve the killing of any person, the applicable penalty range is ten to thirty years’ imprisonment.

## Commentary

**Paragraph 2:** In light of the fact that Article 155.1(1)(g) on unlawful acts against the safety of maritime navigation sets out killing as a potential element of this offense, which is liable to a higher penalty range under the MCC than the other acts mentioned in this article, it was decided to create a separate penalty range for unlawful acts against the safety of maritime navigation that involve the killing of a person.

# Article 156: Unlawful Acts against the Safety of Fixed Platforms

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## *Article 156.1: Definition of Offense*

1. A person commits the criminal offense of unlawful acts against the safety of fixed platforms when he or she unlawfully:
  - (a) seizes or exercises control over a fixed platform by force, threat of force, or any other form of intimidation;
  - (b) performs an act of violence against a person on board a fixed platform if that act is likely to endanger its safety;
  - (c) destroys a fixed platform or causes damage to it that is likely to endanger its safety;
  - (d) places or causes to be placed on a fixed platform, by any means whatsoever, a device or substance that is likely to destroy that fixed platform or likely to endanger its safety;
  - (e) threatens, with or without a condition, to commit an act described in Paragraphs (a) to (d), aimed at compelling a physical or juridical person to do or refrain from doing any act, if the threat is likely to endanger the safety of the fixed platform; or
  - (f) injures or kills any person, in connection with the commission of the offenses set out in Paragraphs (a) to (e).
2. For the purposes of Article 156, *fixed platform* means an artificial island, installation, or structure permanently attached to the seabed for the purpose of exploration or exploitation of resources or for other economic purposes.

## Commentary

The criminal offense of unlawful acts against fixed platforms is derived from the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (entry into force, March 1, 1992). For a discussion of the drafting of this protocol and its substantive content, reference should be made to the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, prepared by the United Nations Office on Drugs and Crime. The legislative guide points out that it is in the interest of all states, even landlocked states, to ratify and implement this protocol for two reasons. First, the ratification and implementation is an international obligation under Security Council Resolution 1373 (2001). Second, a landlocked state, while it has no fixed platforms, may find itself in a position where a national has been killed or injured on board a fixed platform, and the landlocked state wishes to assert jurisdiction over the offense. Where the state has implemented offenses related to vessels and fixed platforms into its domestic law, and where it has incorporated the grounds of extraterritorial jurisdiction, under Article 3(2) of the protocol, it could prosecute a national for an offense committed on board a fixed platform.

The wording of Article 156.1 is taken from Article 1 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. Articles 2(2)(a) and 2(2)(b) of the protocol also require that attempts to commit any of the offenses mentioned in Article 1, or abetting or being an accomplice to a person who commits such offenses, be criminalized in domestic legislation. While these grounds of liability are not specifically enumerated in Article 156, attempt is covered under Article 27 of the MCC and abetting and accomplice liability are covered under Article 31.

**Paragraph 2:** The definition of fixed platform is taken from Article 1(3) of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.

### *Article 156.2: Penalty*

1. The applicable penalty range for the criminal offense of unlawful acts against the safety of fixed platforms is five to twenty years' imprisonment.
2. When the unlawful acts against the safety of fixed platforms involve the killing of any person, the applicable penalty range is ten to thirty years' imprisonment.

## Commentary

**Paragraph 2:** In light of the fact that Article 156.1(1)(f) on unlawful acts against the safety of fixed platforms sets out killing as a potential element of this offense, which is

liable to a higher penalty range under the MCC than the other acts mentioned in this article, it was decided to create a separate penalty range for unlawful acts against the safety of fixed platforms that involve the killing of a person.

## Article 157: Piracy

### *Article 157.1: Definition of Offense*

1. A person commits the criminal offense of piracy when he or she commits any of the following acts:
  - (a) any illegal acts of violence or detention or any other acts of deprivation committed for private ends by the crew or 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; or
    - (ii) against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state; or
  - (b) any act of voluntary participation in the operation of a ship or aircraft with knowledge or facts making it a pirate ship or aircraft.
2. The acts of piracy as defined, committed by a warship, government ship, or government aircraft whose crew has mutinied and taken control of the ship or aircraft, are assimilated to acts committed by a private ship.

### Commentary

Piracy was recognized as an international crime long before genocide, crimes against humanity, and war crimes were. Piracy, as a criminal offense, is no longer as prevalent around the world as it used to be. But there are certain regions of the world, including several post-conflict states, where piracy still represents a significant threat. The Convention on the Law of the Sea (1982) (the Montego Bay Convention) provides a definition of piracy in Article 101. This definition has been used in the MCC. Piracy is a criminal offense for which universal jurisdiction is claimed under Article 6 of the MCC.

When a state is dealing with outbreaks of piracy, investigating piracy, or seeking to implement legislation on piracy, reference should be made to the International Maritime Organization (IMO), a specialized United Nations agency whose purpose is to assist states in taking measures to improve the safety and security of international shipping. The IMO also operates an extensive technical cooperation program that



focuses on improving the ability of developing states to combat piracy. Reference should be made to the IMO Recommendation to Governments for Preventing and Suppressing Piracy and the IMO Recommendation on Armed Robbery against Ships, Guidance to Ship-owners and Ship Operators, Shipmasters and Crew on Preventing and Suppressing Acts of Piracy and Armed Robbery. In addition, reference should be made to the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships (Resolution A.922[22]) and Measures to Prevent the Registration of Phantom Ships (Resolution A.923[22]), both of which were adopted by the IMO assembly. Also of relevance is the International Maritime Bureau (IMB), a specialized division of the International Chamber of Commerce associated with the IMO. The IMB Piracy Reporting Centre maintains round-the-clock watch on the world's shipping lanes, reports pirate attacks to local policing agencies, and issues warnings about piracy hot spots to shipping, both throughout the year and in its annual reports.

## *Article 157.2: Penalty*

The applicable penalty range for the criminal offense of piracy is five to twenty years' imprisonment.

## **Article 158: Bombing**

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### *Article 158.1: Definition of Offense*

1. A person commits the criminal offense of bombing when he or she unlawfully delivers, places, discharges, or detonates an explosive or incendiary weapon or device.
2. For the purposes of Article 158, *explosive or incendiary weapon or device* has the same meaning as in Article 148.1(2)(a).

## **Commentary**

**Paragraph 1:** The wording of Article 158.1 is identical to the wording contained in Article 148.1 on terrorist bombing, minus two elements of the latter crime: the defined target of the bombing (i.e., a place of public use, a state or governmental facility, a public transportation system, or an infrastructure facility) and the requisite intention under Article 148.1(1)(d). Therefore, a person who bombs, for example, another person's house or place of business could be convicted of bombing. The only intention

element required is the intention to deliver, place, discharge, or detonate the explosive incendiary or other lethal device. The criminal offense of bombing has been common in some post-conflict states, particularly in states emerging from an ethnically charged conflict, such as Kosovo.

**Paragraph 2:** Reference should be made to Article 148 and its accompanying commentary.

## *Article 158.2: Penalty*

The applicable penalty range for the criminal offense of bombing is three to fifteen years' imprisonment.

# **Article 159: Disruption of Supply of Public Installations**

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## *Article 159.1: Definition of Offense*

A person commits the criminal offense of disruption of supply of public installations when he or she, in the knowledge that his or her action may result in a disturbance to the supply of services to the population or the economy, destroys, damages, or removes public installations or equipment such as water, sewerage, energy, fuel, or communications.

## **Commentary**

The offense aims to prosecute those who seek to destroy, damage, remove, or disrupt public installations vital to the functioning of the state and the well-being of its population. The public installations referred to in Article 159 are illustrative and not exhaustive. Public installations could also include dams, pipelines, and underwater cables, and electricity, gas, and heating installations. This offense has been included in the MCC in response to the requests of experts working in post-conflict states, such as the Democratic Republic of the Congo, where such acts occur frequently but cannot be prosecuted due to a lack of legislative basis. The destruction of public installations has also been widely perpetrated in Iraq, where oil pipelines have been targeted, and was a common occurrence in Albania, where electrical lines were cut and other public installations interfered with during the nation's transition from the communist era. In some post-conflict states, such as Iraq, public installations have been targeted by crim-

inal elements, often with the intention to intimidate the local population or to compel a government to act or refrain from acting.

A variety of means may be used to disrupt the supply of public installations, including the use of bombs. Where a bomb is used to disturb the supply of public installations, there may be an overlap between the criminal offense of disruption of supply of public installations and that of terrorist bombing under Article 148. This article refers to the destruction of an infrastructure facility, as defined in Article 148.1(2)(e), which could include a facility for the supply of water, energy, or fuel to the population. To convict a person of terrorist bombing, he or she needs to have the intention to destroy the infrastructure facility, as opposed to simple knowledge that his or her actions may result in disturbance to the supply of services to the population or the economy. Reference should be made to Article 148 and its accompanying commentary.

## *Article 159.2: Penalty*

The applicable penalty range for the criminal offense of disruption of supply of public installations is two to ten years' imprisonment.

# **Article 160: Destruction or Unauthorized Removal of Cultural Property**

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## *Article 160.1: Definition of Offense*

1. A person commits the criminal offense of destruction or unauthorized removal of cultural property when he or she:
  - (a) damages or destroys cultural property; or
  - (b) unlawfully removes cultural property from the state.
2. For the purposes of Article 160, *cultural property* means property that, on religious or secular grounds, is of importance for archaeology, prehistory, history, literature, art, or science and that belongs to one of the following categories:
  - (a) rare collections and specimens of fauna, flora, minerals, and anatomy, and objects of paleontological interest;
  - (b) property relating to history, including the history of science and technology and military and social history; to the life of national leaders, thinkers, scientists, and artists; or to events of national importance;

- (c) products of archaeological excavations (including regular and clandestine) or archaeological discoveries;
- (d) elements of artistic or historical monuments or archaeological sites that have been dismembered;
- (e) antiquities more than one hundred years old, such as inscriptions, coins, and engraved seals;
- (f) objects of ethnological interest;
- (g) property of artistic interest, such as:
  - (i) pictures, paintings, and drawings produced entirely by hand on any support and in any material, excluding industrial designs and any manufactured articles decorated by hand;
  - (ii) original works of statuary art and sculpture in any material;
  - (iii) original engravings, prints, and lithographs;
  - (iv) original artistic assemblages and montages in any material;
- (h) rare manuscripts and incunabula or old books, documents, and publications of special interest (historical, artistic, scientific, literary, and so on), singly or in collections;
- (i) postage, revenue, and similar stamps, singly or in collections;
- (j) archives, including sound, photographic, and cinematographic archives; and
- (k) articles of furniture more than one hundred years old and old musical instruments.

## Commentary

**Paragraph 1:** Organized criminal groups are routinely involved in trafficking cultural property, particularly in post-conflict states where weak criminal justice systems are unable to fully enforce the law. A number of international conventions focus on cultural property. These include the Hague Convention for the Protection of Cultural Property (1954); the Convention on the International Trade in Endangered Species of Wild Flora and Fauna (1963); and the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970). Another international instrument, the Convention on Stolen or Illegally Exported Cultural Objects, addresses the problem of trafficking in cultural property from a private law perspective. The 1954 Hague convention focuses on the protection of cultural property in wartime only. The 1963 convention aims to ensure that the international trade in specimens of wild animals and plants does not threaten their survival. Finally, the 1970 convention sets out certain obligations upon states parties

to protect cultural property through the regulation of the import, export, and transfer of ownership. It requires that a state party establish a national service for the protection of cultural property that would, among other things, create a national inventory of protected property (Article 5). Furthermore, the convention requires that a certification process for the exportation of cultural property be established. This process is a reciprocal one among states parties.

Article 3 of the convention says that the import, export, or transfer of ownership of cultural property in violation of the certification procedure should be deemed illicit, although it does not specify that penal provisions need to be introduced into domestic legislation. Article 8 of the convention provides, in relation to some obligations contained in it, that “penalties or administrative sanctions” must be imposed for their breach. A post-conflict state should consider implementing the provisions of the convention. The convention provides that technical assistance in doing so can be obtained from the United Nations Education, Scientific and Cultural Organization (UNESCO).

Although the convention contains no express requirements with regard to substantive criminal law, it was considered imperative to include criminal law provisions on cultural property in the MCC. The destruction of cultural property has been evidenced in post-conflict states, as has its removal, particularly at the hands of organized criminal gangs. There are two elements to Article 160. First, Article 160 focuses on the destruction of cultural property, as defined in Paragraph 2. Second, Article 160 focuses on the removal of cultural property from the state. Paragraph 1(b) refers specifically to the fact that the removal of cultural property must be “unlawful.” In certain circumstances, its removal may be lawful and therefore not subject to criminal jurisdiction—for example, where it is permissible under a cultural-property licensing and regulation system established under the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970).

**Paragraph 2:** The definition of cultural property in this paragraph is taken from Article 1 of the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970). When a state has compiled an inventory of national cultural property, reference could be made to this list in the definition, either as a replacement for the provisions there or to supplement them.

## *Article 160.2: Penalty*

The applicable penalty range for the criminal offense of destruction or unauthorized removal of cultural property is two to ten years’ imprisonment.

## Article 161: Incitement to Crime on Account of Hatred

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### *Article 161.1: Definition of Offense*

A person commits the criminal offense of incitement to crime on account of hatred when he or she:

- (a) directly and publicly incites another;
- (b) to commit a criminal offense;
- (c) on account of hatred for a national, ethnic, racial, religious, or similarly identifiable group;
- (d) in circumstances in which there is a substantial likelihood of imminently causing the commission of such an offense.

### Commentary

The right to freedom of expression is guaranteed in the constitutions of most states. In addition, it is protected under international law in instruments such as the Universal Declaration of Human Rights (Article 19), the International Covenant on Civil and Political Rights (Article 19), the African Charter on Human and People's Rights (Article 9), the European Convention on Human Rights and Fundamental Freedoms (Article 10), the American Convention on Human Rights (Article 13), the Convention on the Rights of the Child (Article 12), and the African Charter on the Rights and Welfare of the Child (Article 7). A person's right to freedom of expression is not an absolute right, however, and may be limited in certain circumstances. According to Article 19 of the International Covenant on Civil and Political Rights, restrictions on freedom of expression must be "provided by law" and "necessary for respect of the rights and reputations of others" or "for the protection of national security or of public order, or of public health or morals." Other conventions provide for similar restrictions on this right. In particular, Article 20 of the International Covenant on Civil and Political Rights includes a positive obligation to restrict freedom of expression in the case of "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence." Article 20(2) provides that such advocacy "shall be prohibited by law." Similar obligations are contained in Article 13(5) of the American Convention on Human Rights and Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination.

Incitement to crime on account of hatred, described in the conventions and in the MCC, is distinct from what is colloquially known as hate speech. Hate-speech legislation in many jurisdictions involves the criminalization of the spreading of or inciting

racial, religious, or ethnic hatred. In contrast, the MCC requires actual incitement to a criminal offense (e.g., through encouragement, suggestion, request, persuasion, threats, or pressuring of another person) that is both direct and public and where there is a likelihood of the incitement provoking imminent commission of the offense. The international conventions do not specifically say whether or not incitement must be accompanied by the actual commission of a criminal offense. Some states have chosen to criminalize incitement without the need for the commission of a criminal offense. In other states, legislation requires a nexus between an act of incitement and the commission of a criminal offense. Under the MCC, incitement to commit a criminal offense is already criminalized under Article 30. Reference should be made to Article 30 and its accompanying commentary. Article 161, as it relates specifically to incitement based on hatred, is a hybrid of the two positions mentioned previously. There is no requirement that a criminal offense actually be committed, although it is necessary that there be a substantial likelihood of the imminent commission of a criminal offense.

Some argue that, particularly in a post-conflict state where different and adverse ethnic groups are spreading hatred through public proclamations, newspapers, or the radio, hate speech—as opposed to incitement to crime on account of hatred in Article 161—should be criminalized to address the problem. In contrast, others argue that this provision would impinge too much upon a person's right to freedom of expression, going well beyond what is permissible. The drafters of the MCC, and the experts consulted in its vetting process, many of whom had witnessed firsthand the spreading of ethnic or religious hatred in post-conflict states, sided with the latter view. Many experts believed it could be dangerous to introduce hate-speech legislation into a fragile post-conflict state where the criminal justice system may not be fully functional and may not have adequate controls. Another relevant factor is that such legislation may have been used during a conflict or under a prior regime as a tool of political and popular suppression of antigovernment sentiments, as was the case in South Africa during the apartheid era. The United Nations Mission in Kosovo Regulation 2000/4 on the Prohibition against Incitement to National, Racial, Religious or Ethnic Hatred, Discord or Intolerance introduced two offenses. The first was similar to that described in Article 161. The second offense was the spreading of “hatred, discord or intolerance between national, racial, religious, ethnic or other groups.” The regulation was gravely criticized by the nongovernmental organization Article 19, which deals specifically with issues surrounding the right to freedom of expression. The criticisms are not unique to Kosovo but apply to any post-conflict state considering the introduction of similar legislation. In addition to criticizing the regulation on the grounds of violation of freedom of expression mentioned above, Article 19 stated that the “longer term solution [to ethnic hatred] lies in fundamental social processes—including conflict resolution and the building of tolerance and acceptance—which are only possible in an atmosphere of open debate. The simple expedient of banning speech may satisfy external demands for action, but will not advance social processes which could bring about a lasting solution to the problem.” Significantly, the group went on to state that “imprisoning someone for breach of this regulation is more likely to generate a backlash than bring the various communities together or to prevent violent clashes.”

## *Article 161.2: Penalty*

The applicable penalty range for the criminal offense of incitement to crime on account of hatred is two to ten years' imprisonment.

# **Article 162: Unauthorized Border or Boundary Crossing**

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## *Article 162.1: Definition of Offense*

A person commits the criminal offense of unauthorized border or boundary crossing when he or she crosses a border or boundary of the state at any location other than an authorized border or boundary crossing.

## **Commentary**

In many post-conflict states, there are too few policing officials, troops, or border-control agents to control the flow of persons into and out of the state. The regulation of the border region of a state may be a momentous task depending on the size of the state. In a peace operation, international military forces may initially be charged with border duty, a task that may then be handed over to national forces or border-control police. Without an effective border-control mechanism, a post-conflict state could receive an influx of people, potentially including criminals, rebel fighters, or terrorists, further destabilizing the state.

The United Nations Mission in Kosovo promulgated Regulation 2001/10 on the Prohibition of Unauthorized Border/Boundary Crossings to address the issue of border control. It provided for the designation of authorized border and boundary crossing points (section 2) and created a number of related criminal offenses (section 3). Article 162 draws inspiration from Regulation 2001/10. Further, measures additional to criminal legislation will be necessary to deal with border-related issues. Significant reforms will be required both in border control and in refugee or migration laws.

## *Article 162.2: Penalty*

1. The applicable penalty range for the criminal offense of unauthorized border or boundary crossing is one to five years' imprisonment.
2. The court may impose a fine, as a principal penalty, upon a person convicted of unauthorized border or boundary crossing.