



# GCTF

GLOBAL COUNTERTERRORISM FORUM

## **Criminal Justice Sector/Rule of Law Working Group**

### **The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector**

#### **Introduction**

The Cairo Declaration on Counterterrorism and the Rule of Law (September 22, 2011) calls for members of the Global Counterterrorism Forum (GCTF) to “develop good practices for an effective and rule of law-based criminal justice sector response to terrorism, including those aspects related to international cooperation.” The GCTF’s Criminal Justice Sector/Rule of Law Working Group met in Washington, D.C. on November 3-4, 2011 to discuss the role of criminal justice authorities in the investigation and disruption of terrorist activities. This discussion and the subsequent meeting in Rabat on February 7-8, 2012, resulted in the composition of this document on good criminal justice counterterrorism practices. Consistent with the Cairo Declaration, all States are encouraged to consider using these non-binding good practices, while recognizing that implementation of these practices must be consistent with applicable international law, as well as national law and regulations, taking into account the varied histories, cultures, and legal systems among States. States are also encouraged, but are not obligated, to share their experiences with the below-mentioned practices in the Working Group. These good practices for addressing terrorism must be built on a functional criminal justice system that is capable of handling ordinary criminal offenses while protecting the human rights of the accused.

In articulating these good practices, the Working Group recognizes that the primary objective of any effective criminal justice response to terrorism is to prevent terrorist incidents before they produce large-scale casualties or similar devastating results, while fully respecting applicable international law and promoting the rule of law. The criminal justice system must also be able to respond to terrorist acts with fair and effective investigation, prosecution, and punishment in the unfortunate event that they occur. Consequently, a comprehensive strategy requires an integrated approach and a broad-based system of criminal offenses, including inchoate or preventive ones such as attempt, conspiracy, providing material support, training, incitement, and solicitation. Of equal importance to the

criminal offense provisions is the need for a legal framework that enables effective investigations and robust cooperation among investigators, prosecutors, judges (where relevant), and other government officials. Agile mechanisms of international cooperation in criminal matters are also fundamental to effectively and efficiently preventing and responding to terrorism.

It is critical that States, where appropriate, have the necessary legal authorities to conduct clandestine surveillance of terrorist suspects, gather evidence of terrorist activities that can be used in court, detain suspects based on such evidence, obtain intelligence from them about terrorist plots, prosecute them fairly and effectively in legal proceedings, and afford those who are convicted appropriate punishment and correctional facilities. All these measures and their application should fully respect human rights obligations and the rule of law, while protecting the safety of those participating in the process and the government's sensitive sources and methods.

The Working Group recognizes that in the collective effort to combat and prevent terrorism we must never lose sight of the truth that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>1</sup> Acts of terrorism deny the very freedom, dignity, and natural reason with which all human persons are endowed; but our criminal justice systems must nonetheless afford those accused of terrorist acts the fundamental human rights that all free societies cherish. Consequently, in order to protect the fundamental human rights of all persons as recognized in the *Universal Declaration on Human Rights*, there must be a competent, independent, and impartial judiciary, and law enforcement officials must work within a rule-of-law framework that affords due process to the accused and appropriate protection to civil liberties.<sup>2</sup> Strong and effective counterterrorism policies are not incompatible with respect for human rights. On the contrary, States that have developed robust, lawful tools for investigating and prosecuting suspected terrorists, consistent with applicable international law, are more likely to observe human rights in pursuit of these suspects. Moreover, counterterrorism efforts can best succeed when they are grounded in human rights obligations and the rule of law.

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<sup>1</sup> *Universal Declaration of Human Rights*, U.N. Ga. Res. 217, art. 1 (December 10, 1948).

<sup>2</sup> *International Covenant on Civil and Political Rights*, Preamble, 999 U.N.T.S. 171 (December 16, 1966) [hereinafter, *ICCPR*]. [“In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” *ICCPR art. 14.1*.]

The Working Group emphasizes that the mere existence of certain legal tools is not sufficient. A comprehensive criminal justice response to terrorism requires a strong criminal justice system that functions in practice. This requires investigative agencies, prosecutors, and investigating judges (where relevant) to overcome institutional barriers and work closely and collaboratively together, while respecting their particular roles. The institutional barriers that often prohibit effective counterterrorism cooperation between governmental organs can be as significant an obstacle to an effective criminal justice system as deficient legislation. Criminal justice sector actors must also receive the requisite training and resources to build their capacity in order to carry out their responsibilities.

All countries are encouraged to consider the following non-exhaustive list of recommended good practices for an effective, rule of law-based criminal justice sector response to terrorism. Many of them are already reflected in UN Security Council resolutions and analogous practices are reflected in multilateral treaties on organized crime, drug trafficking, human rights, and other issues.

In formulating these recommended good practices, the Working Group has drawn on existing United Nations conventions, as well as the experience, analysis, and publications of the United Nations and its specialized agencies.

This list of GCTF good practices as it stands is not exhaustive. The Working Group may choose to expand or modify it to take into account States' experiences in using their criminal justice systems to prevent and counter terrorism.

#### **A. Criminal Procedure Tools**

- *Good Practice 1: Protect Victims, Witnesses, Informants, Undercover Agents, Juries, Investigators, Prosecutors, Defense Counsel, and Judges in Counterterrorism Cases.* Victims, witnesses, informants, undercover agents, juries, investigators, prosecutors, defense counsel, and judges all play an essential role in the investigation of, and in judicial proceedings involving, acts of terrorism. Their ability to participate in law enforcement investigations and/or judicial proceedings without fear of intimidation or reprisal is essential to maintaining the rule of law. Legal procedures and practical measures should be in place to protect them as well as certain

immediate family members.<sup>3</sup> With respect to witnesses with no criminal involvement, they should have confidence in their own security as well as trust in the integrity and accountability of the judicial system, so that they feel secure in cooperating with justice sector officials. Similarly, witness protection programs and other efforts to provide for the safety and security of witnesses, informants, and undercover agents who may have participated in criminal activities are an important means of creating incentives for their cooperation. States should consider developing necessary protection programs in that regard that may also include protection for immediate family members. These programs should have adequate resources to be effective in practice. States are encouraged to develop international cooperation arrangements in order to provide protection to witnesses when appropriate.<sup>4</sup>

- The rights of victims should be protected. This includes the right to protection and appropriate assistance and support during criminal proceedings.<sup>5</sup> In enacting and implementing such measures, States will be ensuring that prosecutors and courts treat victims fairly in the criminal justice process. In addition, States should consider measures necessary to ensure protection of counsel, especially where they are representing

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<sup>3</sup> Protecting witnesses from intimidation and retaliation is an important component of multiple United Nations conventions. “Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings.” *United Nations Convention against Transnational Organized Crime* [hereinafter *UNTOC*], art. 24.1; *accord UNCAC*, art. 32.1. Those measures include physical protection of witnesses, relocation, not disclosing their identity and whereabouts, and evidentiary rules that allow them to testify without being in person. *UNTOC*, art. 24.2; *accord UNCAC*, art. 32.2. These conventions have also called for criminalizing the “use of physical force, threats or intimidation... to interfere in the giving of testimony or the production of evidence.... [or] to interfere with the exercise of official duties by a justice or law enforcement official.” *UNTOC*, art. 23; *accord UNCAC*, art. 25.

<sup>4</sup> Technical Guide for the Implementation of Resolution 1373 at 28 (2001).

<sup>5</sup> These rights have been recognized in UN conventions that call for State Parties to “take appropriate measures within [their] means to provide assistance and protection to victims... in particular in cases of threat of retaliation or intimidation.” *UNTOC*, art. 25.1. These measures include “access to compensation and restitution,” and having their “views and concerns... presented and considered at appropriate stages of criminal proceedings.” *UNTOC*, art’s. 25.2 & 25.3; *accord United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, art’s. 6.2 & 6.6, Dec. 15, 2000, 2237 U.N.T.S. 319, Annex II [hereinafter *Trafficking in Persons Protocol*]. The *Trafficking in Persons Protocol* also calls for “protect[ing] the privacy and identity of victims” through confidential legal proceedings, counseling on their legal rights, “[m]edical, psychological, and material assistance,” “employment, educational and training opportunities,” and “[a]ppropriate housing.” Art’s. 6.1 & 6.3. In addition, the UN Global Counter-Terrorism Strategy calls on all States “[t]o consider putting in place, on a voluntary basis, national systems of assistance that would promote the needs of victims of terrorism and their families and facilitate the normalization of their lives.” UN General Assembly Resolution 60/288 (Sept 2006), Plan of Action, Sec. 1, Para. 8 [hereinafter *UN Strategy*].

informants, while respecting their ability to provide vigorous representation of their clients.

- *Good Practice 2: Encourage Cooperation and Coordination among Domestic Government Agencies that Have Responsibilities or Information Relevant to Counterterrorism.* Effective investigation of terrorist threats often involves the gathering and analysis of information collected by multiple agencies within a single government, such as intelligence, law enforcement, military, finance, and banking agencies, as well as provincial, state or local governments. It is often critical to connect disparate pieces of information drawn from different sources in order to identify and disrupt a terrorist plot and to prosecute terrorism cases. Thus the sharing of information aimed at preventing terrorist offenses among all agencies involved is an important means of preventing terrorist acts. States may wish to consider, where appropriate, promulgating measures and mechanisms establishing a legal framework aimed at enhancing inter-agency cooperation and information sharing, while maintaining necessary protections for personal data.<sup>6</sup> In this context, law enforcement agents, prosecutors and other relevant officials should work together while respecting their competencies, as determined by the applicable legal framework, to enable an effective and integrated criminal justice system.
  
- *Good Practice 3: Provide a Legal Framework and Practical Measures for Undercover Investigations of Terrorist Suspects or Organizations.* Where necessary and feasible, States should put in place adequate mechanisms and legislation for conducting investigations of terrorist activity without the knowledge of the suspected terrorists under investigation. Accordingly, States should enable, where appropriate, the use of special investigative techniques, such as undercover investigations, following established procedures, as provided for in relevant national laws or policies, that assure the accountability of law enforcement officials as well as the production of admissible evidence of terrorist activity and related criminal plans, preparations, actions, and involvement.<sup>7</sup> It is important that procedures be in

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<sup>6</sup> Domestic cooperation has already been stressed by the UNCAC, “Each State Party shall take such measures as may be necessary to encourage... cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences.” Those measures may include providing information “on their own initiative,” or “upon request.” UNCAC art. 38.

<sup>7</sup> United Nations conventions have called on State Parties “to allow for the appropriate use by its competent authorities of... special investigative techniques, such as... undercover operations,... and to allow for the

place to protect those involved in undercover operations from harm to the maximum extent possible, while ensuring their accountability. All such procedures should be consistent with relevant national laws and applicable international law. It is also important that their activities be closely supervised to ensure that they are targeting their operations based on evidence of terrorist activity, that they conduct the operations within appropriate human rights boundaries, and do not engage in entrapment.

- *Good Practice 4: Provide a Legal Framework and Practical Measures for Electronic Surveillance in Counterterrorism Investigations.* The clandestine and complex nature of terrorism requires specialized investigative methods and techniques. Lawfully approved forms of electronic surveillance such as wiretapping, tracking devices, and the monitoring of Internet and other electronic communications have proven to be effective tools to combat terrorist activities. Evidence derived from electronic surveillance should, as provided for in relevant national laws, generally be obtained in a form that will be legally admissible in court, and the methods should be compliant with relevant human rights obligations.<sup>8</sup> Regulating such surveillance can directly promote the right of persons not to be subjected to arbitrary or unlawful invasions of privacy.<sup>9</sup> There should be an appropriate legal authorization by the competent authorities to initiate electronic surveillance against a terrorist suspect. Laws authorizing electronic surveillance also need to be flexible enough to account for rapid changes in communications technology, which terrorists may exploit, and should apply the legal principle of proportionality.
  
- *Good Practice 5: Adopt Incentives for Terrorist Suspects and Others to Cooperate in Counterterrorism Investigations and Prosecutions.* Without adequate incentives, those with knowledge of or involvement in terrorist activity may have little reason to cooperate with law enforcement authorities, especially given the fear of retribution by members of a terrorist organization. Accordingly, adequate incentive programs to encourage

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admissibility in court of evidence derived therefrom.” *UNCAC*, art. 50.1; *accord Organized Crime Convention*, art. 20.1.

<sup>8</sup> Various international conventions have provisions encouraging the use of electronic surveillance. “[E]ach State Party shall... take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of... special investigative techniques, such as electronic or other forms of surveillance,... and to allow for the admissibility in court of evidence derived therefrom.” *UNCAC*, art. 50.1; *accord Organized Crime Convention*, art. 20.1.

<sup>9</sup> *ICCPR*, art. 17.1.

terrorist suspects and others to provide accurate and useful information to competent authorities about terrorist activities and plots should be adopted.<sup>10</sup> Any such program should respect the principle that no one should be compelled to testify against himself or confess guilt. With respect to those involved in planning or undertaking terrorist activities, legal systems should have the flexibility to take into account cooperation with authorities, including testimony in other criminal proceedings, and early admissions of guilt to mitigate punishment.<sup>11</sup> Formal cooperation agreements or “plea agreements” are one way but not the exclusive way to accomplish this objective, as are sentencing rules that address the impact of cooperation. Finally, care should be taken to ensure that incentives for cooperation do not lead individuals to provide false information or evidence to law enforcement authorities.

- *Good Practice 6: Enact Measures to Protect Sensitive Law Enforcement and Intelligence Information in Terrorism Cases:* In order to safeguard the lives of victims and informants, protect sources and methods, and maintain the usefulness of sensitive investigative techniques, governments must be able to protect certain types of information and techniques from public disclosure, even in the course of public criminal justice proceedings. Appropriate legal safeguards should be enacted to protect such information and techniques while affording the accused a fair trial.<sup>12</sup> There are a number of methods being applied for protecting classified or sensitive law enforcement information, which include, *inter alia*: a) holding a closed

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<sup>10</sup> Various United Nations conventions call for State Parties to take “appropriate measures to encourage persons who participate or who have participated in the commission of an offense to supply information useful to competent authorities for investigative and evidentiary purposes.” *UNTOC*, art. 37.1, Oct. 31, 2003, 2349 U.N.T.S. 41 [hereinafter *UNCAC*]; *accord UNTOC*, art. 26.1, Nov. 15, 2000, 2225 U.N.T.S. 209 [hereinafter *Organized Crime Convention*].

<sup>11</sup> United Nations conventions support mitigating punishment or granting immunity to those who cooperate with law enforcement. “Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence,” and “shall consider providing for the possibility... of granting immunity.” *UNCAC*, 1, art’s. 37.2 & 37.3; *accord UNTOC*, art’s. 26.2 & 26.3; *accord United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, art. 7.18, Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter *1988 UN Drug Convention*].

<sup>12</sup> Measures already exist at the international level to protect sensitive information that one State Party receives from another. “State Parties shall take appropriate measures consistent with their national law to protect the confidentiality of any information which they receive in confidence by virtue of the provisions of this convention from another State Party... If States Parties provide information to international organizations in confidence, steps shall be taken to ensure that the confidentiality of such information is protected.” *International Convention for the Suppression of Acts of Nuclear Terrorism*, art. 7, April 13, 2005, 2445 U.N.T.S. 89 [hereinafter *Nuclear Terrorism Convention*].

hearing; b) having the judge review the intelligence or other information to determine whether it should be disclosed; or c)) other appropriate procedures. Because persons often provide this type of information to the government in confidence and in situations of risk to their personal safety, these measures help further the protection of the of the privacy interests of victims and informants from interference or attacks.<sup>13</sup> Moreover, this approach protects national security.

- The above mentioned methods are available for application by States where their legal systems allow. States are encouraged to choose the methods more appropriate to their circumstances and consistent with their domestic laws, while respecting applicable international law. Governments, however, should be cognizant of their duty to ensure that defendants receive a fair trial, including the right to be informed of the nature and cause of the charge against him.<sup>14</sup>
  
- *Good Practice 7: Provide for the Lawful Exercise of Pre-trial Detention of Terrorist Suspects.* Judicially approved and supervised pre-trial detention of terrorist suspects, in appropriate criminal cases, is a necessary tool of an effective criminal justice counterterrorism framework. Such detention will ensure the presence of the individual at trial and protect society from the danger posed by the defendant. The legal basis for, and procedures for review of, pre-trial detention of terrorism suspects, as well as its permissible duration, varies among different countries. In any case, however, pre-trial detention must conform to fundamental due process, be limited to cases in which the necessity for detention has been established, and be fairly administered and not affect the presumption of innocence and the procedural rights of the individual being detained.<sup>15</sup> At the same time, the requirements for pre-trial detention must be flexible enough to protect the community when an adequate legal basis for it has been established.<sup>16</sup>

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<sup>13</sup> Cf, *ICCPR*, art. 17.

<sup>14</sup> *ICCPR*, art. 14.

<sup>15</sup> *ICCPR* arts. 9 and 14.

<sup>16</sup> The need for States to detain persons prior to trial is clearly recognized and authorized by the *ICCPR*, arts. 9, 10, and 14. The regulation of such pre-trial detention, absent a state of emergency, should be subject to judicial review, *ICCPR*, art. 9.3 (requiring persons arrested on criminal charges to be brought promptly before a judge or other judicial power) and art. 9.4 (providing for judicial review of the lawfulness of any form of arrest or detention). [Under article four of the *ICCPR* formal derogation of the judicial review provisions of article nine may be proclaimed during a public emergency that threatens the life of the nation, only to the extent strictly required by the

- *Good Practice 8: Provide for the Professional Development of Investigators, Prosecutors, and Judges Who Handle Terrorism Cases.* A long-term commitment to developing and building a specialized cadre of permanent career investigators, prosecutors, and judges (where relevant) is needed to ensure effective prosecution. Career prosecution and investigative services should be equipped with the infrastructure, remuneration, and specialized training they need to perform critical counterterrorism functions within the criminal justice system. In particular, they should be able to handle the complex legal, forensic, technological, and financial aspects of counterterrorism investigations and prosecutions. A competent and impartial judiciary attuned to the complexity and importance of terrorism cases, including human rights aspects, is also critical to an effective criminal justice approach to counterterrorism within a rule of law framework. Training and resources necessary to handle these cases appropriately should be available to investigators, prosecutors, and judges.
  
- *Good Practice 9: Develop Practices and Procedures to Encourage International Cooperation in Counterterrorism Matters.* Because terrorism often transcends national boundaries, timely and effective international cooperation is indispensable to a criminal justice response to terrorism. This cooperation includes, but is not limited to, formal international assistance, such as extradition and mutual legal assistance. Designating a single central authority could be a way forward to assist other States in finding the competent authority to address requests for assistance and to coordinate efforts. The effectiveness and efficiency of formal international cooperation would be enhanced through: a) the strengthening of central authorities to effectively respond to international requests for assistance;<sup>17</sup> b) raising awareness among prosecutors and other relevant officials of the relevant

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exigencies, and provided they are not inconsistent with other international legal obligations and are not imposed in a discriminatory manner. .]ICCPR, art. 4.1.

<sup>17</sup> Many of the international conventions that are in force contain measures to increase the cooperation between countries. For instance, many contain provisions that limit acceptable reasons to deny an extradition request. *UNCAC*, art. 44; *UNTOC*, art. 16; 1988; *UN Drug Convention*, art. 6; *International Convention for the Suppression of Terrorist Bombings*, art's. 9 & 11, Oct. 24, 1995, 2149 U.N.T.S. 256 [hereinafter *Terrorist Bombings Convention*]; *International Convention against the taking of Hostages*, art. 10, Dec. 17, 1979, 1316 U.N.T.S. 205 [hereinafter *Hostages Convention*]; *Nuclear Terrorism Convention*, art. 13. Other provisions state that "State Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings," with specific provisions for a central authority to handle all requests. *UNCAC*, art. 46; *accord Organized Crime Convention*, art. 18; *1988 UN Drug Convention*, art. 7.

national and international extradition and mutual legal assistance framework and practice; and c) strengthening mutual understanding and trust through confidence-building measures, while recognizing that, consistent with applicable international law, requests for extradition or mutual assistance should not be refused for improper grounds including political motivation.<sup>18</sup>

- Extradition and mutual legal assistance treaties and associated domestic laws should be updated and modernized where needed. In addition, States could, where possible and appropriate, develop new tools to facilitate cooperation among judicial authorities in different countries.<sup>19</sup> In this regard, States should comply with their international legal obligations with respect to the principle of non-refoulement and the prohibition against torture and cruel, inhuman, or degrading treatment. Training should be available to central authorities, judges, and prosecutors on the international requirements of all aspects of mutual legal assistance and judicial cooperation.
  
- In addition to formal means of cooperation under extradition treaties, mutual legal assistance treaties, and letters rogatory, States through authorized official contacts should seek to foster cooperation through the development of networks of counterterrorism investigators and prosecutors as points of contact, in order to provide for the “real time” effective exchange of information, consistent with relevant national laws and regulations. Such flexible cooperation is encouraged by international law and is helpful for an effective criminal justice counterterrorism system.<sup>20</sup>

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<sup>18</sup> See, e.g., U.N. Sec. Res. 1373 (September 2001), para. 3(g), *Terrorist Bombings Convention*, arts. 11 and 12.

<sup>19</sup> For example, States may consider 1) concluding agreements or arrangements that provide for the use of special investigative techniques across national boundaries that allow for the admissibility of such evidence in their courts; b) the exchange of liaison magistrates and justice attaches, without prejudice to their national laws; and 3) whether joint investigative teams could, in a specific case and in accordance with their national laws, further the interests of international cooperation in counterterrorism. See, e.g., *UNTOC*, Art. 19.

<sup>20</sup> Various conventions have been adopted that contain provisions which promote informal international cooperation. For example, the *UNCAC* provides that State Parties shall “take effective measures [t]o enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of [criminal] offences.” *UNCAC*, art. 48; *accord Organized Crime Convention*, art. 27; *1988 UN Drug Convention*, art. 9. Other provisions provide for sharing information to help prevent offenses, or sharing evidence after an offense has been committed. *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation*, art. 18, Sep. 10, 2010 [hereinafter *Beijing Convention*] (“Any State Party having reason to believe that [an offense]... shall be committed shall, in accordance with its national law, furnish any relevant information in its possession to those States Parties.”); *Terrorist Bombings Convention*, art. 15 (“State Parties shall cooperate in the prevention of [criminal] offences.... [b]y exchanging accurate and verified information in accordance with their national law.”).

- *Good Practice 10: Develop and Use Forensic Evidence to Determine the Identities of those involved in Terrorist Acts.* The use of scientifically accepted, human rights-compliant, modern forensic sciences is an invaluable tool in terrorism investigations. These measures may include modern DNA analysis, automatic fingerprint analysis, ballistics, bomb residue analysis, and a host of other tools. It must be recognized, however, that forensic evidence may not always be present at crime scenes, and absent such evidence, the identity of a perpetrator may be discovered through other lawful means. In order to increase the possibility that useful evidence will be recovered, law enforcement and other authorities who first respond to a crime scene should do their utmost to maintain the integrity of the crime scene, so that a proper forensic examination may be conducted, and should consider issuing guidelines to further that objective. In specific cases international assistance may be helpful in securing the crime scene or in the collection, protection, and examination of forensic evidence. Finally, the availability of forensic tools also directly furthers the protection of human rights in that it increases the number of tools to discover the identities of terrorist suspects through non-coercive means.
  
- *Good Practice 11: Ensure that Convicted Terrorists Are Appropriately Punished and Develop Policies for Their Incarceration and Reintegration.* An effective system for incarcerating convicted terrorists is a critical part of an effective criminal justice response to terrorism. Such a system should ensure appropriate punishment so as to deter terrorist activity, prevent further radicalization of prisoners, prevent terrorist activities from being directed or supported from within the prison system, and provide for the de-radicalization and reintegration of prisoners into society where possible and thereby reduce recidivism.
  
- Convicted terrorists should be held securely for the duration of their incarceration, which should reflect the gravity and potential harm to society from their conduct, while treating them humanely and respecting their human rights.<sup>21</sup> Experience has shown that some convicted terrorists

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<sup>21</sup> The principles and philosophy espoused in the *United Nations Standard Minimum Rules for the Treatment of Prisoners*, Economic and Social Council Resolutions 666 C (XXIV) and 2076 (LXII), (July 31, 1957 and May 13, 1977), provide a useful and flexible guide that countries should use when deciding what conditions of confinement are appropriate for prisoners. However, as noted in the *Rules* themselves. “it is evident that not all of the rules are capable of application in all places and at all times.” *Id.* at p. 1, *Preliminary Observation 2*. Thus some of the suggested rules may need to be modified in order to protect against those who seek to continue their terrorist acts from inside prison.

continue to conduct terrorist activities during their incarceration. Governments should enact measures -- such as proportionate restrictions on communications by convicted terrorists -- to prevent such activities from occurring.

- States are encouraged to share with each other relevant experiences and information about the incarceration and reintegration of terrorists. States may make use of the experiences and information from governments that have succeeded in rehabilitating persons convicted of committing terrorism offences and in getting them to renounce violence. For those prisoners who will be released into the community, measures should be undertaken to reintegrate them into society. Such measures could, where appropriate and consistent with the relevant national laws, include strict conditions of court supervised release.

## ***B. Criminal Offenses***

- *Good Practice 12: Criminalize Terrorism offenses as Outlined in the Applicable International Conventions and Protocols.* Although States may approach codification of terrorism offenses differently depending on their legal traditions, States should criminalize the offenses outlined in the relevant international counterterrorism legal instruments to which they are a party, or which are required by relevant UN Security Council resolutions, as part of a comprehensive legal framework to combat and prevent terrorism.<sup>22</sup> Furthermore, States that are not a party to some or all of these international instruments should consider becoming a party.<sup>23</sup> Adequate incorporation into national legislation of the international counterterrorism provisions and obligations constitutes a key element in a comprehensive and coherent counterterrorism legal framework that is sufficiently precise to give fair notice of conduct that is prohibited and guards against potential misuse of criminal laws.

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<sup>22</sup> Certain terrorism related offenses are already covered by specific international conventions requiring State Parties to criminalize those actions. *See e.g.* Hostages Convention, *Supra* note 10, art. 1 (criminalizes “hostage-taking”); *Terrorist Bombings Convention*, art. 2 (makes it illegal to “deliver[ ], place[ ], discharge[ ], or detonate[ ] an explosive or other illegal device”); *Nuclear Terrorism Convention*, art. 2 (makes it an offense to make, possess, or use radioactive material or a device, or to damage a nuclear facility).

<sup>23</sup> *See*, UN Sec. Res. 1373 para. 3(d).

- *Good Practice 13: Criminalize Conspiracies, Solicitation and other Preparatory Acts of Terrorism.* Criminalizing preparatory acts, such as conspiracy, terrorist fundraising, terrorist recruitment, planning and training, particularly when a terrorist attack has not yet been carried out, is vital in an effective criminal justice preventive approach to counterterrorism. If terrorist violence is to be reduced and attacks are to be thwarted before they occur, authorities must be able to focus their attention on proactive intervention when terrorist suspects are at the planning and preparation stages. While countries differ on how exactly these offenses are defined (e.g., membership in a terrorist organization, directing the activity of terrorist organizations, solicitation, incitement or recruitment) criminalization of preparatory acts will greatly facilitate early intervention. The creation of conspiracy or criminal association offenses, which prohibit agreements to commit crimes associated with terrorism, is vital to facilitating this early intervention. For these offenses to be complete, terrorist attacks need not be attempted or accomplished but only agreed to or prepared for in some manner. In the criminalization and prosecution of these acts, countries should pay full respect to the rights of individuals to freedom of expression, freedom of religion or belief, and freedom of association.
- *Good Practice 14: Criminalize Attempts to Commit and Aiding and Abetting Terrorist Acts.* Likewise, countries should enact laws that criminalize attempts to commit, or aiding or abetting the commission of, terrorism offenses.<sup>24</sup> Criminalizing attempts, even when the perpetrator does not ultimately succeed in committing the crime, is essential in a preventative criminal justice system.
- *Good Practice 15: Criminalize Terrorist Financing.* Preventing terrorists and terrorist organizations from funding their activities is an essential component of any successful counterterrorism strategy and a binding requirement under several UN Security Council resolutions.<sup>25</sup> Countries

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<sup>24</sup> International conventions commonly criminalize any attempt to commit the substantive offense covered by the convention. See *UNCAC*, art. 27.2; *Terrorist Bombings Convention*, art. 2.2; *Hostages Convention*, art. 1.2; *Genocide Convention*, art. 3(d); *ICTY Statute*, art. 4.3; *ICTR Statute*, art. 2.3. These same international conventions often criminalize participating in an offense as an accomplice. See *UNCAC*, art. 27.1; ; *Terrorist Bombings Convention*, art. 2.3; *Hostages Convention*, art. 1.2; *Genocide Convention*, art. 3(e) (makes punishable “complicity in genocide”); *ICTY Statute*, art. 4.3 (makes punishable “complicity in genocide”); *ICTR Statute*, art. 2.3 (makes punishable “complicity in genocide”).

<sup>25</sup> See, e.g., U.N. Sec. Res. 1267 (1999); U.N. Sec. Res 1373 (2001).

should enact laws that criminalize the financing of terrorism in accordance with the International Convention for the Suppression of the Financing of Terrorism, and are encouraged to implement the Financial Action Task Force (FATF) Recommendations on Criminalizing Terrorist Financing.<sup>26</sup> Procedures and proper mechanisms allowing for the freezing, seizing, and confiscation of terrorist assets and funds used or allocated for the purpose of terrorist financing, should also be enacted in accordance with the relevant UN Security Council resolutions and subject to appropriate review.

### **Conclusion: Capacity Building**

It is vital for States to assist each other in developing the necessary capacity to confront terrorism through the criminal justice system. Accordingly states should in the first instance have a modern, fair and efficient criminal justice system that forms the basis for a robust criminal justice response to terrorism. Thus, capacity building is a core element in an effective counterterrorism program. This Working Group encourages all States and relevant multilateral bodies to participate in such efforts.

Capacity-building programs should be designed to ensure that law enforcement and criminal justice officials understand and implement the good practices discussed above that are consistent with their legal requirements and circumstances. Furthermore, counterterrorism enforcement should be conducted within a framework that respects human rights and promotes the rule of law and good governance.

States are encouraged to submit offers of assistance and requests for assistance to the GCTF Administrative Unit using the form in the attached addendum to improve cooperation in counterterrorism capacity building efforts in a way that is most consistent with the priorities and legal systems as well as the special circumstances of each state. The Working Group Co-Chairs will, in cooperation with the GCTF Administrative Unit, share requests for and offers of assistance with all Working Group members on a timely and regular basis.

This Working Group recognizes that there is no obligation on any state to provide or receive assistance. Such offers or requests should be based on the sovereign

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<sup>26</sup> In addition to the International Convention for the Suppression of the Financing of Terrorism, other international conventions also prohibit the activities of those who “knowingly finance” offenses set out in that particular convention. See *Terrorist Bombings Convention*, art. 15; *accord Nuclear Terrorism Convention*, art. 7.1.

decision of each state based on its legal system, priorities, needs, and circumstances.

The Working Group recommends that States consider focusing their relevant counterterrorism capacity-building efforts around the following principles:

*Use the Enumerated Good Practices as One Tool to Guide Capacity-Building:* The Working Group encourages all states to consider using the Good Practices as a non-binding guide for implementing counterterrorism capacity-building assistance activities. States should keep in mind that the above Good Practices may be updated over time to take into account the experiences of states in using their criminal justice systems to counter and prevent terrorism.

*Increase Focus on Institutional Development.* Effective efforts to combat terrorism—and to conduct proactive investigations—will often require reform and increased professionalization and specialization of relevant criminal justice entities.<sup>27</sup>

*Further Inter-governmental Coordination.* As noted above, one of the fundamental obstacles to effective investigation and prosecution is often the lack of coordination, cooperation, and information sharing among public safety, law enforcement, intelligence, and prosecutorial agencies. Encouragement of institutional mechanisms, such as interagency task forces, to coordinate among various agencies of government is key to overcoming obstacles.

*Encourage Skills Development and Specialized Expertise.* As noted above, to effectively use the criminal justice system to counter terrorism, countries should consider developing a professional cadre of practitioners in every component of the criminal justice system.<sup>28</sup> Given the increasingly complex and highly

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<sup>27</sup> Some international conventions provide for specialized authorities to deal with a specific issue. The *UNCAC*, for example, says that each State Party shall “ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence... to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.” *UNCAC*, art. 36.

<sup>28</sup> In the UN Global Counter-Terrorism Strategy, the General Assembly recognizes “that States may require assistance in developing and maintaining [an] effective and rule of law-based criminal justice system” and encourages “them to resort to the technical assistance delivered, inter alia, by the United Nations Office on Drugs and Crime.” *UN Strategy*, Plan of Action, Sec. 4, Para. 4. In addition, United Nations conventions have recognized the importance of specialized training across the entire spectrum of the criminal justice system. “Each State Party shall... initiate, develop, or improve specific training programs for its law enforcement personnel including

specialized nature of terrorism investigations and prosecutions, States can benefit from ensuring that law enforcement officials, judges, and prosecutors are provided with specialized counterterrorism training and skills to develop and implement the above-mentioned tools effectively. Given the international nature of the terrorist threat, specialized expertise in international cooperation, including the development of effective central authorities, is also critical.

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prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and control of the offences covered by this convention.” *UNTOC*, art. 29.