Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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4 October 2024

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolution 49/10.

I am an independent human rights expert appointed and mandated by the United Nations Human Rights Council to report and advise on human rights issues from a thematic or country-specific perspective. I am part of the special procedures system of the United Nations, which has 60 thematic and country mandates on a broad range of human rights issues. I am sending this letter under the communications procedure of the Special Procedures of the United Nations Human Rights Council to seek clarification on information we have received. Special Procedures mechanisms can intervene directly with Governments and other stakeholders (including companies) on allegations of abuses of human rights that come within their mandates by means of letters, which include urgent appeals, allegation letters, and other communications. The intervention may relate to a human rights violation that has already occurred, is ongoing, or which has a high risk of occurring. The process involves sending a letter to the concerned actors identifying the facts of the allegation, applicable international human rights norms and standards, the concerns and questions of the mandate-holder(s), and a request for follow-up action. Communications may deal with individual cases, general patterns and trends of human rights violations, cases affecting a particular group or community, or the content of draft or existing legislation, policy or practice considered not to be fully compatible with international human rights standards.

I offer comments and suggestions on the definition of terrorism proposed by the Council of Europe Committee on Counter-Terrorism (CDCT),[1] which is closely based on the definition in article 3 of the European Union's Directive on Combating Terrorism 2017.[2] The CDCT Plenary approved a draft text of the definition in December 2003 and, in March 2024, endorsed[3] the proposal of the CDCT Bureau to adopt the definition as an Amending Protocol ("draft Amending Protocol") to the Council of Europe Convention on the Prevention of Terrorism 2005[4] ("2005 Convention"). The CDCT Secretariat is currently preparing an explanatory memorandum to be examined and approved at the CDCT Plenary meeting in December 2024.

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1 CDCT, 12th Plenary Meeting, 13-14 May 2024, CDCT(2024)06, Appendix, https://rm.coe.int/cdct-2024-06-plenary-list-of-decisions/1680afaa1d.
2 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.
3 CDCT(2024)06, above.
4 CETS No. 196 (adopted 16 May 2005, entered into force 1 June 2007).

The proposed definition has various positive aspects and it is recognized that there may be certain advantages in harmonizing the Council of Europe definition with the existing EU definition, given the significant overlapping memberships of the two regional organizations. I am nonetheless concerned that certain elements of the definition are not consistent with the obligations of Member States under international human rights law and caution the Council of Europe against replicating, rather than remedying, the flaws in the EU definition.

Positive aspects

It is welcome that the preamble to the draft Amending Protocol reaffirms that all measures to prevent or suppress terrorist offences in the Protocol "should be in accordance with relevant human rights and fundamental freedoms, particularly those enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), as well as other obligations under international law, including, where applicable, international humanitarian law". This provision reinforces the positive references to consistency with international law in the underlying 2005 Convention.[5]

The draft Amending Protocol broadens the definition of terrorism in the 2005 Convention by extending it beyond existing treaty offences to establish a more general and comprehensive definition. While this necessarily entails a loss of legal certainty and introduces risks of over-inclusiveness, the draft definition has a number of positive elements that increase relative certainty. First, the conduct elements (actus reus) in article 1(1) are reasonably clearly drafted, many of them are properly limited to serious acts of violence against people, and some of them are based on acts proscribed in existing international counter-terrorism instruments. Secondly, two "specific intent" elements raise the threshold for liability above the standard in the Terrorist Financing Convention 1999 on which they are based, namely by requiring that the aim of a listed act is to "seriously" intimidate a population or "unduly" compel a government or an international organization. Thirdly, the threshold of liability is raised further by the objective contextual or chapeau requirement that the listed acts, "given their nature or context, may seriously damage a country or an international organization". In combination these elements render the draft definition more certain, and more limited to genuinely "terrorist" conduct, than some other general definitions in the instruments of regional organizations and national law. A number of concerns nonetheless remain.

Third specific intent element

The foremost human rights concern relates to the third alternative specific intent element, in draft article 1(2)(c), that an act must be committed with the aim of "seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation". Whereas the other two alternative elements are based on an international consensus reflected in the Terrorist Financing Convention and Security Council resolution 1566 (2004), the third element "has no counterpart in international law", as the EU Fundamental Rights Agency observed in relation to the same element in EU law, warning further of the

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5 Preamble and articles 3(1), 12(1)-(2), 26(4)-(5).

6 EU Fundamental Rights Agency, Report on Directive (EU) 2017/541 on Combating Terrorism: Impact on Fundamental Rights and Freedoms (2021), 10.

risk of "confusion" vis-à-vis international instruments.[6][7] The European Parliament also expressed disquiet about this formulation.[8]

During the drafting by the Council of Europe's CDTC, Switzerland accurately objected that such element was "overly vague and hence… a challenge as regards the principle of legal certainty", bringing "a risk of overcriminalization, arbitrary application and possibly abuse inherent in the use of language that is too broad".[9] In an independent assessment of the proposal, the Organization for Security and Cooperation in Europe's Office for Democratic Institutions and Human Rights (ODIHR) similarly judged that the third element is "vague and highly unforeseeable and its inclusion would significantly broaden the definition".[10] Given that the Council of Europe's membership (46 member states) is larger and more politically and legally diverse than that of the European Union (26 member states), such definition is:

> *[P]articularly susceptible to abuse by regimes that intend to use counter-terrorism legislation to target political dissent, be it political opposition, independent media or journalists, human rights defenders or other civil society actors. It could for example lead to violations of freedom of expression of those who engage in debate on political or constitutional matters, especially when read together with ancillary offences of incitement and provocation*.[11]

Numerous actors have expressed concerns that this element of EU definition of terrorism on which the CDCT proposal is based does not satisfy the principle of legality,[12] including the United Nations Human Rights Committee in relation to national implementation in the EU.[13] More generally, the European Commission itself has acknowledged the concerns of stakeholders about the definition in relation to legal clarity, terrorist intent, foreseeability and impact on lawful activities, though state authorities tended to disagree; the Commission found overall the negative impacts to be "limited",[14] in contrast to the expert human rights study it commissioned from the EU's Fundamental Rights Agency, mentioned earlier.

As my mandate has consistently pointed out over many years, the principle of legal certainty under article 15(1) of the ICCPR requires criminal laws to be sufficiently precise so that it is prospectively clear what conduct constitutes a criminal offence. The principle seeks to prevent ill-defined and/or overly broad laws, which are

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6 EU Fundamental Rights Agency, Report on Directive (EU) 2017/541 on Combating Terrorism: Impact on Fundamental Rights and Freedoms (2021), 10.

7 Ibid.

8 European Parliament, Recommendation on the role of the European Union in combating terrorism (2001) OJ C 72 E/135, Preamble recital G.

9 CDCT, 11th Plenary Meeting, 11-13 December 2023, CDCT(2023)14, Annex II.

10 OSCE ODIHR, "Note on the Proposed Revision of the Definition of Terrorist Offences in article 1 of the Council of Europe Convention on the Prevention of Terrorism", TERR-All/479/2023 [NR], 28 September 2023, 12.

11 Ibid.

12 Amnesty International, the International Commission of Jurists, and the Open Society Justice Initiative and the Open Society European Policy Institute, "Joint Submission on the European Commission's proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism" (2016), 9; Open Society Foundations, the International Commission of Jurists, European Network against Racism and Amnesty International "Joint Civil Society Report on the Fundamental Rights Impact of the EU Directive on Combating Terrorism" (2021); International Commission of Jurists, "Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism" (2020), 20.

13 E.g., Concluding Observations: Belgium, CCPR/CO/81/BEL, 12 August 2004, para. 24.

14 European Commission, "Staff Working Document: Evaluation of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA", SWD(2021) 324 final, 18 November 2021, 44.

open to arbitrary application and abuse, including to target members of civil society on political or other unjustified grounds.[15]

The core problem with the third element is that it is very unclear as to what may or may not constitute "fundamental… structures", including uncertainty as to what qualifies as a "structure" in each the diffuse and plural "social", "economic", "political" and "constitutional" spheres, and which among such structures may be regarded as "fundamental". The provision invites inevitable subjectivity and elasticity in interpretation, including potential politicization[16] given the characteristics of the structures mentioned. Such abstractions would need to be described more concretely, specifically, and precisely to satisfy the principle of legality and fairness to any accused, to prevent any "chilling effect" on legitimate activities that over-broad provisions necessarily entail, and to make the law workable and effective in practice for police investigators, prosecutors, judges and, where relevant, juries. In addition, the notion of merely "destabilising" such structures (in contrast to the alternative of "destroying" them) involves further vagueness, and potentially sets a low threshold of harm: many of the violent acts in the definition of terrorism could potentially be interpreted to destabilise a structure to some degree, even if such destabilisation is relatively minor. While the third element must still be underpinned by one of the harmful conduct elements in article 1(1), such harms do not necessarily rise to the level of, and should not be classified as, "terrorism" given the vagueness and over-breadth inherent in the third intent element.

Other elements in the definition of terrorism, including the first two specific intent elements,[17] already encapsulate more precisely the core interests the third element appears to be seeking to protect. For example, the aim of intimidating a population protects against attacks on "social" life, while compelling a government safeguards "political" and "constitutional" structures (particularly if "government" is properly understood as encompassing all branches of government – executive, legislative and judicial). Economic interests are separately addressed by the definition's conduct elements concerning, for example, destruction of facilities, infrastructure, property and so on likely to result in "major economic loss" (article 1(1)(d)), as well as indirectly through system/data interference causing extensive damage to an information or computer system (article 1(1)(i)), release of dangerous substances (article 1(1)(g)), and interfering with or disrupting fundamental natural resources (article 1(1)(h)). The overriding chapeau requirement that an act "may seriously damage a country or an international organization" also already encompasses the core interests covered by the third intent element, rendering the latter repetitive and redundant. To the extent that the third element is intended to go further than what other elements of the definition already cover, then the scope of such additional protection needs to be more precisely identified and made explicit in the text. As mentioned earlier, however, given that the third element goes further than the international consensus on specific intent elements (intimidation of a population or compulsion of a government or international organization), even with further specification it is not a desirable extension of the scope of "terrorism" and should be omitted altogether.

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15 A/70/371, para. 46(b).
16 Cian Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (2012), 66.
17 CDCT(2023)14, Annex II (Switzerland).

Listed acts: intent elements

A number of the ten conduct elements in draft article 1(1)(a)-(j) raise human rights concerns. While the chapeau requires all of these elements to be committed "intentionally", the mental element of some of the offences – in article 1(a), (d), (g), (h) and (i) – is nonetheless uncertain,[18] raising concerns about legality, potential over-breadth, and likely divergence in national implementation. Specifically:

- In **article 1(1)(a)**, it is unclear whether intentional attacks on a person's life must also be intended to involve a risk of death, or whether the risk that the act "may cause death" is solely an objective conduct element.

- In **article 1(1)(d)**, it is unclear whether intentional extensive destruction to the listed objects must also be intended to be "likely to endanger human life or result in major economic loss", or whether the likelihood of those consequences is an objective element.

- In **article 1(1)(g)**, it is unclear whether intentional release of dangerous substances or causing floods or fires must also be intended to have "the effect… to endanger human life", or whether such danger is an objective element.

- In **article 1(1)(h)**, it is unclear whether intentional interference with the listed resources must also be intended to have the "effect… to endanger life", or whether such consequences is an objective element.

- In **article 1(1)(i)**, it is unclear whether intentional interference in a system or data must also be intended to cause extensive damage to an information or computer system, or whether such consequence is an objective element.

In the absence of textual clarity, different national legal systems are likely to (a) legislate and/or (b) interpret and apply these elements in different ways, creating higher or lower levels of criminal liability for terrorism among the 46 member states, and potentially frustrating transnational cooperation under the Convention in certain cases. During the drafting of some international counter-terrorism convention offences that specify consequences of acts, for example, states were divided on whether similar chapeau intention requirements applied only to the acts themselves or also to their consequences.

Accordingly, the text should precisely articulate the mental elements in relation to consequences. Further, given the gravity of a "terrorism" conviction, in terms of both penalties and denunciation and stigmatization of the offender, the mental elements should be set at an appropriately high level of culpability. In all of the above-mentioned provisions of article 1(1), it recommended that all of the consequential harms must be specifically intended by the person.

Even where intention is specified in relation to a consequence, it can have different meanings in different legal systems. It may refer to where a person means or desires to cause the consequence, but also to an awareness that the consequence will

[18] See also OSCE ODIHR, above, 11.

occur in the ordinary course of events (also known as indirect intent, oblique intent, or *dolus indirectus*), which usually requires a high level of certainty as to the result, not a mere possibility or risk. Some legal systems provide for lower fault elements such as *dolus eventualis* (i.e., an awareness of a substantial likelihood, but not certainty, of the result occurring) or recklessness. Consideration could be given to explicitly articulating what degrees of "intention" apply to the offences, in particular to restrict intention to direct intention and at most indirect intent, to ensure than appropriately high level of culpability is required of terrorist offenders.

Listed acts: thresholds of harm

Consideration should be given to raising the thresholds of some of the draft offences, again to ensure that terrorist offences are reserved for the most serious conduct. Specifically:

- **Article 1(1)(a)** should be limited to intentionally causing death, not a mere risk of death ("may cause death"); or at least intentionally causing a "likelihood" of death.

- **Article 1(1)(d)** is loosely based on the Terrorist Bombings Convention 1997, but goes beyond its protection of public property to include attacks on private property that are likely to endanger human life (also not included in the Bombings Convention, which is limited to an intent to kill or injure) or result in major economic loss. The "good practice" definition of terrorism in Security Council resolution 1566 (2004), and the model definition of my mandate, limit terrorism to acts that are intended to cause death or serious personal injury, not those which somehow vaguely "endanger" life or merely result in major economic loss. It is also unclear at what scale(s) "major economic loss" is to be measured,[19] i.e., whether in terms of direct losses to the value of object targeted, more indirect losses to the object and others, as long as there is some causal connection to the act (and to what degree of causation?), including losses to the wider economy or country (bearing in mind the chapeau requires acts to "seriously damage a country"). Despite the requirements of "extensive destruction" causing "major economic loss", depending on the interpretation of those terms, there remains a risk of criminalizing as terrorism acts of unruly democratic protest that should be treated in a more proportionate manner as public order offences.[20] The provision should omit acts against private property altogether, given the generally lesser risks involved than in attacks on public places or property. It should also remove reference to a likelihood of endangering life, on the basis that article 1(1)(a)-(b) already covers intentionally causing death or injury by any means, as well as any risk to life.

- **Article 1(1)(f)** criminalizes various dealings with chemical, biological, radiological or nuclear weapons, as well as their research and development, where a specific intent element in article 1(2) is

[19] See also OSCE ODIHR, above, 9-10.
[20] OSCE ODIHR, above, 9-10.
[21] Given the specific intent element, it is unlikely that freedoms of legitimate scientific or academic research or expression and information would be captured by the offence.

present.[21] However, unlike all of the other substantive offences in article 1(1), the actus reus does not additionally require the commission or likelihood of any physical harm. This is contrast to the amended Nuclear Material Convention 1979 and the Nuclear Terrorism Convention 2005, which generally require specified dealings to be accompanied by an intent to cause death, serious bodily injury, or substantial damage to property or the environment.[22] While unlawful dealings with such dangerous materials should be prohibited, it is questionable whether such dealings should be qualified as "terrorism" absent any death or injury or intent to kill or injure, in accordance with the "best practice" definitions mentioned earlier.

- **Article 1(1)(g)-(h)** require the specified acts to have "the effect… to endanger life". Actual endangerment sets a higher threshold than a mere risk (such as "may" endanger life) or a likelihood of endangerment (i.e., likely to involve a risk). Nonetheless, the ordinary meaning of the term "endanger" itself refers to a risk, threat or peril to life, but does not clarify what degree of risk is required. On its own, it could accordingly be interpreted along a wide spectrum of risk, from a minor, remote or marginal danger to life, to a chance or possibility of endangerment, to likelihood or probability, to a near certainty. It recommended that the provision qualify the danger to life, such as by requiring that the act "seriously endanger" life.

- **Article 1(1)(i)** criminalizes a system or data interference that causes extensive damage to an information or computer system, but does not require any intention to kill or injure, any actual death or injury or endangerment to life, or even any consequential property destruction (i.e., beyond damage to the system itself).[23] Again, such offences sets the threshold too low to warrant classification as "terrorism" and should instead be regulated as ordinary cyber-related crimes – unless harm to people to is added, and "information or computer system" is defined to be limited to specified critical digital infrastructure, damage to which entails particularly serious, broader consequences.

- **Article 1(1)(j)** criminalizes threatening to commit a terrorist offence, but it sets the threshold of liability too low, since it potentially covers any threat, even those that are trivial. In contrast, various international counter-terrorism conventions require a threat to be "credible",[24] so as to confine the offence to serious cases. The draft United Nations Comprehensive Terrorism Convention requires "a credible and serious threat".[25] Liechtenstein suggested in the CDCT that threats should be

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21 Given the specific intent element, it is unlikely that freedoms of legitimate scientific or academic research or expression and information would be captured by the offence.

22 Under the Nuclear Terrorism Convention, the "use" of such material/device is an offence if it alternatively is intended to compel some person or entity to do or refrain from doing something; while under the amended Nuclear Material Convention, mere transport is an offence.

23 See also OSCE 10.

24 Nuclear Terrorism Convention art 2(2); Beijing Convention 2010, article 1(3) (but it is not an offence to threaten to commit the offences in article 1(1)(e) and (i), namely communicating false information or a threat to transport BCN weapons and related material); Hague Convention 1970 (as amended by the Beijing Protocol 2010) art 1(2).

25 Draft Convention art 2(2), in Ad Hoc Committee Report A/68/37 (2013) 6.

qualified as "serious".[26] A "credible" threat may be understood as one that is realistic in the sense that the target of the threat would reasonably perceive that the offender is both willing and able to carry it out.[27] This does not necessarily mean, however, that the person is in fact likely to or intends to carry it out, or that the threat is imminent or even possible to carry out, as long as the threat reasonably appears to be credible. It is also questionable whether the threat offence should apply to all of the substantive offences in article 1(1), particularly (d), (f) and (i).[28] In this context, Liechtenstein and Switzerland in the CDCT, plus the OSCE, have expressed concern that the threat offence could criminalize activities protected under human rights law.[29] Finally, there is considerable opposition to including a threat offence at all,[30] particularly given the limited nexus to actual harmful physical conduct. The OSCE suggests that it if is retained, it should be an ancillary offence under the 2005 Convention, rather than a principal offence as in the CDCT draft,[31] which could affect the severity of penalties in national law.

Contextual chapeau element

As mentioned, the contextual chapeau requirement that an act "may seriously damage a country or an international organization" is a welcome additional element that helps to limit terrorist offences to the most serious acts against the country or international organization. Nonetheless, it sets liability too low, since "may" indicates that the mere possibility of such consequence, including a remote chance, would be sufficient.[32] During the CDCT drafting, Switzerland recommended that "may" be replaced with "in the ordinary course of events seriously damages" a country or an international organization.[33] That formulation properly requires a degree of certainty or high likelihood that serious damage would occur, thus appropriately reserving terrorist liability for the most serious harms. Given that the contextual requirement is objective, an even more restrictive approach would be to require that the person intended serious damage to occur, in addition to such consequence being likely. This would further ensure that individuals are liable for the grave crime of "terrorism" only where they possess the intent to cause such result.

In the implementation of the equivalent element in the EU definition of terrorism, some EU member states reported difficulties in determining criteria to

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26 CDCT, 11th Plenary Meeting, 11-13 December 2023, CDCT(2023)14, Annexes I (Liechtenstein).

27 Separately, the OSCE suggests that a threat must involve a real and immediate danger, when a perpetrator would have the capacity to commit such an offence or makes the target reasonably believe in it: OSCE ODIHR, "Note on the Proposed Revision of the Definition of Terrorist Offences in Article 1 of the Council of Europe Convention on the Prevention of Terrorism", TERR-All/479/2023 [NR], 28 September 2023, 11.

28 OSCE ODIHR, "Note on the Proposed Revision of the Definition of Terrorist Offences in article 1 of the Council of Europe Convention on the Prevention of Terrorism", TERR-All/479/2023 [NR], 28 September 2023, 11.

29 CDCT, 11th Plenary Meeting, 11-13 December 2023, CDCT(2023)14, Annexes I (Liechtenstein) and II (Switzerland): https://rm.coe.int/cdct-2023-14-final-lod-helsinki-2784-5920-1033-v-1/1680ae0a2e; OSCE 11.

30 OSCE 11; 'Opinion of the European Economic and Social Committee on the [...] Proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism' (2016), para. 3.2.2.3; Amnesty International, the International Commission of Jurists, and the Open Society Justice Initiative and the Open Society European Policy Institute, Joint Submission on the European Commission's proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism (2016), 7.

31 OSCE 11.

32 See also OSCE 9.

33 CDCT(2023)14, Annex II.

establish that an act "may seriously damage a country or an international organisation".[34] The phrase "damage a country or international organization" is vague and uncertain[35] since it does not further indicate the nature of the interests that must be damaged – material and/or intangible – as well as the necessary scale of damage. For instance, in terms of the nature of the harms, does it encompass psychological harms to a country's population, adverse effects on political stability or foreign relations, or loss of economic confidence? In terms of scale, does it require damage to the country as a whole, or fundamental interests, or is serious harm even to small part of the country still serious damage to the country? During the CDCT drafting, a suggestion was not accepted to replace damage to a country with damage to a "State institution",[36] but that still does not provide adequate clarity. The uncertainty is compounded by the abstract nature of the "fundamental structures" in the third alternative specific intent element that can constitute the underlying terrorist offence. Further, the interpretive principle of effectiveness aims to avoid redundancy in a treaty provision; as such, serious damage to a country must entail something additional to the underlying acts and specific intent elements, i.e., terrorism is more than "merely" intimidating a population, compelling a government, or seriously destabilising or destroying fundamental structures. So as not to infringe the principle of legality, and to make the offence more workable for law enforcement, this chapeau element of the offence needs to be drafted more concretely and specifically.

Exclusion Clauses

By amending the 2005 Convention, it is welcome that the terrorism offences in the Amending Protocol would be subject to the binding armed conflict "exclusion clause" in article 26(5) of the Convention:

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

There is a similar clause in the EU Counter-Terrorism Directive 2017, but it is in non-binding recital, resulting in some EU member states not giving effect to it in domestic law. The Amending Protocol would help to domesticate the clause across Europe, including amongst EU member states that have not implemented the EU recital. A separate problem is that some states have interpreted "armed forces during an armed conflict" as being limited to state military forces, whereas "as those terms are understood under international humanitarian law" – a requirement of the clause – armed forces includes organized non-state armed groups in non-international armed

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34 Report from the European Commission to the European Parliament and the Council based on article 29(2) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, COM(2021)701 final, 18 November 2021, 5.

35 See also OSCE ODIHR, above, 9.

36 CDCT(2023)14, Annex II.

38 Ibid.

conflict.[37] This was also the meaning intended during the drafting of the post-1997 international counter-terrorism conventions from which this exclusion clause derives.[38] Some other regional instruments have avoided any ambiguity by **explicitly clarifying that the activities of both government forces and organized armed groups are excluded** from the scope of terrorism offences.[39]

I encourage the Council of Europe to consider strengthening safeguards in relation to a number of other protected legal interests under human rights and humanitarian law. I recognize that many of the offences under the 2005 Convention and its 2015 Additional Protocol, which flow from the definition of terrorism, are generally not so overbroad as to capture a wide range of conduct that that is not connected to terrorist violence, unlike, for instance, certain over-broad "support", "association", membership of terrorist financing offences in some other treaties and national laws. I also acknowledge and welcome that the new definition under the Amending Protocol would be subject to the savings clause in article 26(4) of the 2005 Convention, namely that: "Nothing in this Convention shall affect other rights, obligations and responsibilities of a Party and individuals under international law, including international humanitarian law." Further, the various offences under the 2005 Convention and 2015 Additional Protocol are subject to specific obligations on states parties to (a) respect human rights law in criminalizing, implementing and applying the offences, specifically including freedom of expression, freedom of association and freedom of religion; and (b) respect "the principle of proportionality, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment, and should exclude any form of arbitrariness or discriminatory or racist treatment".[40]

Even so, risks remain of overbroad or abusive national implementation and application of the extensive preparatory offences that would hinge off the expanded definition of terrorism under the proposed Amending Protocol. Such a risk has been identified in the context of the similar EU definition of terrorism by the EU's own Fundamental Rights Agency, which warns of the expansive use of counter-terrorism law against "activities that are not of such a strictly defined terrorist nature", including against "ideologies, groups and individuals that the state perceives as undesirable, which can encompass non-violent anarchist or separatist movements, public protests of various types, and non-governmental organisations or non-EU nationals".[41] It is important that the new Protocol, as in the previous two instruments, sends strong, explicit signals that the new definition should not compromise any relevant human rights or humanitarian law. In this respect, the existing safeguards in the two preceding instruments themselves may not be sufficiently specific to protect a number of particular international legal interests. Three additional exclusion clauses are recommended for the Amending Protocol, also to amend the 2005 Convention and

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37 See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Address to the Council of Europe International Conference on the Investigation and Prosecution of Terrorism Offences Committed in the Context of Armed Conflict, Strasbourg, 15 May 2024, https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/statements/2024-stm-council-europe-remarks-ct-ihl.pdf; Ben Saul, 'From Conflict to Complementarity: Reconciling International Counter-Terrorism Law and International Humanitarian Law' (2022) 103 International Review of the Red Cross 157.

38 Ibid.

39 African Union Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014, article 28G(D); African Model Anti-Terrorism Law 2011, section 4(xl)(c).

40 2005 Convention, article 12(1)-(2); 2015 Protocol, article 8(1)-(2).

41 EU Fundamental Rights Agency, above, 10.

2015 Protocol.

First, there should be a binding exclusion clause for humanitarian and medical activities protected by international humanitarian law,[42] such as that in (non-binding) recital 38 of the EU Counter-Terrorism Directive 2017, and as recommended by Switzerland in the CDCT drafting and the OSCE, among others.[43] The legitimate activities of human rights organizations,[44] including their role in promoting and protecting human rights in armed conflicts and emergency situations, could also be explicitly excluded.

Secondly, there should be a "democratic protest" "exception, such as that found in some national laws, to exclude acts of advocacy, protest, dissent or industrial action, which are not intended to cause death, serious bodily harm, or serious risk to public health or safety.[45] The Counter-Terrorism Executive Directorate has also suggested that this is good practice.[46] Such a clause would prevent criminalizing as terrorism certain lesser harms in the course of the traditions of direct democratic action, even they otherwise attract liability for ordinary or public order offences. Thus, for example, large public demonstrations that extensive destroy property and cause major economic loss, but do not kill, injure or endanger people, would not be an offence under article 1(1)(d). A protest "sit in" on a bus or train would not be the offence of "seizing" public transport under article 1(1)(e). AN industrial strike which briefly disrupts a water or power supply, causing a trivial but not serious danger to life, would not infringe article 1(1)(h). Malicious cyber operations that damage computers, without killing or injuring, would not be an offence under article 1(1)(i). Broader and more general variations of such an exception are the suggestions to exempt legitimate activities or acts aimed at the exercise or protection of human rights and fundamental freedoms (Liechtenstein) or the defence or exercise of human rights and fundamental freedoms (Switzerland); such clauses also overlap with the next category suggested below.

Thirdly, there should be considered an "*in extremis*" exception safeguarding resistance, as a last resort, against attempts to overturn a democratic, human rights-based constitutional order, as is found in some national constitutions.[47] The European Parliament, for example, sought to distinguish terrorism under EU law from those "who resist totalitarian regimes and repression in third countries or who support such resistance".[48] Without such clause, the Council of Europe's counter-terrorism law would demand pacifism against even the most violently repressive authoritarian regimes, and require transnational cooperation to suppress those who legitimately resist such regimes (beneath the threshold of violence of an armed conflict, when the existing humanitarian law exclusion clause would then apply).

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42 On rules, see e.g. ICRC, Customary International Humanitarian Law, Rules 25-26, 28-30, 31-32, and 55-56.
43 CDCT(2023)14, Annex II; OSCE 13; Saul, above.
44 See also CDCT(2023)14, Annex II (Switzerland).
45 See e.g. Canadian Criminal Code, section 83.01(1)(E); Australian Criminal Code, section 100.1(3); Terrorism Suppression Act 2002 (New Zealand), section 5(5).
46 Counter-Terrorism Executive Directorate, "Analytical Brief: A Commentary on the Codification of the Terrorism Offence" (2024), 17.
47 E.g. Germany's Basic Law.
48 European Parliament, Legislative resolution on the Commission proposal for a Council framework decision on combating terrorism OJ C153 E/275, 27 June 2002.

Conclusion

I recognize that the CDCT is preparing an explanatory memorandum which in part may aim to clarify some of the ambiguities and interpretive and policy issues raised in this communication. Nevertheless, non-binding guidance is not sufficient to cure legally binding standards that do not satisfy the principle of legality in the first place, or otherwise over-reach and risk criminalizing legitimately protected international legal interests, including humanitarian law and political and other rights and freedoms. Moreover, the Council of Europe lacks strong powers to supervise implementation that the EU enjoys through its transposition infringement proceedings, and thus has a lesser capacity to ensure that national implementation is relatively consistent and rule of law and human rights compliant across all 46 member states. Reliable on "common sense" restraint in prosecutorial discretion to prevent over-reach or abuse is also inadequate, given that the quality, policies, oversight and susceptibility to politicization of prosecutors varies between countries and over time. As one superior national court has observed, it is the duty of law-makers to clearly define the scope of criminal liability, and not to devolve an excessive discretion to the executive (through prosecutors) to decide who is a "terrorist" on a case by case basis; otherwise the rule of law, separation of powers, and the principle of legality are compromised.[49] Even with prosecutorial restraint, unclear or over-broad laws have a chilling or deterrent effect on the public and individual behaviour, since the law is always available in the background to be used at any time.

While I appreciate the interest in harmonizing the Council of Europe definition of terrorism with that of the EU, given significant overlapping memberships in the same geographical region, I caution against replicating and entrenching the deficiencies of the EU's approach. The "Strasbourg effect" of Council of Europe instruments can influence practice in other regions and of other states, including as a bloc of 46 member states representing around one quarter of the world's states. The Council of Europe, whose core mission is to promote democracy, human rights and the rule of law, should not champion counter-terrorism standards which fall short of international human rights law and "best practice".

Finally, I note that civil society consultation and participation appears to have been very limited during the CDCT's drafting of a definition and the Amending Protocol, while all relevant documentation does not appear to have been publicly disclosed (e.g., the early European Commission proposal put before the CDCT and from which drafting proceeded). While the constraints upon the CDCT as an inter-governmental body are well understood, I encourage the CDCT to consider ways and means of enhancing its engagement with civil society, particularly on fundamental standard setting initiatives such as a treaty-based general definition of terrorism. I refer in this respect also the Committee of Ministers' Guidelines for civil participation in political decision making 2017.[50]

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

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[49] *R v Gul* [2013] UK Supreme Court 64, para. 36.

[50] Adopted by the Committee of Ministers on 27 September 2017 at the 1295th meeting of the Ministers' Deputies.

1. Please indicate how the Council of Europe intends to ensure that the proposed definition of terrorism satisfies the principle of legality and does not criminalize acts that are not genuinely terrorist in nature, in accordance with best practice international standards on definition. Specifically, please indicate whether revisions will be made to draft Article 1 of the Amending Protocol concerning:

   (a) The third specific intent element in article 1(2)(c).

   (b) The fault/mental elements of certain offences in article 1(1).

   (c) The thresholds of harm of the listed acts / conduct in article 1(1).

   (d) The contextual chapeau element in article 1(1).

   (e) The addition of exclusion clauses concerning (i) humanitarian and medical activities under humanitarian law, (ii) democratic protest, and (iii) defence of human rights.

2. Please explain what opportunities will be provided for further civil society consultation on the Amending Protocol between now and its adoption, including in relation to the preparation of the proposed explanatory memorandum, and whether and how the Committee of Ministers' Guidelines for civil participation in political decision making are applicable to the CDCT.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

I stand ready to provide the Council of Europe with any technical advice it may require in ensuring that its instruments are fully compliant with international human rights standards.

Please be informed that a copy of this letter was sent to Permanent Delegation of the European Union.

Please accept, Excellency, the assurances of my highest consideration.

Ben Saul
Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism