



## **Briefing Paper: Amendment to the Framework Decision on Combating Terrorism – Provocation to Commit a Terrorist Offence**

### **Introduction**

This note addresses the European Commission's proposal for an amendment to the Framework Decision on Combating Terrorism of 2002,<sup>1</sup> and in particular the provisions which would require EU Member States to criminalise public provocation to commit a terrorist offence. The International Commission of Jurists (ICJ) is concerned that without further safeguards in the text of the Framework Decision, it may lead to disproportionate interference with freedom of expression.

The ICJ does not agree that an EU law requirement to criminalise provocation to terrorism as proposed by the Commission is necessary, nor does it represent the most efficient way forward, as a similar obligation already exists under Article 5 of the Council of Europe Convention on the Prevention of Terrorism. EU efforts could instead be focused on encouraging effective and human rights compliant implementation of the Council of Europe Convention. What is essential however is that any new Framework Decision on this subject, does not impose lesser human rights safeguards than the Council of Europe Convention.

### **Provocation offences and freedom of expression**

The ICJ recognises that states have an international obligation, under Security Council resolution 1624, to prohibit and prevent incitement to terrorism.<sup>2</sup> These obligations reflect the general human rights law duty to protect against criminal acts such as terrorist attacks, including through the criminal law.<sup>3</sup> Freedom of expression, protected in Article 10 of the European Convention on Human Rights (ECHR), Article 11 of the Charter of Fundamental Rights of the European Union, as well as other international human rights treaties,<sup>4</sup> is also an essential element of states' international human rights obligations, as one of the core values

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<sup>1</sup> Proposal for a Council Framework Decision amending Framework Decision 2002/475/JHA on Combatting Terrorism, COM (2007) 650

<sup>2</sup> Security Council Resolution 1624 (2005) Paragraph 1

<sup>3</sup> *X and Y v the Netherlands*, (1985) 8 EHRR 235; *Osman v UK*, (1988) 29 EHRR 245; *Av UK*, (1998) 27 EHRR 611

<sup>4</sup> Including Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and Article 5 (d)(iii) of the Convention on the Elimination of Racial Discrimination (CERD).

of a democratic society.<sup>5</sup> These two obligations, to protect against terrorism and to respect human rights including freedom of expression, should not be seen as opposing: as the ICJ's Berlin Declaration on Counter-Terrorism and Human Rights affirmed, "safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent on the state".<sup>6</sup>

Particular caution needs to be exercised, however, where the criminal law extends to cover speech which only indirectly incites or risks inciting terrorist acts. Broadly defined offences of indirect incitement can criminalise much that is legitimate political debate. Under Article 10 ECHR, offences of incitement, including indirect incitement, can be justified,<sup>7</sup> but must be clearly prescribed by law, necessary in a democratic society, proportionate to a legitimate aim, serve a pressing social need and must not unjustifiably discriminate. Political speech is accorded particular protection<sup>8</sup> because of its value in assisting the public in developing informed opinions on issues of public interest, and the protection of expression extends to views which are uncomfortable to government,<sup>9</sup> or which offend, shock or disturb.<sup>10</sup> The *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*,<sup>11</sup> an authoritative set of international standards on this issue, affirm that speech should be criminalised on national security grounds only where it is intended to incite imminent violence, is likely to incite such violence, and there is a direct and immediate connection between the speech and the likelihood or occurrence of such violence.<sup>12</sup>

In practice, arbitrary, discriminatory or excessive application of indirect incitement offences may be counter-productive in alienating communities who will be disproportionately affected by the law. The enactment of such offences is also likely to have a chilling effect in inhibiting constructive political, media and community debate on issues related to terrorism. Again, this impact is likely to be most strongly felt in already alienated minority communities, where discussion of issues related to terrorism needs to be encouraged, rather than stifled.

The ICJ is also concerned that measures at an EU level, or in the national laws of EU Member States, which allow for significant intrusions into rights of freedom of speech, may give legitimacy to broadly defined speech offences in non-EU countries with which the EU co-operates.<sup>13</sup> Increasingly, in Europe and elsewhere, broad offences of *apologie du*

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<sup>5</sup> *Handyside v UK*, 1 EHRR 737; *Lingens v Austria* (1986) 8 EHRR 407.

<sup>6</sup> ICJ Berlin Declaration on upholding human rights and the rule of law in countering terrorism, 2004

<sup>7</sup> *Incal v Turkey* App No 22678/93, para.54; *Gerger v Turkey* App No 24919/94; *Erdogdu and Ince v Turkey*, App No 25067/94. In *Hogefeld v Germany*, App No 35402/97, the ECtHR accepted that a measure limiting freedom of expression – though not by a criminal sanction- was justifiable in a case of indirect incitement, where the applicant's previous statements could be understood by supporters as an appeal to continue the activities of a terrorist group, in light of her background.

<sup>8</sup> *Lingens v Austria* (1986) 8 EHRR 407

<sup>9</sup> *Surek and Ozdemir v Turkey* App No 23927/94 para.61; *Ozgur Gundem v Turkey* App No 23144/93 para.70

<sup>10</sup> *Handyside v UK*, *op cit.*

<sup>11</sup> The Johannesburg principles are non-binding but authoritative principles adopted in 1995 by a group of experts in international law, national security and human rights, convened by Article 19, the International Centre Against Censorship, and the University of Witwatersrand. They are based on international and regional legal standards, evolving state practice and general principles of law.

<sup>12</sup> Principle 6

<sup>13</sup> See press release of the ICJ Eminent Jurists Panel, *Eminent Jurists conclude sub-regional hearing on terrorism and human rights in the Maghreb*, 7 July 2006, [http://ejp.icj.org/hearing.php3?id\\_rubrique=14](http://ejp.icj.org/hearing.php3?id_rubrique=14)

*terrorisme*, glorification or encouragement of terrorism are being enacted, with the potential to significantly intrude on freedom of expression.<sup>14</sup> The ICJ Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, which has held 16 hearings on counter-terrorism and human rights around the world in the past two years, has heard serious concerns in this regard from many jurisdictions.

It is therefore important that the Framework Decision does not either require, or encourage, the creation of excessively broad offences of indirect incitement at national law.

### **The Offence of Public Provocation Proposed for the Framework Decision**

The proposed amendment to the Framework Decision on Combating Terrorism would create a new offence of public provocation to commit a terrorist offence. Under Article 1(1) (a) the elements of the new offence would be:

- the **distribution**, or otherwise making available, of a message to the public
- with the **intent to incite** the commission of a terrorist act as defined in the Framework Decision on Combating Terrorism
- Where such conduct, whether or not directly or indirectly advocating terrorist offences, **causes a danger** that one or more such offences may be committed.

The offence would not be expressly subject to a clause to protect freedom of expression, although these principles are set out in the preamble to the amendment.

The ICJ has three principal concerns with the proposed new offence.

#### **1. The wide definition of terrorism in the framework decision will make the proposed offence of provocation unacceptably wide and indeterminate.**

The offence of provocation in the proposed Framework Decision closely follows that in the Council of Europe Convention on the Prevention of Terrorism.<sup>15</sup> Where it differs considerably however is in the definition of terrorism on which it relies. The Council of Europe Convention does not set out a definition of “terrorist offence”, but refers to the ten specific Council of Europe treaties which deal with terrorist crimes. These Conventions

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<sup>14</sup> Including in the UK, Terrorism Act 2006, section 1; the Russian Federation, Law No 153-FZ of 27 July 2006, amending Article 205.2 of the Penal Code. Draft legislation creating offences of indirect incitement to terrorism is under consideration in the Netherlands and Belgium. Outside Europe, wide offences of apologetic have recently been created in Tunisia (anti-terrorism law of 2003), and similar offences have raised concerns in Algeria and Morocco; in Jordan, Article 150 of the Penal Code creates broad offences of incitement; in Uganda, the Anti-terrorism Act of 2002, Article 9, creates a broadly worded offence of promotion of terrorism, publishing or disseminating news or materials that promote terrorism.

<sup>15</sup> The Convention provides in Article 5 that:

1. For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.
2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

require states to criminalise specific acts, including bombings, attacks against shipping and aircraft, hostage-taking, attacks involving nuclear material, and attacks against internationally protected persons.<sup>16</sup> The definition of terrorism in the Framework Decision on Combating Terrorism, by contrast, is cast in very broad terms.

Terrorism is defined in Article 1.1 of the Framework Decision, as extending to listed acts ranging from attacks on life and physical integrity, to extensive destruction of property, infrastructures or information systems,<sup>17</sup> where such acts seriously damage any country or any international organisation, and aim to seriously intimidate a population or “unduly compel” any government or international organisation to perform or abstain from any act, or seriously destabilise or destroy the fundamental structures of a country.

In the view of the ICJ, the breadth and uncertainty of this definition conflicts with the principle of legality,<sup>18</sup> one of the core principles of the rule of law, which requires that laws be sufficiently clearly formulated for individuals to foresee to a reasonable degree the application of the law and to regulate their conduct accordingly.<sup>19</sup> This problem is reflected in national systems which may replicate the Framework Decision’s definition of terrorism, or legislate for even wider definitions.

The Presidency, in its recent note on the Framework Decision,<sup>20</sup> compared the definitions of terrorism in the Framework Decision and the Council of Europe Convention, concluding that any differences between the two were minor and were “negligible for the purposes of adopting the text.”<sup>21</sup> The ICJ considers however that the definition in the Framework

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<sup>16</sup> The relevant treaties, listed in Annex 1 to the Convention, are: the Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971; the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, 1973; the International Convention Against the Taking of Hostages, 1979; the Convention on the Physical Protection of Nuclear Material, 1980; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 1988; the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988; the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988; the International Convention for the Suppression of Terrorist Bombings, 1997; and the International Convention for the Suppression of the Financing of Terrorism, 1999.

<sup>17</sup> Under Article 1.1 (a) (i), a terrorist offence requires one of the following acts: attacks upon a person’s life which may cause death; attacks upon the physical integrity of a person; kidnapping or hostage taking; causing extensive destruction to a government or public facility or system in a way likely to endanger life or result in major economic loss; seizure of aircraft or other means of transport; manufacture, possession, etc, of weapons or explosives, or development of biological or chemical weapons; release of dangerous substances, or causing fires, floods or explosions so as to endanger life; interfering with or disrupting the supply of water, power or other services, so as to endanger human life.

<sup>18</sup> *Sunday Times v UK*. (1970) 2 EHRR 245.

<sup>19</sup> This conclusion was reached by the EU Network of Independent Experts on Fundamental Rights, Thematic Comment No.1, *The Balance between liberty and security in the response of the European Union and its Member States to the terrorist threat*, March 2003, pages 11, 16. This concern is reflected in statements of the UN Human Rights Committee on national laws of European states: UN Human Rights Committee, concluding observations on Estonia, CCPR/CO/77/EST, para.8, Concluding Observations on Belgium, CCPR/CO/81/BEL para 24.

<sup>20</sup> Note on Council Framework Decision amending Framework Decision 2002/475.JHA on Combating Terrorism, 15 February 2008, 6561/08 CATS11 DROIPEN 13

<sup>21</sup> para.22.

Decision has the potential for much wider application than that of the Council of Europe Convention. First, because, as noted above, its scope is uncertain. Second, the Framework Decision definition includes acts which fall outside the scope of the Council of Europe Conventions, such as extensive destruction of private property, or causing extensive destruction to public property, infrastructure and information systems (by means other than explosives or lethal devices, which would fall within the Council of Europe Convention on the Suppression of Terrorist Bombings), or interfering with or disrupting the supply of water, power, or other natural resources (by means other than explosives or lethal devices); or the seizure of any form of public or goods transport.

These categories may include acts which constitute legitimate political protest, and speech which indirectly provokes such acts would be likely to include legitimate criticism and dissent. In national implementation of the amendment to the Framework Decision, this definition could be used to justify measures which criminalise provocation of relatively low-level acts such as destruction of property, with consequences for unjustified interference with freedom of expression.

*The ICJ welcomes the fact that the new offence of provocation relates only to the offences in Article 1(1)(a)-(h), and not to ancillary offences in Articles 2 and 3. The ICJ considers however that the offence should be further confined to provocation of acts of violence which threaten the life or physical integrity persons, for the purposes set out in Article 1.1.*

## **2. The requirement that speech should “cause a danger” of an offence, could allow for criminalisation of speech which causes only an abstract and remote risk of violence**

Under proposed Article 1.1 (3), speech does not have to actually result in a terrorist act. It is sufficient that speech must “cause a danger” of a terrorist offence, the same standard that applies in the Council of Europe Convention.<sup>22</sup>

This test leaves some doubt as to the level and the imminence of the risk necessary for the offence of provocation to be committed. According to principle 6 of the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* which provide the authoritative standard for offences of incitement to acts of terrorism, expression which is a threat to national security should be criminalised only where there it is intended to incite imminent violence, it is likely to incite such violence, and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.” This reflects the principle established by the United States Supreme Court in *Brandenburg v Ohio*,<sup>23</sup> that speech advocating the use of force could only be made criminal

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<sup>22</sup> The explanatory notes to the Council of Europe Convention suggest that the term “causes a danger” should be applied in light of the principles of ECHR law, taking into account the context in which the statement is made: “when considering whether such danger is caused, the nature of the author and of the addressee of the message, as well as the context in which the offence is committed, shall be taken into account in the sense established by the case-law of the European Court of Human Rights.”

<sup>23</sup> 395 US 444 (1969). See also the Joint Declaration by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, International Mechanisms for Promoting Freedom of Expression: “while it may be legitimate to ban incitement to terrorism or acts of terrorism, States should not employ vague terms such as “glorifying” or “promoting” terrorism when restricting expression. Incitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in

where it was directed to inciting or producing imminent lawless action and was likely to incite or produce such action.

The ICJ is concerned that the term “causes a danger”, as used in both the Council of Europe Convention and the Framework Decision, allows for the criminalisation of speech which does not carry an immediate risk of a terrorist act, but only a more remote possibility. Criminalisation of such speech would amount to an interference with freedom of expression which would be unlikely to be proportionate or to serve a pressing social need, and would therefore violate the right to freedom of expression as protected by Article 10 ECHR.

More precision as to the degree of risk envisaged to create an offence of provocation is needed on the face of the Framework Decision, to ensure that national implementation measures comply with the right to freedom of expression. *The ICJ considers that, in order to best guard against disproportionate interference with freedom of expression, the term “danger” in the amendment to the framework decision should be replaced with the term “imminent risk”. If the draft text is not altered in this way, then the Framework Decision should be restrictively interpreted and implemented, to require a degree of imminence in the danger caused.*

### **3. To be effective, safeguards for human rights protection must be included in the body of the framework decision.**

Given the binding nature of the Framework Decision, a requirement to criminalise conduct must be matched with clear requirements to protect human rights and in particular freedom of expression, if these negative consequences, resulting from over-broad national implementation measures, are to be avoided. At present, the body of the Framework Decision amendment does not contain any express protection for freedom of expression.

The preamble of the amendment, however, at para.14, states that “nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as freedom of expression, assembly, or of association, the right to respect for private and family life, including the right to respect of the confidentiality of correspondence.” Para.15 goes on to state that: “public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism are intentional crimes. Therefore, nothing in this Framework Decision may be interpreted as being intended to reduce or restrict the dissemination of information for scientific, academic or reporting purposes. The expression of radical, polemic or controversial views in the public debate on sensitive political questions, including terrorism, falls outside the scope of this Framework Decision and, in particular, of the definition of public provocation to commit terrorist offences.”

These are important statements which should guide interpretation and national implementation of the Framework Decision. Given the particular risks for freedom of expression in the provocation offence, however, the ICJ considers it essential that there be clear protection for freedom of expression in the body of the text. This should require compliance with the principles of Article 10 ECHR, which states that interference with freedom of expression should be justified only to the extent that it is clearly prescribed by

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which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”

law, pursues a legitimate aim, and is necessary in a democratic society and proportionate to the aim pursued.

The Council of Europe Convention, from which the offence of public provocation is taken, includes in Article 12 clause safeguarding human rights. It requires states to ensure that “the establishment, implementation and application of the criminalisation under Articles 5 ... of this Convention are carried out while respecting human rights, in particular the right to freedom of expression, freedom of association and freedom of religion” as established in international law.” It further states that measures taken under Article 5 must be “subject to the principle of proportionality, with respect to the legitimate aims pursued and to the necessity in a democratic society, and should exclude any form of arbitrariness or discriminatory or racist treatment.”

The Presidency has recently proposed a new recital in the preamble, based on Article 12.2 of the Council of Europe Convention, which would state:

The establishment, implementation and application of the criminalisation under the Framework Decision should be [proportional to the nature and circumstances of the offence] [subject to 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.”

The Presidency has suggested the removal of the words “subject to the principle of proportionality” in order to avoid confusion between ideas of proportionality in EU law, and in human rights law. There could be concern, however, that in the alternative text (underlined above) the use of the word “offence” prejudices the question of whether or not the offence of provocation of terrorism applies to any given case.

The ICJ welcomes the proposal of the Swedish delegation to include a new article in the body of the Framework Decision. However, the proposed text does not provide a safeguard equivalent to that in Article 12 of the Council of Europe Convention, since it refers only to “fundamental principles” of freedom of association and freedom of expression, rather than to the tests of necessity in a democratic society and proportionality to a legitimate aim.

*The ICJ suggests that a clause should be inserted in the text of the Framework Decision along the following lines:*

*“The establishment, implementation and application of the criminalisation under the Framework Decision should respect the human rights obligations of Member States, in particular freedom of expression, freedom of association and freedom of religion, should be proportionate to the legitimate aims pursued and necessary in a democratic society, and should exclude any form of arbitrariness or discrimination.”*