



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

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Submission of comments on the Draft Council of Europe Convention on the Prevention of Terrorism

The International Commission of Jurists (ICJ) welcomes the opportunity to comment on the Council of Europe draft Convention on the Prevention of Terrorism. The ICJ would like to submit the following preliminary considerations to the Committee of Experts on Counter-Terrorism (CODEXTER).

The ICJ wishes to draw the attention of the Council of Europe in particular to the following suggested improvements:

- To ensure full respect in article 2 of the draft Convention for international law, including international human rights law;
- To revise the obligations in article 3; most notably the obligation to encourage the public to provide factual and specific information in paragraph 4;
- To revise the crime of public provocation to ensure compliance with the *nullum crime sine lege* principle and to ensure a sufficiently clear and predictable separation between recognizable criminal behaviour and the legitimate expression of political and social dissent;
- To strengthen the limited scope of concrete obligations of states with regard to the rights of victims contained in article 12 of the Convention (protection, compensation and support of victims of terrorism);
- To exclude the death penalty as sanction for the crimes contained in the draft Convention;
- To ensure that the extradition and mutual legal assistance clauses fully reflect international law and reflect sufficiently human rights guarantees;

A. The framework for prevention of terrorism

The relationship between human rights and the prevention of terrorism has been described in the *ICJ Berlin Declaration for Upholding Human Rights and the Rule of Law in Combating Terrorism* (Annex 1)

"Terrorism poses a serious threat to human rights. The ICJ condemns terrorism and affirms that all states have an obligation to take effective measures against acts of terrorism. Under international law, states have the right and the duty to protect the security of all people.

(...)

There is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other

rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state. (...)”

The present draft Convention should follow this approach and regard international human rights law, international humanitarian law and international refugee law as an integral and not merely limiting component of the fight against terrorist threats in Europe.

Key concerns with regard to the draft Convention

1) Purpose of the Convention, Article 2

Article 2 of the draft Convention defines the purpose of the Convention as:

“(...) the prevention of the negative effects on the full enjoyment of human rights through measures taken both at the national level and through international co-operation.”

These measures should be taken:

“(...) with due regard to existing applicable multilateral and bilateral treaties and arrangements between the State Parties.”

The ICJ questions that the drafters of the Convention consider that counter-terrorism policies must merely ‘take due regard’ of applicable existing international law obligations.

This is critical in particular with regard to binding legal obligations under international human rights law, humanitarian and refugee law. Article 2 should be adjusted to ensure ‘full respect’, to underline the binding nature of the applicable norms of international law, including human rights, humanitarian and refugee law.

Moreover, the clause is too narrow as it is limited to treaty obligations. State parties to this Convention are equally bound by customary international law.

2) National Prevention Policies, Article 3

The ICJ favours an approach that includes preventive policies as part of a more holistic response to terrorism as recently reflected in the report of the United Nations High Level Panel on Global Security Threats. The issues and obligations covered in article 3 are selective and show a considerable lack of precision.

2.1. Article 3, paragraph 1

The lack of precision is evident for example with regard to Article 3, paragraph 1, which states *inter alia*:

“Each State Party shall take appropriate measures, particularly in the field of (...) the media (...), with a view of preventing terrorist offences and their negative effects (...).”

While the media may have a role to play with regard to the prevention of terrorism it is not clear which appropriate measures the state should take with regard to the media to

prevent terrorism. It is open to speculation whether it could be understood to call on states to limit legitimate media reporting or public coverage of terrorist attacks; to limit access to information rights; to introduce preventive schemes of control or other forms of direct or indirect censorship of media outlets or allow states to limit the confidentiality of sources.

The role of freedom of expression and the media and national security is best expressed in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information of November 1996.¹ The ICJ considers that these principles should guide the reference to media in article 2, for example by reference to this document in the Explanatory Memorandum.

The ICJ welcomes the clarification, that this obligation should be fulfilled ‘while respecting human rights’. However, in light of the uncertain normative content of article 3 and the open character of the provision the ICJ questions its utility.

2.2. Article 3, paragraph 4

The ICJ is concerned with the scope and effect of Article 3, paragraph 4, which reads:

“Each State Party shall (...) consider encouraging the public to provide factual, specific help to its competent authorities that may contribute to preventing terrorist offences and offences set forth in this Convention.”

The inclusion of this obligation into the draft raises similar concerns as the crime of ‘non-reporting’ contained in a previous draft. The ICJ welcomes the deletion of a crime of non-reporting during the 7th session of CODEXTER and strongly recommends the same with regard to Article 3, paragraph 4.

The ICJ agrees that an effective strategy against terrorist threats requires broad public support. In democratic societies such support is based on societal consensus to which the policy of governments should contribute. The scope of the above provision, however, remains so imprecise that it may well legitimize policies that violate human rights. The draft fails among other matters to define what kind of encouragement states would be called upon to consider.

For example, it is not clear how far the notion of providing ‘factual and specific help’ would have to be understood. Would the provision encourage states to consider setting up systems of citizen informants, who are asked to provide ‘factual and specific help’ that ‘may contribute’ to prevent an offence? Would the provision of ‘factual and specific help’ cover the active search for specific information? Under which conditions and with which competencies would the public be allowed to do so? Could the Convention be read to cover policies, such as the introduction of ‘civil control groups’, ‘village guards’ or ‘peasant soldiers’ – policies that have proven in the past to have devastating effects on human rights? Will there be any legal duty, be it civil, criminal or administrative connected to such encouragement? What impact will it have on those who are not actively providing information or who are perceived as not contributing factual and specific information? What will be the impact on minority communities, especially if terrorists are identified as belonging to a specific religious, national or ethnic minority? Would there be not a risk of suspicions against those who are not

¹ Available at <http://www.article19.org/docimages/511.htm>

actively reporting or collaborating? Would such policies allow a state to affect relationships within the family, between lawyer and client or other privileged relationships?

The experience with similar measures worldwide in times of crisis, including where there is a threat of terrorism, clearly suggests, that policies of this sort lead to an escalation of the situation and do not assist in preventing terrorism. It is moreover critical that some anti-terror campaigns may be connected with situations of armed conflict, where such a provision may risk diluting the distinction between combatant and civilian.

The draft Convention in its present form risks endorsing and legitimizing such approaches. The fact that the clause does not mandate states to introduce any such policies, but merely 'encourages States to consider them' would not prevent individual states using Article 3, paragraph 4, as an international justification to embark on policies contrary to human rights. This is even more critical as the Convention is open also to non-member states of the Council of Europe.

The ICJ believes that no Council of Europe Convention should endorse policy approaches without defining them and clarifying their limits. They should only be suggested as part of a normative framework if there is agreement about their utility. The ICJ believes that these concerns cannot be reconciled by a simple change of language, but require that the provision be deleted from the draft.

3) Scope of criminal offences

The ICJ shares the serious concerns expressed in the submission by Amnesty International (Preliminary Observations on the Draft European Convention on the Prevention of Terrorism, January 2005, IOR 061/002&/2005) and the opinion provided by the Council of Europe Commissioner for Human Rights about the broad definition of the crimes contained in articles 4-6.

The crime of 'public provocation' contained in article 4, in particular, fails to ensure a sufficiently clear and predictable separation between recognizable criminal behaviour and the legitimate expression of political and social dissent. It therefore conflicts with the right to freedom of expression in article 10 ECHR and the principle of *nullum crimen sine lege*.

As the European Court of Human Rights emphasized in its *Handyside versus the United Kingdom*² 'article 10 constitutes one of the essential foundations of a democratic society' and that it covers 'not only information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sectors of the population.' The present provision carries the inherent risk, that legitimate expression of opinions that may be considered as disturbing in times of crises are criminalized.

The Court stressed in the *Sunday Times* case that any liability must be formulated:

² *Handyside versus the United Kingdom*, Judgment of 7 December 1976, 1 EHHR 737, paragraph 48.

“(...) with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances the consequences which a given action may entail.”³

The safeguard clause contained in article 9 that refers to the European Convention of Human Rights is an important protection but will not prove sufficient in practice as long as the prescription of the crime itself is not formulated in a sufficiently clear and precise manner to ensure that legitimate expression of opinions cannot be criminalized.

The present definition seems to combine elements of a typology of a ‘crime’ for apology of terrorism with the crime of incitement to commit a terrorist act. The ICJ is in particular concerned with the unqualified reference to the ‘danger’ of terrorist acts and the lack of a clear proximate cause of an imminent risk of a terrorist crime. The provision fails to establish a specific and direct causal link between the distribution of a message and the imminence of such danger. The references in the Explanatory Memorandum seem insufficient in this respect.

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information provide guidance in this respect in principle 6 (Expression that may threaten National Security):

“(E)xpression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”

The ICJ further questions the use of the term ‘unlawfully’ contained in the second paragraph 2 of articles 4-6. The inclusion of this element seems either to be redundant or unjustified. General criminal law principles may exclude the unlawfulness or guilt and apply to the crimes set forth in article 4-6. The Explanatory Note refers to other exclusions, such as law enforcement activities. It is questionable why law enforcement activities should be excluded from the prescription of the crime. Are the drafters of the Convention suggesting that the state has the right to ‘publicly provoke the commission of a terrorist offence’ or to ‘provide training for terrorism’ or to ‘recruit a person to commit a terrorist act’?

4) Sanctions and measures

The ICJ strongly recommends amending Article 8, paragraph 1, to bring it up to the standard of the Council of Europe by excluding expressly the imposition of the death penalty as punishment for the crimes contained in the draft convention. Such amendment would ensure coherence with article 18 of the Convention, which prohibits a state party to extradite a person facing the death penalty or life without parole for the offences set forth in the Convention. If a state party must refuse extradition on these grounds, it would be contradictory to allow the state to inflict this punishment if

³ Sunday Times versus United Kingdom, Judgment 26 April 1979, Series A, paragraph 49.

prosecuting the crime itself. In light of the openness of the Convention to non-members of the Council of Europe, such clarification is necessary to uphold the *acquis* of the Council of Europe.

5) Protection, Compensation and support of victims of terrorism

The ICJ welcomes a specific provision on the protection, compensation and support to victims of terrorism.

However, the ICJ regrets its limited scope. In this regard the ICJ wishes to refer to the elaboration of draft guidelines on the protection of victims of terrorist acts (CDDH 030 Addendum) and the joint comment on these guidelines by Amnesty International and the International Commission of Jurists (*Recommendations of Amnesty International and the International Commission of Jurists to Strengthen the draft Council of Europe Guidelines on Aid to and Protection from Terrorism*, available at www.icj.org).

A broader approach to the prevention of terrorism should include effective access to justice for victims of terrorist acts, the right to information and to a prompt, thorough, and effective and independent investigation. Emergency and continued assistance are equally crucial.

As far as the second sentence is concerned, the ICJ believes that the term ‘may’ should be replaced by “should” and that the provision of financial assistance and compensation should not be made subject to the existence of domestic law. Moreover, in line with the draft Guidelines mentioned above, it should also include ‘other measures mitigating the negative effect of the terrorist act suffered by the victim’ and should include an additional obligation of the state whose citizens are affected.

6) Duty to investigate, mutual legal assistance and extradition

6.1. Rights under investigation and in custody

The ICJ considers that article 13 should be either amended to include a specific reference to rights under the European Convention on Human Rights (arts 3, 5 or 6) and similar provisions under the International Covenant on Civil and Political Rights (arts. 7, 9, 10 and 14) or that such component be included into a general human rights clause.

While these rights apply as a matter of human rights law to all Council of Europe member states, recent experience in the fight against terrorism suggests that a specific clarification would be a positive way to prevent any dispute about the application of due process rights. This would also be useful as the Convention is open to other states.

This approach would be in line with recent counter-terrorism conventions in other regional systems, such as the recently adopted Inter-American Convention Against Terrorism, which states in article 15, paragraph 3: “any person taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including the enjoyment of all rights and guarantees in conformity with the law of the state in the territory of which

the person is present and applicable provisions of international law.”⁴ A similar reference is also contained in article 9 of the OAS Convention to Prevent and Punish the Acts of Terrorism taking the form of crimes against persons and related extortion that are of international significance, registered by the OAS adopted on 2 February 1971.⁵

6.2. Grounds for refusing extradition

The ICJ considers that the present grounds for refusing extradition and mutual legal assistance are inappropriate and do not reflect the state of international law. The responsibility of a state extraditing a person to another state is not only engaged if the person faces a serious risk of torture, but also with regard to other serious human rights violations.

The ICJ Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism reflects the obligations for Council of Europe member states and should serve as guidance for the Council of Europe Draft Convention on the Prevention of Terrorism. It states in principle 10:

“Non-refoulement: States may not expel, return, transfer or extradite, a person suspected or convicted of acts of terrorism to a state where there is a real risk that the person would be subjected to a serious violation of human rights, including torture or cruel, inhuman or degrading treatment or punishment, enforced disappearance, extrajudicial execution, or a manifestly unfair trial; or be subject to the death penalty.”

The present draft article 18, paragraph 2 fails to include the protection against these other serious human rights violations. The ICJ is particularly concerned with the still debated reference to inhuman, degrading treatment or punishment and the lack of any reference to fair trial violations. Both issues are of great relevance in the fight against terrorist acts.

Inhuman or degrading treatment or punishment like torture constitutes a peremptory norm of international law. An explicit reference also ensures full compliance with the jurisprudence of the European Court of Human Rights, the Council of Europe’s own Guidelines on counter-terrorism and human rights (Principle XIII) and member states obligations under article 7 ICCPR. Equally, the ICJ urges that the draft Convention should preclude a state from extraditing a person facing manifestly unfair trials. This is among other matters, reflected in the Council of Europe Guideline Principle XIII/4, and also in the United Nations Model Treaty on Extradition stating in article 3 (f).⁶

⁴ Resolution AG/Res. 1840 (XXXII-0/02), 3 June 2002.

⁵ See UNTS 1986, Vol.1438 I-24381.

⁶ It reads: “If the person whose extradition is requested has been or would be subjected in the requesting State to torture, inhuman and degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14.” The Model Treaty adds in article 4, paragraph (g): “(...) if a person whose extradition is requested has been sentenced or would be liable to be tried or sentenced in the requesting state by an extraordinary or ad hoc court or tribunal.” See UN Doc. A/Res/45/116, 14 December 1990.

The importance of guaranteeing these rights has equally been highlighted in recent years in the context of the provision of mutual legal assistance. The ICJ strongly suggests providing for a similar list of grounds allowing a state to refuse mutual legal assistance if the proceedings are associated with serious human rights violations in the receiving state.

It should also be noted that equally there are restrictions on the use of evidence obtained through mutual legal assistance, in particular as regards the exclusionary rule, according to which information or evidence that may have been obtained through torture and inhuman and degrading treatment and punishment (see in particular article 15 United Nations Convention Against Torture). The Exclusionary Rule is an expression of the absolute prohibition of torture under international law⁷ and applies to not only to criminal or civil trials, but also to ‘any proceedings’, including quasi-judicial proceedings.⁸

⁷ Human Rights Committee, *General Comment No. 20 concerning prohibition of torture and cruel treatment or punishment* (Art. 7), 10 March 1992, UN Doc. HRI/GEN/1/Rev.7, at paragraph 12; Committee against Torture, Communication No. 193/2001, *P.E. v. France*, Views adopted on 21 November 2002, CAT/C/29/D/193/2001, 19 December 2002 at paragraph 6.3; Committee against Torture, Communication No 219/2002, *G.K. v. Switzerland*, Views adopted on 7 May 2003, CAT/C/30/D/219/2002, at paragraph 6.10.

⁸ See article 15 CAT, but also *P.E. and GK v. France*, Views adopted on 21 November 2002, CAT/C/29/D/193/2001, 19 December 2002 at paragraph 6.3. *G.K. v. Switzerland*, Views adopted on 7 May 2003, CAT/C/30/D/219/2002, at paragraph 6.10 and most recently with regard to immigration proceedings under the UK anti-terror law, CAT/C/SR.289, at paragraph 34, sub-heading “D. Subjects of Concern”.