
Warsaw, 28 September 2023
Note-Nr: TERR-All/479/2023 [NR]

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

This Note has benefited from contributions made by Helen Duffy, Professor of Human Rights and Humanitarian Law, University of Leiden; and Alan Greene, Reader in Constitutional Law and Human Rights, Birmingham Law School, United Kingdom.



OSCE Office for Democratic Institutions and Human Rights

Ul. Miodowa 10, PL-00-251 Warsaw
Office: +48 22 520 06 00, Fax: +48 22 520 0605
www.legislationline.org

EXECUTIVE SUMMARY

This Note provides a brief legal analysis concerning the modified definition of “terrorist offence” proposed by the European Union (EU), in the context of ongoing discussions regarding a revision of the existing definition in Article 1 of the Council of Europe Convention on the Prevention of Terrorism.

As underlined at the international and OSCE level, respect for human rights for all and the rule of law should constitute the fundamental basis of the prevention and fight against terrorism. While not underestimating the existence of potential terrorist threats and recognizing the importance of legal and institutional counter-terrorism frameworks, policy, legislation and practices in this field, including any proposed definition of terrorism, must comply with international human rights law, international refugee law, international humanitarian law, as well as rule of law principles.

There are positive elements to the proposed definition of “terrorist offence”, which can on its face be seen as an attempt to clarify the material element of terrorist offences, coupled with a requirement of intent to commit the reprehensible acts and elaboration of the necessary ‘aim’ pursued. At the same time, the proposed definition contains number of shortcomings, which may potentially result in an expansive notion of terrorism, likely to be regulated by criminal legislation of a given state. This may lead to legal uncertainty as it leaves wide discretion to the implementing authorities, with a potential for arbitrary or overbroad interpretation, discriminatory or abusive application, as a consequence having far-reaching implications on the exercise of human rights and fundamental freedoms. To offset these risks, it is essential to clearly define and strictly circumscribe each of the constitutive elements of the proposed definition of the criminal offence.

Actus reus (criminal conduct) – Some of the terms used to define the reprehensible acts in Article 1 should be more narrowly defined to ensure that it is limited to acts passing a certain threshold of seriousness. The inclusion of “threats” as one of the possible reprehensible acts should be reconsidered entirely. If nevertheless retained, the notion of “threats” should be narrowly defined with appropriate qualifiers, connecting it to a real and immediate danger, when a perpetrator would have the capacity to commit such an offence or making a target reasonably believe in it.

Mens rea (criminal intent) – To more strictly circumscribe the *mens rea*, the proposed definition should specify that the perpetrator must have intended not only the commission of the act(s) but also the consequences contemplated.

“Terrorist” aim – Given the risks associated with vagueness and an expansive notion of terrorism, the aim of “*seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation*”, should be reconsidered entirely.

Need for exceptions or exclusion clause to safeguard legitimate activities – The proposed definition should include explicit exceptions or exclusions safeguarding legitimate activities, especially the defence or exercise of human rights and fundamental freedoms, activities of human rights and humanitarian organizations, and other legitimate activities, such as for educational, scientific and academic research, legal assistance, journalistic or artistic purposes.

More generally, a useful addition to the Convention would be to expressly state that nothing in the Convention in general, and in this definition, should be interpreted as imposing restrictions to fundamental rights and freedoms, unless such restrictions are compliant with international human rights standards. For rights that are subject to restrictions, the tests of being prescribed by clear and foreseeable law, necessary in a democratic society in order to achieve a number of legitimate aims provided in international instruments, proportionate to these aims and non-discriminatory, must be met.

More specific and detailed comments are included in the text of this Note.

TABLE OF CONTENTS

I. INTRODUCTION AND SCOPE OF THE NOTE	3
II. LEGAL ANALYSIS AND RECOMMENDATIONS	5
1. Defining Terrorism and Human Rights Implications	5
2. General Remarks on the Proposed Definition	7
3. Constitutive Elements of the “Terrorist Offence”	9
3.1. Actus Reus (Criminal Conduct)	9
3.2. Mens Rea	11
3.3. “Terrorist” Aims/Motives	11
4. Lack of Exceptions or Exclusion Clause to Safeguard Legitimate Activities	12

I. INTRODUCTION AND SCOPE OF THE NOTE

1. During its 9th plenary session in December 2022, the Council of Europe (CoE) Committee on Counter-Terrorism (CDCT) decided to open formal negotiations on the text of the definition of terrorism. In May 2023, at its 10th plenary session, the CDCT agreed to proceed with negotiations based on the draft text of the modified definition of terrorist offences in Convention No. 196, as proposed by the European Commission, on behalf of the European Union (hereinafter “proposed definition”)¹ and to seek further

¹ The proposed definition reads as follows: “**Article 1 Terminology**

1. For the purposes of this Convention, “terrorist offence” means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix or any of the following acts, which are defined as an offence under national law, and given their nature or

consultations on the feasibility of this approach by non-EU member States, inviting CDCT members to submit written comments on the proposed draft text by 30 September 2023.² In accordance with the CDCT terms of reference, the OSCE may send representatives to CDCT plenary meetings as participants without the right to vote. .

2. The present Note was prepared by ODIHR in response to the above request to provide written comments within the framework as established by relevant OSCE human dimension commitments in the field of counter-terrorism and human rights.³ It offers, for consideration of CDCT members, written comments with the aim to contribute to the discussions and inform the CDCT's subsequent negotiations on a proposed revised definition of "terrorist offence" in Article 1 of the CoE Convention on the Prevention of Terrorism (CETS No. 196, hereinafter "Warsaw Convention").⁴ In line with ODIHR's mandate to support participating States in implementing their human dimension commitments and based on ODIHR's long-standing expertise in legislative assistance, the Note provides an analysis on the compliance of the proposed definition with relevant international and regional human rights standards and recommendations, as well as OSCE human dimension commitments.⁵ It also refers to relevant OSCE/ODIHR publications on counter-terrorism and human rights that address the issue of defining "terrorism" in a human rights-compliant manner.⁶
3. The Note does not review in details all the aspects of the proposed definition but primarily focuses on the most concerning issues, in particular with respect to broad terminology used to define the material elements of the criminal conduct (*actus reus*), the lack of clarity as to the required intent (*mens rea*), the overbroad definition of the aims/motives

context, may seriously damage a country or an international organisation, when committed intentionally and with one of the aims referred to in paragraph 2: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping; (d) causing extensive destruction of a government or public facility, a transport system, an infrastructure facility, a public place or private property likely to endanger human life or result in major economic loss; (e) seizure of means of public or goods transport, other than aircraft and ships; (f) manufacture, possession, acquisition, transport, supply or use of weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons; (g) release of dangerous substances, or causing fires or floods, the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) system or data interference that causes extensive damage to an information or computer system; (j) threatening to commit any of the acts listed in points (a) to (i).

2. The aims referred to in paragraph 1 are: (a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation."

² <CDCT List of decisions - 10th plenary meeting>.

³ See especially the *OSCE Bucharest Plan of Action for Combating Terrorism* (2001), Annex to OSCE Ministerial Council Decision MC(9).DEC/1, Bucharest, 3-4 December 2001, paras. 6, 18 and 22; see also Madrid Ministerial Statement on Supporting the United Nations Global Counter-Terrorism Strategy (2007), para. 22.

⁴ Council of Europe (CoE), *Convention on the Prevention of Terrorism* (CETS No. 196; hereinafter "Warsaw Convention"), 16 May 2005, Article 1; and its *Additional Protocol* (CETS No. 217; hereinafter "Riga Protocol" or "Additional Protocol"). The current definition of Article 1 of the Warsaw Convention reads as follows: "... (1) [f]or the purposes of this Convention, "terrorist offence" means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix..." The Appendix refers twelve international Conventions and related Protocols: Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded at Montreal on 23 September 1971; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted in New York on 14 December 1973; International Convention Against the Taking of Hostages, adopted in New York on 17 December 1979; Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, done at Rome on 10 March 1988; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997; International Convention for the Suppression of the Financing of Terrorism, adopted in New York on 9 December 1999; and International Convention for the Suppression of Acts of Nuclear Terrorism, adopted in New York on 13 April 2005.

⁵ For a detailed overview of relevant international and regional standards, recommendations and OSCE commitments pertaining to counter-terrorism and human rights, ODIHR hereby refers to its *ODIHR Comments on the Law on Combatting Terrorism of the Republic of Uzbekistan* (20 December 2019); and the *ODIHR Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism* (21 September 2020).

⁶ See in particular: *ODIHR Manual on Countering Terrorism, Protecting Human Rights* (2008); the *Practical Manual for Law Enforcement Officers on Human Rights in Counter-Terrorism Investigations* (2013), jointly published by ODIHR and the OSCE Secretariat's Transnational Threats Department / Strategic Police Matters Unit (TNTD/SPMU); the *ODIHR and OSCE Secretariat Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach* (2014); and the *ODIHR Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework* (2018), amongst others.

and the lack of an exception or exclusion clause. The absence of comments on certain aspects of the proposed definition should not be interpreted as an endorsement. In particular, the Note does not address the interlinkages of the proposed definition with other provisions of the Warsaw Convention, especially those dealing with ancillary, preparatory or inchoate offences – which can substantially expand the scope and indeterminacy of the crimes, nor does it comment on the content of the Annex if it were to be updated in the future. Given that the proposed definition may be subject to further amendments in the months to come, ODIHR may provide further substantive comments on proposed future revised definition(s). Thus, the content of this Note is without prejudice to written analyses and recommendations that ODIHR may provide in the future.

II. LEGAL ANALYSIS AND RECOMMENDATIONS

1. DEFINING TERRORISM AND HUMAN RIGHTS IMPLICATIONS

4. As underlined in the UN Global Counter-Terrorism Strategy and Plan of Action, international documents and OSCE commitments, respect for human rights for all and the rule of law should constitute the fundamental basis of the prevention and fight against terrorism.⁷ The protection and promotion of all human rights, as well as effective counter-terrorism measures are not exclusive, but rather complementary and mutually reinforcing objectives,⁸ which is also the very essence of the OSCE's comprehensive concept of security. As such, there is international recognition of the crucial importance of counter-terrorism legislation and practice to comply with international law, including with the international human rights standards.
5. Definitions of terrorism, which provide the basis for criminal offences, can have serious human rights implications.⁹ In its work, ODIHR regularly observes that overbroad and vague definitions in counter-terrorism legislation are prone to erroneous, arbitrary or even abusive application against people expressing dissent, political opponents, civil society activists, human rights defenders or journalists, independent media and others.¹⁰
6. An overly broad or ill-defined definition of terrorism may facilitate arbitrary application of criminal law and procedures with consequences for the enjoyment of rights including the rights to respect for private life (Article 8 ECHR, Article 17 ICCPR), rights to freedom of peaceful assembly and of association (Article 11 ECHR, Articles 21 and 22 ICCPR), freedom of expression (Article 10 ECHR, Article 19 ICCPR), freedom of religion or belief (Article 9 ECHR, Article 18 ICCPR), the right to political participation (Article 25 ICCPR) as well as the right to liberty and security (Article 5 ECHR, Article 9 ICCPR) and the right to a fair trial (Article 6 ECHR, Article 14 ICCPR). Broad or vague definitions of criminal offences also run the risk of discriminatory application for instance on grounds of national or ethnic origin, religion or belief, political or other opinion, sex,

⁷ See OSCE, *Charter on Preventing and Combating Terrorism*, 10th Ministerial Council Meeting, Porto 2002, pars 5-7. See also UN, *Global Counter-Terrorism Strategy and Plan of Action* (2006), Pillar IV; and the *Joint Statement* of the UN High Commissioner for Human Rights, the Secretary General of the Council of Europe and ODIHR Director (29 November 2001).

⁸ UN High Commissioner for Human Rights, *Report on the protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/4/88, 9 March 2007, para. 2.

⁹ See generally European Court of Human Rights (ECtHR), *Guide to the Caselaw of the European Court of Human Rights: terrorism* <https://ks.echr.coe.int/documents/d/echr-ks/guide_terrorism_eng>.

¹⁰ See e.g., *ODIHR Comments on the Law on Combatting Terrorism of the Republic of Uzbekistan* (20 December 2019); and the *ODIHR Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism* (21 September 2020). See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders*, A/HRC/40/52, para. 34; *ODIHR Submission for the Call for Inputs: Global Study on the Impact of Counter-Terrorism Measures on Civil Society and Civic Space*, 16 January 2023; and the United Nations, *Global Study on the Impact of Counter-Terrorism on Civil Society and Civic Space*, June 2023.

gender identity, migration status, minority status, descent, socio-economic status, birth or other status – or the intersection of any of these grounds, contrary to international standards.¹¹

7. In order to comply with international human rights guarantees, the definition of “terrorist offence” in national law must first comply with the principle of legality, guaranteed by Article 15 ICCPR and Article 7 ECHR. Criminal offences must be defined in precise and unambiguous language, so that the law is reasonably foreseeable in its application and consequences.¹² An offence must be clearly enough defined in law that “*the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him liable*”.¹³ All the essential elements of the offence – the individual conduct concerned and the intent – therefore need to be clearly stipulated in law. National law should also include adequate safeguards against arbitrary prosecution, conviction and punishment, and any ambiguity should be resolved in favour of the accused.¹⁴
8. ODIHR therefore has consistently called on OSCE participating States to follow the approach of [UN Security Council Resolution 1566 \(2004\)](#) and strictly confine terrorist offences to acts that meet all of the elements contained therein, including the “intention of causing death or serious bodily injury, or the taking of hostages”.¹⁵ The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereafter: UN Special Rapporteur on Counter-Terrorism and Human Rights) has noted that any definition of terrorism should be confined to conducts that are of a “genuinely terrorist nature”.¹⁶ This means it should be confined to acts that meet three cumulative criteria:
 - (1) they amount to acts passing a certain threshold of seriousness, *i.e.*, either
 - (a) the intentional taking of hostages, or
 - (b) acts intended to cause death or serious bodily injury to one or more members of the general population or segments of it, or
 - (c) acts involving lethal or serious physical violence; and
 - (2) they are done *with the intention* of provoking terror in the general public or a segment of it or compelling a government or international organization to do or abstain from doing something; and
 - (3) they correspond to an offence under the universal terrorism-related conventions (or, in the alternative, they correspond to all elements of a serious crime defined by national law).¹⁷

¹¹ Article 14 ECHR and Article 1 of Protocol 12 to the ECHR; Article 2 (1) and Article 26 ICCPR.

¹² ECtHR, *Sunday Times v. UK*, 26 April 1979, para.49: “the law should be ... formulated with sufficient precision to enable them – 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.”

¹³ ECtHR, *Kokkinakis v. Greece*, Application no. 14307/88, 25 May 1993, para. 52.

¹⁴ See generally, [ODIHR Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework](#) (2018), pp 35- 36.

¹⁵ [UN Security Council Resolution 1566 \(2004\)](#), S/RES/1566 (2004), para. 3.

¹⁶ UN Special Rapporteur on Counter-Terrorism and Human Rights, Report to the UN Commission on Human Rights, UN Doc. E/CN.4/2006/98, 28 December 2005, para. 42.

¹⁷ See UN Special Rapporteur on Counter-Terrorism and Human Rights, *Annual Report: Ten areas of best practices in countering terrorism*, UN Doc. [A/HRC/16/51](#), 22 December 2010, Practice 7 (Model definition of terrorism) at para. 28; and [UN Security Council Resolution 1566 \(2004\)](#), S/RES/1566 (2004), para. 3. On the definition of “terrorism” within the OSCE context, see [ODIHR-TNTD/SPMU Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach](#) (2014), pages 27-30. See also e.g., ODIHR, [Opinion on the Draft Law of Tunisia Related to the Fight against Terrorism and Prevention of Money Laundering](#), 9 December 2013, paras. 18-27. See also, UNODC, [Model Legislative Provisions Against Terrorism](#) (2009), page 12: “It is understood, in line with the International treaties, that the conducts described therein have to be criminalized by States Parties when committed ‘unlawfully’ and ‘intentionally’”.

This approach has also been reiterated by ODIHR in its legislative assistance and other programmatic work.

2. GENERAL REMARKS ON THE PROPOSED DEFINITION

9. The 2019 Final Report of the CDCT Sub-Group for the Purpose of Examining the Feasibility of Elaborating a Definition of Terrorism concluded that the current wording of Article 1 of the Warsaw Convention does not encompass all forms of terrorism currently prevalent and that merely updating the Appendix containing the list of relevant UN counter-terrorism treaties would not remedy this deficiency, in particular because of the sectorial nature of the UN treaties listed in the Appendix.¹⁸ It also provided an overview of the main characteristics of a possible European definition of “terrorism”. The purported aim of the proposed definition, as underlined by the Bureau of the CDCT, is to *“better reflect contemporary trends in terrorism, enable more comprehensive police and judicial cooperation under the Convention and its Additional Protocol, improve the compatibility of these two aforementioned legal instruments with domestic and EU law as well as current and prospective UN law and practice, enhance legal certainty and the rule of law in the application of Council of Europe instruments pertaining to terrorism, and finally provide a more concrete basis for Council of Europe activities [in this field]”*.¹⁹ The new proposed definition needs to be viewed against these objectives. It is based on the definition of Article 3 of EU Directive 2017/541 on Combatting Terrorism. It appears to depart from that definition only in limited aspects to take account of the framework of the Warsaw Convention and its additional protocol of 2015.
10. At the outset some general observations can be made with respect to the proposed definition. In the past two decades and in the wake of large-scale terrorist crimes committed in Europe and the OSCE region more broadly, there has been a growing trend to adopt ever-broader definitions of terrorism, in international instruments and in national legislation.²⁰ The text of the proposed definition needs to be considered in this context, in light of the reality of how terrorism-related offences have been developed – and interpreted and applied – expansively around the globe, with very serious adverse consequences for human rights protection and for the legitimacy of criminal law responses. As noted before, broad or vague definitions of terrorism have led to arbitrary or even abusive application as mentioned above (see paragraph 6).²¹ The breadth and uncertainty of the definition of “terrorism” must also be considered together with the trend in counter-terrorism legislation to expand the use of offences criminalizing broadly defined ancillary, preparatory or inchoate offences, such as various forms of support for, association with, encouragement, provocation or incitement to terrorism. This reflects the growing focus on the willingness to prevent an ultimate harm by criminalizing conduct before the actual causing of that harm, which raises concerns as to the principles of legal certainty, and that remoteness should be limited in criminal law²² and potential

¹⁸ CDCT Sub-Group for the Purpose of Examining the Feasibility of Elaborating a Definition of Terrorism, [2019 Final Report](#), p. 3.

¹⁹ *Ibid.* p. 2.

²⁰ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders, A/HRC/40/52, paras. 34-35.

²¹ See e.g., [ODIHR Comments on the Law on Combatting Terrorism of the Republic of Uzbekistan](#) (20 December 2019); and the [ODIHR Note on the Shanghai Convention on Combating Terrorism, Separatism and Extremism](#) (21 September 2020). See also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders, A/HRC/40/52, para. 34. See also: [ODIHR Submission for the Call for Inputs: Global Study on the Impact of Counter-Terrorism Measures on Civil Society and Civic Space](#), 16 January 2023.

²² i.e., that there should be a close connection between the individual’s acts and any harm it engenders or risk of harm arising, meaning that individuals cannot be prosecuted absent a meaningful proximate link between their behaviour and the ultimate wrong (see e.g., [ODIHR Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework](#) (2018), pp. 37-38)

discriminatory impact when the constitutive elements of such preparatory or ancillary offences are not strictly circumscribed.²³

11. Moreover, although *prima facie* simpler, moving from the existing inductive approach outlining a narrow definition of terrorism, applicable only to certain specific circumstances as listed in the Annex, to a single, all-encompassing definition of terrorism runs the risk of over-inclusiveness. This is deeply problematic from a rule of law perspective and the principle of legality because it leaves wide discretion to the authorities and potential for arbitrary application. In order **to offset this risk, reduce potential discretionary application by implementing authorities and legal uncertainty, and enhance compatibility with the principle of legality, it is essential to clearly define and strictly circumscribe each of the constitutive elements of the proposed definition of the criminal offence.** This is all the more important given the application of extensive or additional counter-terrorism powers and the application of different investigative or judicial procedures to a person charged with such a terrorist offence. Also, a broad and over-encompassing definition of “terrorist offence” could also have the effect of implicitly endorsing comparable approaches as can be observed beyond the EU/Council of Europe.
12. Furthermore, as noted above, the proposed definition resembles the definition of the EU Directive 2017/541. The latter definition has, however, been subject to strong criticism on human rights and rule of law grounds for its breadth and uncertainty, and consequent potential arbitrary application and interferences with the exercise of human rights. With regards to the introduction of new ancillary, preparatory or inchoate offences pursuant to Directive 2017/541, the EU Fundamental Rights Agency’s (FRA) 2021 research report on the human rights impact of the Directive in EU Member States²⁴ found that the Directive’s broad definitions of “terrorist offence” and “terrorist group” *“makes the scope of the newly introduced offences in Member States’ legislation, which are defined through their relationship to these broadly conceived criminal acts, unclear.”*²⁵ The FRA noted concerns that, in some EU Member States *“the use of counter-terrorism legislation and measures, is expanded to activities that are not of such a strictly defined terrorist nature”*. These include those of non-violent anarchist or separatist movements, public protests of various types, and non-governmental organisations or non-EU nationals.²⁶ This observation of FRA was made in the context of the expansive notion of terrorism, especially in relation to the Directive’s *“third aim: seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation”*,²⁷ which departs from the international approach and is overly vague. Therefore, transposing this EU Directive 2017/541 definition, at least to a great extent, to the Warsaw Convention without the caveats provided in the preamble of the Directive and further context and without addressing the aforementioned concerns raised in respect of the challenges with the implementation and application of the Directive, warrants careful consideration of the approach taken.
13. Finally, it is noted that the Warsaw Convention does not include a general clause stipulating that all provisions of the Convention, including the definition of “terrorist offence” must respect international human rights guarantees. Such clauses exist in the EU Directive and in Article 12 of the Warsaw Convention but only with respect to Articles 5

²³ See e.g., UNODC, *Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism* (2019), noting for instance that the definition of the mental element (*mens rea*) for support or preparatory offences is particularly significant in terms of gender implications.

²⁴ EU Fundamental Rights Agency (FRA), *Directive (EU) 2017/541 on Combatting Terrorism: Impact on Fundamental Rights and Freedoms Summary* (2022). The full study of 2021 is available at <https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-directive-combating-terrorism_en.pdf>.

²⁵ *Ibid.* page 4.

²⁶ *Ibid.* page 9.

²⁷ *Ibid.* page 9.

to 7 and 9 of the Convention on public provocation, recruitment, training and ancillary offences. In any case, as practice and criticism to date make very clear, such clauses are not an adequate substitute for narrow and specific wording in the definition of terrorist acts or of the related offences, and strict implementation and oversight.

3. CONSTITUTIVE ELEMENTS OF THE “TERRORIST OFFENCE”

3.1. Actus Reus (Criminal Conduct)

14. The proposed provision seeks to adopt a generic definition of “terrorist offence”, and therefore the *actus reus* is likely to be broader than in the existing definition. However, as underlined above, there is even more need in this case to clearly and strictly circumscribe the constitutive elements of the offence, including the *actus reus*. Some of the terminology used in Article 1 (1) to define the reprehensible acts or conducts appear overly broad or vague, thereby not in line with the principle of legality and potentially subject to erroneous or arbitrary interpretation and discriminatory application, which as a consequence may have far-reaching implications on the exercise of human rights and fundamental freedoms. For example:
 - The proposed definition in Article 1 chapeau includes a reference to acts that “given their nature or context, *may seriously damage a country or an international organisation*”. The nature of the “*serious damage*” remains vague and broad, as it is unclear who and according to what criteria may decide that certain actions constitute serious damage. The broad concept of damage to a country is unlikely, without further specification, to meet standards of foreseeability. With such a wording, there is a real risk that advocating causes with economic implications, criticizing governmental action and failures deemed to affect standing and influence in the world, or more broadly challenging laws or unjust structures (either perceived or real), other acts of protest or opposition, or defence of human rights could fall within the scope of this definition. Furthermore, the proposed definition refers to acts that “*may*” cause such serious damage, not that have in fact *caused* (or would unavoidably lead to) such damage, meaning that it could readily be interpreted as arising even where no damage of any type has actually occurred and in cases where a future occurrence of such damage is not a certain or even likely outcome; this is notwithstanding the separate criminalization of attempt as an inchoate offence. Covering damage that ‘may’ potentially arise, without further specification, raises issues with respect to a lack of legal certainty and regarding the above-mentioned principle that remoteness must be limited in criminal law. Also, the reference to “*a country*” is resonant of broad concept or set of criminal provisions of “crimes against the state”, which is especially problematic due to its potential for arbitrarily application. The reference to “*international organisation*”, although not new, may also be overly broad, depending on how “*international organisation*” is defined.
 - Article 1 (1) (d) refers to “*causing extensive destruction of a government or public facility, a transport system, an infrastructure facility, a public place or private property likely to endanger human life or result in major economic loss*”. Through a potential overbroad interpretation, fundamental rights and freedoms, such as legitimate protest, which is protected by Article 11 ECHR and Article 21 ICCPR, could be disproportionately constrained. This right protects protests that are potentially disruptive. Moreover, the degree of probability required to be “*likely to endanger human life*” is unclear, and contrasts with the language in sub-paragraphs (g) and (h) which refer to “*...the effect of which is to endanger human life*”. Furthermore, it could be disproportionate to criminalise as a terrorist offence action

(including strikes or other peaceful protest) which is “likely” to result in “*major economic loss*” to an undefined range of persons. The wording “*major economic loss*” and “*private property*” are also broad and could be applied to vast situations. It is significant that this provision is limited to ‘*causing extensive destruction*’, but what this means in practice for any individual participating in but not committing the crime depends on, among others, modes of liability and the scope of related terrorist offences. There is also no definition of what can be considered “extensive”, therewith leaving further room for flexibility. These considerations are especially important in light of frequent controversies surrounding the law and practice of intent requirements in many states, especially in the context of exercise of the right to participate in peaceful protest (see with respect to intent sub-section 3.2). While certain actions may be the subject of public order offences, it is submitted that it would not be legitimate to extend counter-terrorism laws to legitimate protest actions owing to the powerful stigma and delegitimising effect of the terrorist label.

- Article 1 (1) (f) of the proposed definition refers to “*research into, and development of, chemical, biological, radiological or nuclear weapons*”. The phrasing as it stands runs the risk of potentially capturing legitimate academic or scientific research. Moreover, it is unclear what “research” would entail, what the delineation is between research and development for the purpose of this definition and whether research for peaceful purposes are excluded from the scope of this definition. **While the aims defined in paragraph 2 of the proposed definition would help confining the abovementioned actions, there is nevertheless the risk that the proposed definition expands the scope of Article 1 to actions that are *prima facie* innocuous and do not cause harm in and of themselves** (see also paragraph 26 below on exception clauses). This may have a chilling effect on the right to freedom of expression and to seek, receive and impart information under Article 10 ECHR, as well as the rights to education and the protection and promotion of academic and scientific freedom under Articles 12 and 15 of the International Covenant on Economic, Social and Cultural Rights.
- Article 1 (1) (i) of the proposed definition simply refers to “*system or data interference that causes extensive damage to an information or computer system*”. It is noted that sub-paragraph (i) of Article 4 of the EU Directive 2013/40/EU defines illegal system interference as “*seriously hindering or interrupting the functioning of an information system by inputting computer data, by transmitting, damaging, deleting, deteriorating, altering or suppressing such data, or by rendering such data inaccessible, intentionally and without right*” and refers to illegal data interference in Article 5 of the same Directive as “*deleting, damaging, deteriorating, altering or suppressing computer data on an information system, or rendering such data inaccessible, intentionally and without right.*” Without such qualifiers that more strictly circumscribe its scope, the provision may potentially cover a broad range of acts.²⁸ **It would therefore be recommended to revisit the proposed definition, adding more qualifiers and narrowly circumscribing the definition. Moreover, this provision does not appear subject to any requirement that the conduct causes a danger to life or even to economic interests and should be supplemented accordingly.**
- Article 1 (1) (j) also covers, as part of the proposed definition, the *threat* of committing any of the acts mentioned in subparagraphs (a) to (i). The inclusion of an inchoate offence under the scope of the proposed definition appears problematic in

²⁸ Cf. Articles 4 and 5 of the *Budapest Convention on Cybercrime* (ETS No. 185), which cover unlawful interference with both data and information systems.

several ways. First, it is questionable whether mere threats, which generally constitute evidence of the intent or *mens rea* of the “terrorist offence”, without any concrete acts or *actus reus*, reaches the level of seriousness required to constitute in and of itself a “terrorist offence”. Second, if not strictly and narrowly defined, there would be a high risk of criminalizing the mere legitimate exercise of the right to freedom of expression. Third, it is noted that other ancillary, preparatory or inchoate offences – and their respective constitutive elements – are actually provided in other provisions of the Warsaw Convention and its Protocol and it is unclear why threats would be treated any differently. The reference to threats seems particularly problematic in relation to vague formulations contained in sub-paras (d) and (f)-(i). If the reference to “threat” were to be kept, at the very minimum, the requirements for a punishable “threat” should be defined more precisely, including e.g., that it concerns an unambiguous and immediate threat, with the specific intent of making the target reasonably believe that the perpetrator would have the capacity to commit the terrorist offence, and it would require evidence of the “terrorist” aim (see below). **The inclusion of “threats” as one of the possible reprehensible acts should be reconsidered entirely. If nevertheless retained, the notion of “threats” should, at a minimum, be narrowly defined with appropriate qualifiers, connecting it to a real and immediate danger, when a perpetrator would have the capacity to commit such an offence or making the target reasonably believe in it.** Any qualifying and constitutive elements for each of these steps would need to be carefully considered.

3.2. Mens Rea

15. The general requirement that terrorist actions be committed ‘intentionally’ is an important safeguard in the first paragraph of Article 1. As currently worded, however, the *mens rea* in certain components of Article 1 is not sufficiently clear. The nature of the “intent” is not specified and should be clarified in order to ensure greater foreseeability in the application of the definition. This is notable in the context of acts of terrorism defined by their consequences, specifically Article 1(1)(d), (g), (h) and (i). While the first paragraph of Article 1 refers to acts committed intentionally, Article 1(1) (d), (g), (h) and (i) are silent on whether the *consequences* outlined therein, for instance the intention to or creating real danger to human life, should also be intended for an act to satisfy the definition of terrorism (see for exceptions to human rights under sub-section 4). **To clarify and more strictly circumscribe the *mens rea*, the proposed definition should specify that the consequences outlined therein are also intended, for an act to qualify as a “terrorist offence”.**
16. On a side note, regarding ancillary, preparatory or inchoate offences, it is also essential that the nature of the intent of all responsible, and the relationship between the conduct, intent and the ‘aims’ specified in respect of all responsible individuals is clearly defined.

3.3. “Terrorist” Aims/Motives

17. Terrorism is often considered a special (dual) intent crime, linked to the particular nature – and often the onerous sanctions – of terrorism in criminal law.²⁹ The individual should not only intend to carry out the conduct but also intend to make the relevant contribution to a ‘terrorist’ act by spreading fear or terror or coerce public authorities or international

²⁹ See Special Tribunal for Lebanon, [Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging](#) (2011), p. 3, which states: “On the basis of treaties, UN resolutions and the legislative and judicial practice of States, there is convincing evidence that a customary rule of international law has evolved on terrorism in time of peace, requiring the following elements: (i) the intent (*dolus*) of the underlying crime and (ii) the special intent (*dolus specialis*) to spread fear or coerce authority; (iii) the commission of a criminal act, and (iv) that the terrorist act be transnational.”

organizations (special intent). The latter is reflected in Article 1 (2) (a) and (b) of the proposed definition referring respectively to the aim of “seriously intimidating a population” or “unduly compelling a government or an international organisation”.

In addition, Article 1 (2) (c) notes that the actions defined in paragraph 1 of the proposed definition should 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.*”

18. While the first two aims mentioned under paragraph 2 are in line with those stated in the model definition proposed by the Special Rapporteur on Counter-terrorism and Human Rights in 2010 and with other international instruments, this third aim is not. Most definitions, including the UN Draft Convention, refer solely to the aims of intimidating a population or compelling a government or international organisation. It is true that the third aim would not be new language, given its inclusion in the EU Directive, but it would expand the reach of such problematic language considerably and potentially influence its incorporation elsewhere, beyond the EU and Council of Europe context.
19. **The language in Article 1 (2) (c) is vague and highly unforeseeable³⁰ and its inclusion would significantly broaden the definition of the Warsaw Convention. It would render the definition particularly 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. Also, advocating for causes that run counter to connotations of social morals and values in a society, addressing issues such as inequality, defending or promoting the rights of certain minority or marginalized groups, such as the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) people in the face of stiff public opposition could be deemed as intended to cause destabilisation to social structures.³¹ In this respect, it must be reiterated that a vibrant democracy also implies the expression of views that may “offend, shock or disturb” the state or any sector of the population, including information or ideas contesting the established order or advocating for a peaceful change of the Constitution or legislation by, for example, advocating for the decriminalization of abortion, asserting a minority consciousness, protecting or promoting the human rights of LGBTI people, calling for regional autonomy, or even requesting secession of part of the country’s territory.³²

4. LACK OF EXCEPTIONS OR EXCLUSION CLAUSE TO SAFEGUARD LEGITIMATE ACTIVITIES

20. The breadth and scope of the proposed definition may trigger far-reaching responses that may unduly thwart or punish a range of legitimate activities. There is no clause in the proposed definition aiming to safeguard legitimate activities, especially the exercise of human rights and fundamental freedoms and activities of human rights and humanitarian organizations, or create exceptions or exclusion clauses for example, as one sees in some other contexts.³³

³⁰ As noted before in para 13 of the present Note.

³¹ Amnesty International, Dangerously Disproportionate: The Ever Expanding National Security State in Europe, <<https://www.amnesty.org/en/documents/eur01/5342/2017/en/>>

³² See ODIHR-Venice Commission, *Guidelines on Freedom of Association* (2015), para. 182.

³³ For instance, exceptions to ensure that those engaged in genuine human rights and humanitarian work are not unduly restricted in their work and to protect legitimate activity of lawyers, human rights defenders, teachers, doctors, journalists, artists, etc. See e.g., UN Special Rapporteur on Counter-terrorism and Human Rights, 2019 Report, [A/HRC/40/52](#), para. 75 (f) on exemption of humanitarian action,

21. Given the wide scope of conduct that could be criminalised under the proposed definition read together with ancillary offences, which may extend to the provision of humanitarian or legal assistance, advocacy or acts of peaceful protest, an exception for humanitarian or other legitimate civil society action should be clearly included.
22. It is noted that the Directive 2017/541 specifically states that “[n]othing in this Directive should be interpreted as being intended to reduce or restrict the dissemination of information for scientific, academic or reporting purposes” and that “[t]he expression of radical, polemic or controversial views in the public debate on sensitive political questions, falls outside the scope of this Directive”. While this language is not sufficiently comprehensive, it nevertheless sends an important message and acts as a safeguard against overbroad application. However, no similar exceptions or exclusion are envisaged to more narrowly circumscribe the scope of the proposed definition.
23. The report of the Special Rapporteur on Counter-terrorism and Human Rights of 2020 on the impact of counter-terrorism measures on civic space recommended that “Definitions of terrorism and of violent extremism in national laws must not be overly broad and vague. They must be precise and sufficiently narrow to not include members of civil society or non-violent acts carried out in the exercise of fundamental freedoms.”³⁴ The ODIHR report on foreign terrorist fighters underlines the importance of providing for “careful, narrowly constructed but effective exceptions” to ensure that those engaged in genuine human rights and humanitarian work are not unduly restricted in that work, while noting however that such exceptions are no substitute for clear terrorism provisions that are strictly construed.³⁵
24. **In light of this, the proposed definition should be supplemented to include clear exceptions or exclusion clauses to safeguard legitimate activities, especially the defence or exercise of human rights and fundamental freedoms, activities of human rights and humanitarian organizations, and other legitimate activities, such as for education, scientific and academic research, legal assistance, journalistic or artistic purposes.**

[END OF TEXT]

calling the Security Council to “unambiguously exempt humanitarian action from its counter-terrorism measures and expressly clarify that humanitarian protection and assistance must never be conceptualized as support for terrorism or suppressed and criminalized on that basis”; and [ODIHR Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework](#) (2018), pages 26-28. Exemptions for humanitarian relief organizations or other legitimate exercise of human rights, including freedom of peaceful assembly, freedom of expression, right to strike, as done by other states may be instructive, such as in the New Zealand Terrorism Suppression Act 2002, sections 9(1) and (2), which explicitly allow for the provision of food, clothing and medicine, even to designated terrorist entities as far as is necessary to satisfy essential needs; Section 5 of the definition also states the following: “To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action is not, by itself, a sufficient basis for inferring that the person (a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or (b) intends to cause an outcome specified in subsection (3)”. Other states’ laws provide explicit exemptions for humanitarian work; see e.g., Article 260^{ter} of the [Swiss Penal Code](#) specifies that the criminal offence of participating in a terrorist offence “does not apply to humanitarian services provided by an impartial humanitarian organization, such as the International Committee of the Red Cross, in accordance with Art. 3 common to the Geneva Conventions of August 12, 1949”. See also Article 260^{quinquies} (3) of the Swiss Penal Code, which also provides that “The act is not considered to be financing of terrorism when it aims to establish or re-establish a democratic regime or the rule of law, or to enable the exercise of human rights or the protection of them”. [Canadian Federal Criminal Code](#), S83.01, seeks to exclude actions which cause: “interference with or serious disruption of an essential service, facility or system, whether public or private” if such disruption was caused by ‘advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (c)’.

³⁴ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders, [A/HRC/40/52](#), para 75. See also the Special Rapporteur’s 2023 Global Study on the Impact of Counter-Terrorism on Civil Society & Civic Space, available at <<https://defendcivicspace.com/>>.

³⁵ [ODIHR Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework](#) (2018), pages 26-28.