



## **International Commission of Jurists**

### **Response to the European Commission Consultation on Inciting, Aiding or Abetting Terrorist Offences**

#### **Executive Summary**

In this response, the International Commission of Jurists (ICJ) sets out its views on the human rights compatibility of offences of incitement to terrorism, and on the appropriate limits of such offences in European Union law as well as in the national laws of European states. The ICJ considers that:

- Incitement to terrorism should be a criminal offence only where there is a subjective intention to incite acts of terrorism, and where the speech concerned causes the commission of an act of terrorism or an imminent risk of such an act; these principles, reflected in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, should provide the benchmark for any further EU legislation as well as for implementation in national law.
- There is a risk that broadly-worded offences of *apologie*, encouragement, justification or glorification of terrorism will have a chilling effect in inhibiting constructive debate, in particular in minority communities.
- Such broadly worded offences are also likely to be counter-productive in alienating communities which perceive the legislation as directed against them.
- Offences of incitement to acts of terrorism should be based on a definition of terrorism that is sufficiently precise to create legal certainty.
- The meaning of incitement in the Framework Decision is already wide, since it is based on a wide definition of terrorism, and also includes incitement to ancillary offences such as knowingly funding organisations identified as terrorist. The scope of incitement under the Framework Decision should not be further extended to include conduct such as *apologie*, encouragement, justification or glorification of terrorism which go beyond either direct or indirect incitement to acts of terrorism.

- Although Article 5 of the Council of Europe Convention on the Prevention of Terrorism includes important safeguards for freedom of expression, in practice, it is being implemented in some national laws of European states in a way that does not comply with freedom of expression, contrary to Article 12 of the Convention.
- In particular, the laws recently enacted in both the United Kingdom, and in the Russian Federation, are likely to breach the principle of legality, and to allow for disproportionate and discriminatory interferences with freedom of expression;
- Effective and human rights compliant national laws on incitement to terrorism would best be achieved not by further EU legislation, but by non-legislative clarification of the current requirements of Article 4, and by EU monitoring of and support for national measures. In this regard the new EU Fundamental Rights Agency could have an important role.

In conclusion, the ICJ considers that the following elements should set the limitations to offences of incitement to terrorist acts, and should form the basis for any new definition of incitement to acts of terrorism in EU law:

- That there must be subjective intent to incite an act of terrorism;
- That there must be a causal link to a violent act of terrorism, or an imminent risk of such an act;
- That the offence of incitement must be linked with a definition of terrorism sufficiently precise that it allows for legal certainty;
- That the offence of incitement to terrorist acts should not extend to incitement to offences which are not directly linked to violent acts of terrorism, for example offences of funding organisations involved in terrorism, or to offences which do not fall within the meaning of terrorism, such as public order offences;
- That the offence must not criminalise justification or glorification of terrorism where it amounts to explanation or discussion of the circumstances leading to terrorism, or debate on the causes of terrorism or the ideology of groups linked with terrorism.

In the view of the ICJ, such limitations are necessary at a national level to avoid unjustified or abusive application of the criminal law. More broadly worded offences of indirect incitement are likely to lead to disproportionate interferences with freedom of expression and to give rise to discriminatory application of the law, as well as to a perception of bias against particular groups.

## **I. Introduction**

The International Commission of Jurists is a non-governmental organization working to advance understanding and respect for the Rule of Law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva (Switzerland). It is made up of 45 eminent jurists representing different justice systems throughout the world and has 90 national sections and affiliated justice organizations. The International Commission of Jurists has consultative status at the United Nations Economic and Social Council, the United Nations Organization for Education, Science and Culture (UNESCO), the Council of Europe and the Organization of African Unity. The organization also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union.

The ICJ has a long history of work to uphold human rights and rule of law in states of emergency or situations where there is a threat of terrorism. The *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, agreed in 2004 by 160 jurists from around the world, drew on this experience to formulate principles for the protection of human rights in counter-terrorism. The ICJ monitors counter-terrorism developments worldwide, and the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, an independent panel established by the ICJ in 2005, has held hearings around the world to consider national experiences of the impact of terrorism and counter-terrorism measures on human rights protection.

The ICJ welcomes this opportunity to contribute at an early stage to the European Commission's consideration of the complex issues of incitement to acts of terrorism. The ICJ's particular concern in this area is the effect which offences of indirect incitement to terrorism may have in practice on the protection of human rights and the rule of law in European states. In this submission the ICJ will therefore first respond to question 7 of the questionnaire, on the compatibility of incitement offences with freedom of expression, and then to questions 3 to 6, 8 and 13 of the questionnaire.

### ***The international law framework for incitement to acts of terrorism***

Offences of incitement to acts of terrorism are supported by the international law duty on states to protect against acts of terrorism through the criminal law, an obligation which arises from international law on terrorism, but also from the positive obligation to protect under international human rights law. The obligation under Security Council Resolution 1624 (2005) to adopt necessary and appropriate measures to prohibit and prevent incitement to commit terrorist acts<sup>1</sup> is reflected at a European level, in the Council of Europe Convention on the Prevention of Terrorism, and in the European Union Framework Decision on Combating Terrorism. In the law of the European Convention on Human Rights (ECHR), it is well established that the state has obligations to protect the life and physical integrity of those within its jurisdiction<sup>2</sup> from the acts of private

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<sup>1</sup> SC Resolution 1624 (2005) Paragraph 1

<sup>2</sup> Article 2, Article 3, Article 8 ECHR.

individuals, through the maintenance of a sufficient legal framework, including criminal law offences where appropriate, and the effective enforcement of the law.<sup>3</sup> More specifically, Article 20 para.2 of the International Covenant on Civil and Political Rights (ICCPR) requires states to prohibit advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

At the same time, European Union (EU) Member States are subject to international human rights law obligations to protect freedom of expression, including under Article 10 of the European Convention on Human Rights (ECHR), 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). Freedom of expression as protected by the ECHR forms part of European Union law under Article 6 of the Treaty of European Union, and this protection is reflected in Article 11 of the Charter of Fundamental Rights of the European Union. The principle of legality, which requires that laws be sufficiently clearly formulated to be reasonably predictable in their operation, and to allow individuals to regulate their conduct appropriately, is protected by Article 7 ECHR as well as Article 15 ICCPR, and is a core principle of the rule of law.

The ICJ considers that international obligations to prevent incitement to acts of terrorism are capable of implementation in full compliance with EU Member States' human rights obligations, including the right to freedom of expression. As the ICJ affirmed in the Berlin Declaration, "safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the state." International and European Union counter-terrorism measures all affirm the importance of protecting human rights in effectively countering terrorism. It is this dual obligation which must be given practical effect in drafting and implementing offences of incitement.

### *Offences of incitement to acts of terrorism in practice*

The ICJ emphasises that great caution needs to be exercised in the criminalisation of speech, in particular political speech of the kind that is concerned in debates related to terrorism, armed conflict, or the ideologies or causes associated with them. In the experience of the ICJ, in Europe and elsewhere, laws criminalising such speech are in practice often abused, and lead to arbitrary or discriminatory restrictions on freedom of expression. In this regard, the ICJ is concerned at the recent trend in European states towards the criminalisation of a wider spectrum of speech offences, extending to broad categories of indirect incitement such as *apologie du terrorisme*, glorification, encouragement, or justification of terrorism. The breadth and indeterminacy of these offences, in particular where they are tied to wide definitions of terrorism in national law, threaten the principle of legality, a core element of the rule of law.

Furthermore, in practical terms, the ICJ considers that such offences may prove to be counter-productive, in alienating communities which perceive the offence as directed

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

against them, and expect that there will be further bias in its application in practice. This belief is sometimes supported by political rhetoric in EU Member States, which suggests the selective application of these laws to religiously-motivated terrorism. 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>4</sup>

**In light of these concerns, the ICJ considers it essential that national legislation on incitement to acts of terrorism , including legislation implementing Article 4 of the Framework Decision, should define incitement to acts of terrorism in narrow terms, with sufficient safeguards to protect freedom of expression.**

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<sup>4</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)

## II: Responses to the Questionnaire

**Question 7:** *Could you provide any information/analysis/assessment on the compatibility between freedom of expression and the notion of incitement, whether direct or indirect, to commit terrorist offences? Would you have any information / analysis on concrete cases examined by the competent authorities or courts?*

The fundamental importance of freedom of expression is recognised in international human rights law, as providing one of the essential foundations of a democratic society.<sup>5</sup> Political speech is accorded particular protection<sup>6</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>7</sup> or which offend, shock or disturb.<sup>8</sup> Prosecutions for incitement to acts of terrorism of their nature interfere with rights of freedom of expression, and will often impact on political speech. Such interferences must meet the requirements in Article 10 ECHR that they be prescribed by law, necessary in a democratic society to serve specified legitimate aims, and non-discriminatory (Article 10 read with Article 14 ECHR).<sup>9</sup>

### *Prescription by law: the principle of legality*

The Article 10 requirement that limitations on rights be adequately prescribed by law is of particular concern in relation to offences of indirect incitement which may often have a broad and uncertain scope. The Article 10 requirement reflects the principle of legality (*nullum crimen sine lege*) protected by Article 7 ECHR, which requires that criminal offences must be sufficiently clearly formulated for the individuals to foresee to a reasonable extent the application of the law and to regulate their conduct so as to avoid breach of the law.<sup>10</sup> The Berlin Declaration, in principle 3, affirms the importance of this principle in regard to counter-terrorism laws.<sup>11</sup>

### *Necessity and Proportionality*

The principle of proportionality requires restraint in resorting to criminal proceedings, particularly where other means are available for replying to criticism or attacks. Nevertheless, where remarks incite to violence against public officials or other individuals or sectors of the population, in particular in situations where there is a threat

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<sup>5</sup> *Handyside v UK*, 1 EHRR 737

<sup>6</sup> *Lingens v Austria* (1986) 8 EHRR 407

<sup>7</sup> *Surek and Ozdemir v Turkey* App No 23927/94 para.61; *Ozgur Gundem v Turkey* App No 23144/93 para.70

<sup>8</sup> *Handyside v UK*, *op cit*.

<sup>9</sup> A right to non-discrimination is further provided for in Protocol 12 ECHR.

<sup>10</sup> *Sunday Times v UK*. (1970) 2 EHRR 245; Particular latitude may be accorded in relation to speech offences where it is inherently difficult to formulate precisely their application in particular circumstances: *Ozturk v Turkey*, App No 22479/93.

<sup>11</sup> Principle 3 of the Berlin Declaration states that: “States should avoid the abuse of counter-terrorism measures by ensuring that persons suspected of involvement in terrorist acts are only charged with crimes that are strictly defined by law, in conformity with the principle of legality.”

of terrorism or separatist conflict, states may impose constraints, including criminal sanctions, where they react “appropriately and without excess” to the remarks.<sup>12</sup>

In assessing whether the imposition of criminal liability for speech is proportionate and serves a pressing social need, the key question is therefore whether the speech amounts to incitement to acts of terrorism.<sup>13</sup> For speech to amount to incitement the European Court of Human Rights considers that it must, in the particular context of the case, be connected with a subsequent act of terrorism or a heightened risk of such an act.<sup>14</sup> Publication of statements by members of organisations considered to be terrorist, or of statements strongly critical of government policy, cannot in themselves justify the imposition of criminal liability.<sup>15</sup> The right of the public to be informed of different perspectives on a particular political situation, even where those perspectives are unpalatable to the government, must be taken into account.<sup>16</sup>

### *Discrimination*

Particular caution needs to be exercised in the prosecution of offences of incitement to acts of terrorism, that there is not disproportionate application of the law to particular religious or ethnic communities associated with particular causes. The right to non-discrimination in the protection of freedom of expression is guaranteed in the ECHR (Article 14 read in conjunction with Article 10 ECHR), as well as in the ICCPR (Article 2 para.1), and CERD.<sup>17</sup> Where offences of incitement to terrorism are broadly drafted, with a wide scope for discretion in their application, the risk of discriminatory application is considerable. Furthermore, it is the experience of the ICJ that in many jurisdictions the enactment of such offences, irrespective of how they are applied in practice, is perceived

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<sup>12</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 as a representative of a terrorist organisation

<sup>13</sup> *Erdogdu and Ince v Turkey*, op cit, para.52, *Surek and Ozdemir v Turkey*, op cit.

<sup>14</sup> *Ozturk v Turkey*, paras.69-71. “The Court therefore discerns nothing which might justify the finding that Mr *Ozturk* had any responsibility whatsoever for the problems caused by terrorism in Turkey and considers that the use of the criminal law against the applicant cannot be justified in the circumstances of the present case...” para.69. Contrast *Ceylan v Turkey* App No 23556/94 where there was a violation of Article 10 where the applicant criticised “state terrorism” by the Turkish military but this did not incite to violence, with *Surek v Turkey (No.1)* App No 26682/95 where prosecution of a newspaper for the publication of letters which detailed torture by state agents was considered justified as the language of the letters amounted to an “appeal to bloody revenge” in the context of a serious security situation in South-East Turkey, representing recourse to violence as necessary and justified.

<sup>15</sup> *Ozgur Gundem v Turkey*, App No 23144/93 para.63

<sup>16</sup> *Ozgur Gundem v Turkey*, op cit, para.70; *Surek and Ozdemir v Turkey* App No. 23927/94

<sup>17</sup> Article 5 (d)(viii), States undertake to guarantee freedom of expression rights without discrimination on the basis of race, colour or national or ethnic origin. These standards are also reflected in Principle 4 of the Johannesburg principles which states: “in no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.”

as biased against particular religious or ethnic communities. Such laws therefore risk having a counter-productive effect in alienating already marginalised groups.

### *The Johannesburg Principles*

Given the difficulties of protecting freedom of expression where there are broadly-worded offences of incitement to terrorism, and past experience of the abuse of such offences, the ICJ considers that the authoritative standards set out in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* should provide the benchmark for offences of incitement to acts of terrorism, including in European law.<sup>18</sup> Principle 6 states that:

“Expression 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;
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.”<sup>19</sup>

The ICJ considers that this standard, in requiring a subjective intention to incite, as well as an imminent risk of violence, sets out important safeguards to ensure that offences of direct or indirect incitement interfere with freedom of expression only to an extent that is necessary, proportionate, and serves a pressing social need, and to ensure that the scope of incitement offences is sufficiently constrained to prevent unjustified discrimination in their application. Subjective intention to incite to a violent act of terrorism is important to guard against the imposition of objective penal responsibility, which is prohibited in international law,<sup>20</sup> and which would allow for extensive intrusion into freedom of expression. The requirement of an imminent risk imposes the further safeguard that the speech concerned must have a real, as opposed to an abstract, connection with an actual or potential act of violence. **The ICJ considers that the standards set out in the Johannesburg principles should form the benchmark for any further EU legislation**

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<sup>18</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>19</sup> 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 which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring.”

<sup>20</sup> The Nuremberg Tribunal recognised members of three Nazi organisations to be guilty of particular offences, but rejected objective penal individual responsibility for membership of the group, unless the individual had participated voluntarily and acknowledged the criminal goals of the group. This is reflected in the International Criminal Tribunal for the Former Yugoslavia: Report of the Secretary General pursuant to para.2 of Security Council Resolution 808 (1993) 3 May 1993 (S/2/25704).



**on incitement to acts of terrorism, as well as for implementation of existing obligations under the Framework Decision.**

**Question 3:** *What are your views with regard to the fact that there is no legal definition of incitement in the Framework Decision?*

The ICJ does not consider that the lack of a definition of incitement in the Framework Decision is necessarily problematic, if the essential elements of the conduct to be criminalised are clear. The ICJ is concerned at the Framework Decision's wide definition of terrorism, and the extension of the offence of incitement to offences ancillary to acts of terrorism, such as funding of "terrorist groups".

As has been noted above, it is a condition of compliance with rights to freedom of expression (Article 10 ECHR) as well as with the principle of legality (Article 7 ECHR) that any offence of incitement in national law should be sufficiently precise to predict its application in practice and to allow individuals to regulate their conduct so as to comply with the law.<sup>21</sup> Given that the Framework Decision does not take direct effect but falls to be implemented by national legislation, the lack of a definition of incitement in the Framework Decision is not necessarily problematic in terms of these standards. However there may be a concern that the lack of a clear definition at an international or EU level may contribute to varied and inconsistent legislation at a national level, as states adopt different interpretations of the obligation imposed by Article 4. If the essential elements of the conduct which the Framework Decision requires to be criminalised in national law are unclear, this may lead to national law offences in breach of the principle of legality, or of the right to freedom of expression.

The requirement in Article 4 for a criminal offence of incitement to acts of terrorism requires at a minimum an offence of direct incitement to acts of terrorism, that is, express calls for the commission of an act of terrorism. Offences of incitement to acts of terrorism may also criminalise some indirect incitement: speech which, though it does not expressly call for a particular act of terrorism, intends to incite and has the effect of inciting such acts. **The ICJ considers that, properly defined and applied, offences of incitement to acts of terrorism are sufficient to criminalise indirect incitement, without resort to broader offences of *apologie*, glorification, justification or encouragement of terrorism. It will often be the case that such offences cannot properly be considered as offences of "indirect incitement" since they refer to a far wider range of conduct than that which incites to acts of terrorism.**

At present, the scope of national law offences of incitement varies: the 2004 study for the Council of Europe found differing terms in the incitement offences applicable to crimes of terrorism in European states.<sup>22</sup> Furthermore, the scope of incitement offences in some

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<sup>21</sup> *Handyside v UK*, op cit; *Kokkinakis v Greece* (1993) 17 EHRR 397; *Muller v Switzerland*, (1988) 13 EHRR 212.

<sup>22</sup> Council of Europe, "*Apologie du terrorisme*" and "*incitement to terrorism*" (2004) Although it found that virtually all states criminalised incitement to terrorism, many as part of a general offence of incitement to commit crime, this was variously described as inducement, incitement, instigation, furthering, motivating

national laws may lack clarity or be disputed.<sup>23</sup> A number of elements are not explicit in the Framework Decision and may vary in incitement offences in national law. These include:

- the level of intent that is required to incite to an act of terrorism, and whether the requirement is one of intent to incite, or recklessness as to incitement.
- whether incitement extends only to incitement to a particular act of terrorism, or to a general category of such acts;
- whether there is a requirement for an act of terrorism to be actually committed or attempted as a result of the incitement for the offence of incitement to terrorism to be established;
- what degree of risk of an act of terrorism must result from the statement, for the offence of incitement to be committed.

In one respect the scope of incitement to acts of terrorism under the Framework Decision is already wide: the definition of terrorism, and of associated crimes, in Articles 1 to 3 of the Framework Decision, covers a wide range of conduct. Terrorism is defined in Article 1 of the Framework Decision, as extending to acts including extensive destruction of government or public facilities or infrastructures, where they 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. It is significant that this definition is not limited to national terrorism, or to acts of terrorism committed within or directed against the implementing state. The ICJ supports the conclusion of the EU Network of Independent Experts on Fundamental Rights, that the breadth of the definition of terrorism in the Framework Decision breaches the principle of legality.<sup>24</sup> This problem is reflected in national systems which may replicate the Framework Decision’s definition of terrorism, or even go beyond it.

Furthermore, the offence of incitement required by Article 4 also extends to acts which incite to “directing a terrorist group”,<sup>25</sup> participating in the activities of a terrorist group, including by supplying information or material resources, or by knowingly funding its criminal activities,<sup>26</sup> as well as aggravated theft, extortion or falsification of documents

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or counselling the commission of a crime, or publishing calls for violence, though the report notes that some of the variation in language may be attributable to translation. para.5.3.1.

<sup>23</sup> For example, in the UK debate on the Terrorism Act 2006, the government argued that it was unclear whether the scope of existing offences of incitement would include general calls for acts of terrorism, rather than a call for a particular terrorist act: Joint Committee on Human Rights, *Counter-terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, HL 75-I/HC 561-I, para.21 et seq.

<sup>24</sup> 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>25</sup> Article 2.2(a)

<sup>26</sup> Article 2.2(b)

with a view to committing terrorist offences.<sup>27</sup> The ICJ is concerned at the extension of the offence of incitement of acts of terrorism to cover incitement to such ancillary offences, which do not directly involve violent acts of terrorism. This problem would be exacerbated if incitement were to be broadly defined. The elements of intention to incite to an act of terrorism, and an imminent risk of an act of terrorism, must be present for a conviction of this kind to comply with freedom of expression.

**The ICJ considers that, if “incitement” in Article 4 were to be broadly defined to include glorification, justification or encouragement of terrorism then this, combined with the wide definition of terrorism and the range of terrorism offences to which it would apply, would make the scope of the prohibition under the Framework Decision highly indeterminate, in breach of the principle of legality, and would risk disproportionate or discriminatory interference with rights to freedom of expression. In order to safeguard against such over-broad definitions at a national level, an express clarification that incitement under Article 4 should be limited on the basis of the Johannesburg Principles would be beneficial.**

**Question 4:** *What are your views with regard to Article 5 of the recently adopted Council of Europe Convention on the Prevention of Terrorism (2005) in which the public provocation to commit a terrorist offence is defined as “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”?*

The ICJ considers that although Article 5 of the Council of Europe Convention contains safeguards for freedom of expression, it does not on its face set out a sufficient requirement for an imminent risk of acts of terrorism. The most significant concern with Article 5, however, relates to its implementation in national law, with insufficient regard for the human rights protections required by the Convention itself.

The ICJ recognises that Article 5 contains important safeguards designed to protect freedom of expression, in requiring subjective intent to incite, and objective danger of an act of terrorism being committed.<sup>28</sup> The ICJ considers however that Article 5 does not on its face require a sufficiently high standard of causation or risk to be established between speech and an actual or potential act of terrorism. Article 5 does not require that a terrorist offence must be actually committed for the offence of provocation to be established, neither does it require an imminent risk of a terrorist offence. It requires only that there be a “danger” of such an offence. The meaning of this term is unclear from the face of the Convention, but the explanatory notes suggest that it 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,

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<sup>27</sup> Article 3

<sup>28</sup> These safeguards are noted with approval in the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Schenin E/CN.4/2006/98, 28 December 2005, para.56.

shall be taken into account in the sense established by the case-law of the European Court of Human Rights.”

**The ICJ considers that in order to effectively protect freedom of expression, the Article 5 requirement that conduct should cause a “danger” of a terrorist offence should be interpreted as requiring a real and imminent risk of such an offence in the particular circumstances of the case, rather than a mere abstract danger. Such a test is supported by the Johannesburg Principles, as well as by the principles applicable under Article 10 ECHR, which requires that there should be a “pressing social need” for restrictions on freedom of expression. In the implementation of Article 5 in national laws, there should be an express requirement of immanent risk, in order to effectively ensure protection of freedom of expression in practice.**

It is significant that Article 12 of the Council of Europe Convention 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 obligations, in particular the right to freedom of expression, freedom of association and freedom of religion” as established in international law. Article 12 further makes explicit that measures taken under Article 5 must be “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 ICJ is concerned that the requirements of Article 12 are being given insufficient consideration in some measures of national implementation of the Convention, which dilute the safeguards against disproportionate interference with freedom of expression rights established in Articles 5 and 12 of the Convention.** To date, there have been few ratifications of the Convention, and the majority of Council of Europe states have yet to take steps to implement its provisions. However, there is significant concern in particular with the implementation measures enacted in the United Kingdom and the Russian Federation, that the requirement to criminalise indirect incitement under Article 5 is being used as justification for much more draconian legislation, which significantly intrudes on freedom of expression and may violate Article 10 ECHR. These concerns are considered further below in response to question 8.

**It is important that, in considering whether to legislate further on incitement to acts of terrorism, the European Commission should take full account of the difficulties of implementation being experienced with Article 4 of the Council of Europe Convention. There is a risk that a broad and insufficiently precise Framework Decision obligation to prohibit indirect incitement could lead to further unjustifiable inroads into freedom of expression.**

**Question 5:** *What are your views with regard to the analysis made in the explanatory report to the above mentioned Council of Europe Convention that the above-quoted provision would cover:*

- *dissemination of messages praising the perpetrator of an attack;*

- *denigration of victims*
- *calls for funding terrorist organisations*
- *other similar behaviour*

**In the view of the ICJ, where such acts are committed with intent to incite acts of terrorism, and where they lead directly to an act of terrorism or the imminent risk of such an act, they can legitimately be criminalised. Conversely, however, where such acts are not committed with the requisite intent, and do not lead to an act of terrorism or the immanent risk of such an act, their criminalisation would not serve a pressing social need and would risk non-compliance with Article 10 ECHR.**

For example, whether praise for a person who has been involved in acts of terrorism can legitimately be criminalised will depend on the context of the praise and to the intention and effect of the praise in that context, including who the statements were made to and whether they refer to a terrorist campaign that is still ongoing. In *Ozturk v Turkey*<sup>29</sup> for example, the ECtHR found a violation of Article 10 ECHR, where the applicant was prosecuted for publishing an approving biography of a leader of a Maoist organisation. Although the book gave moral support to his ideology, the Court considered that it could not be shown to have aggravated the separatist threat to Turkey, and therefore there was no pressing social need capable of justifying the interference with Article 10.

Whether these situations should fall within the meaning of provocation or incitement also depends on the definition of terrorism to which they relate. Calls for funding for “terrorist organisations” could cover a very wide range of conduct depending on the range of organisations listed or otherwise identified as terrorist. In particular, where the definition of terrorism relates to acts committed abroad, the criminalisation of statements which indirectly incite funding will be particularly problematic, as there may be an imperfect understanding of the political circumstances in the country concerned, and of the activities of the organisation to which funding is provided. There has been criticism in the United Kingdom (UK), for example, of the potential effect of the wide domestic law definition of terrorism, coupled with the offence of encouragement of terrorism, in criminalising statements which are made without intent to incite or encourage terrorism, but which approve the funding of a foreign organisation which refuses to condemn the use of serious disruption against an oppressive regime.<sup>30</sup> Criminalising speech which has such a weak and uncertain link with any act of terrorism risks violation of freedom of expression, and inhibits legitimate exercise of this right.

**Question 6:** *Are there any other situations that, in your view, could be covered by a provision of this type addressing indirect incitement to commit terrorist offences? Are there any situations that, in your view, should not be covered by a provision of this type?*

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<sup>29</sup> App No.22479/93

<sup>30</sup> Joint Committee on Human Rights, The Council of Europe Convention on the Prevention of Terrorism, First Report of Session 2006-07, HL Paper 26, HC 247, para.49

As has been stated above, the ICJ considers that the situations in which indirect incitement to acts of terrorism is criminalised, should be limited to situations where there is a subjective intent to incite, and an imminent risk that an act of terrorism will result from the incitement. Where these criteria are fulfilled, and where the offence is based on a determinate and adequately circumscribed definition of terrorism, and is applied in a way that is non-discriminatory, there is likely to be compliance with human rights law.

Broadly worded offences such as *apologie*, justification, glorification or encouragement of terrorism, should not be included within the scope of incitement. There are particular concerns that a number of legitimate, though sometimes difficult or unwelcome, forms of expression could be prohibited by such offences. These include, amongst others:

- Explanation of circumstances surrounding the resort to terrorist acts – for example, expression of understanding of the desperation of those who resort to suicide bombing in response to a repressive regime;
- Teaching and academic or media debate on the political situation in countries where there is armed opposition to the government, or concerning ideologies grounding terrorist movements;
- Debate within immigrant communities of the political situations in home countries where there is internal conflict or terrorist violence, including constructive debate on how to counter an oppressive or undemocratic regime;
- Dissemination – including by the media and by human rights organisations - of information on violations of human rights by a government, or criticism of a government for violations of human rights, for example those committed in suppressing a terrorist threat or in the course of an internal armed conflict;
- Media or NGO reporting of statements by terrorist groups, where such reporting is not intended to incite terrorism.

A broadly-worded offence of indirect incitement would affect these forms of expression not only through prosecutions, but also more subtly through the chilling effect that the threat of prosecution, and the uncertainty as to the boundaries of legitimate expression, would have on debate.

In addition, as a matter of criminal law policy, there is a need to maintain a clear separation between terrorist offences, including incitement to acts of terrorism, on the one hand, and public order offences, on the other. Legislation on incitement to acts of terrorism, therefore, should not extend to incitement to other offences involving the disruption of public order.

**Question 8:** *Could you provide any information/analysis/assessment on how Member States' legal systems deal with the question of the glorification and/or the apology of*

*terrorism or terrorist offences? If, for instance, a specific incrimination exists, how is the compatibility with freedom of expression guaranteed?*

The majority of European states criminalise incitement to acts of terrorism, either as a specific crime of terrorism or, more commonly, as part of more general offences of incitement to commit criminal activity.<sup>31</sup> Prior to the Council of Europe Convention on the Prevention of Terrorism, only three European states, France, Spain and Denmark, had made some form of indirect incitement to acts of terrorism criminal, through offences of *apologie du terrorisme*. However, following the agreement of the Council of Europe Convention, both the United Kingdom and the Russian Federation have enacted offences of indirect incitement, and new offences are proposed in the Netherlands and Belgium. **The ICJ is concerned at the emerging trend for national implementation measures to go further than is required by Article 5 of the Council of Europe Convention and thereby impose unnecessary and unjustifiable restrictions on rights to freedom of expression. The political invocation of international law obligations to prevent terrorism as a justification for measures restrictive of human rights, to an extent that is not justified by the terms of international agreements on terrorism, is of particular concern to the ICJ.**

It should be noted that, in European states where offences of *apologie* have been in place for some time, these laws have led to a very small number of prosecutions.<sup>32</sup> Furthermore, in Spain, the application of the offence of *apologie* has been limited by the Spanish Supreme Court in order to ensure compliance with freedom of expression concerns.<sup>33</sup> The Court held that offence should be restricted to circumstances where there is praise of a particular crime or of those who committed it; where the crime is presented as an alternative to the constitutional order; and where there is approval of criminal acts rather than “mere ideologically motivated statements”. In addition, the statement must carry a danger of inciting others to acts of terrorism.

#### *“Encouragement of terrorism” in the United Kingdom*

In the UK, section 1 of the Terrorism Act 2006 creates the offence of encouragement of terrorism, as a measure to implement Article 5 of the Council of Europe Convention on the Prevention of Terrorism and to allow for ratification of the Convention by the UK. The offence is committed by the publication of a statement “which is likely to be understood by some or all members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism.” The offence requires that the person publishing such a statement must either intend to directly or indirectly encourage the commission, preparation or instigation of acts of terrorism, or be reckless as to whether he does so.

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<sup>31</sup> Council of Europe report, “*Apologie du Terrorism*” and “*incitement to terrorism*” (2004)

<sup>32</sup> The Council of Europe report on *Apologie* and Incitement, op cit, reported that between 1992 and 2001 there were only four convictions in France for *apologie* (page 99) and in Denmark there had been no trials or convictions by 2004 (page 87). In Spain, by 2004 there had been about 12 cases with fewer convictions (page 170).

<sup>33</sup> Judgment 2/1997

“Encouragement” of terrorism includes statements which glorify terrorism and from which members of the public could reasonably infer that they should emulate the conduct glorified. “Glorification” is defined as “any form of praise or celebration.”

It is of particular concern that the offence of encouragement to terrorism is linked to the definition of terrorism in the Terrorism Act 2000, which is widely defined. Under the Act, terrorism includes serious violence against persons or property, or serious risk to the health or safety of the public or serious disruption of an electronic system, where such acts are designed to influence the government or international organisation or to intimidate the public – either in the UK or abroad – for a political, religious or ideological cause. The very wide definition of encouragement of terrorism, when read with the definition of terrorism in UK law, results in a criminal offence of very uncertain scope, which is likely to be difficult to apply in practice, and which is open to discriminatory application against the UK Muslim community.

The offence of encouragement of terrorism has been widely criticised in the UK for its breadth and indeterminacy and for its impact on freedom of expression. The Parliamentary Joint Committee on Human Rights (JCHR) concluded that the offence failed to meet the requirement in Article 12 ECHR that offences of provocation of terrorism should respect ECHR rights. In particular, the JCHR considered that the wide definition of terrorism led to a considerable risk that the offence of encouragement of terrorism would breach Article 10 ECHR; that the lack of a requirement to establish a danger of acts of terrorism as a result of the statements made fell short of the safeguards in Article 5 of the Convention; and the inclusion of the very vague concept of glorification of terrorism led to a “genuine difficulty of distinguishing between expressions of understanding, explanation or commemoration on the one hand, and encouragement on the other.” The JCHR concluded that the shortcomings of the offence were such that it would be incompatible with Article 12 of the Council of Europe Convention.<sup>34</sup>

A further concern with the UK offence of encouragement of terrorism relates to the requirement of intent, which is defined in the UK law to include both subjective intent and subjective recklessness as to whether terrorism will be directly or indirectly encouraged. When applied to a speech offence of such wide scope, the requirement only of recklessness as to whether some members of the public could be indirectly encouraged to terrorism, has the potential to disproportionately interfere with freedom of expression rights and to have a chilling effect on political speech.

#### *“Justification” of terrorism and extremism in the Russian Federation*

The Russian Federation, though not a European Union Member State, provides an important illustration of the potential for human rights-intrusive national measures in response to Article 5 of the Council of Europe Convention. The Law on Implementation

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<sup>34</sup> Joint Committee on Human Rights, *The Council of Europe Convention on the Prevention of Terrorism, First Report of Session 2006-07*, HL Paper 26, HC 247



of the European Convention on the Prevention of Terrorism,<sup>35</sup> enacted in July 2006, amends the criminal code to create a new offence of the dissemination of materials which “publicly justify terrorism”. These provisions criminalise a much wider range of speech than Article 5 of the Council of Europe Convention. It is a particular concern that the requirements of intention and a causal link with a danger of an act of terrorism, are absent from the Russian legislation.

In the Russian legislation implementing the Convention, the problem of the definition of terrorism, or other conduct which it is prohibited to incite, is particularly acute, since the prohibition on incitement extends not only to justification of “terrorism”, but also to justification of “extremism”. Extremism, defined in the Federal Law on Extremism of 2002, refers to a wide range of behaviour, including “the excitation of racial, national or religious strife, or social hatred associated with violence or calls for violence” and “the abasement of national dignity.”<sup>36</sup> Under the 2002 law, public calls for the performance of such acts in itself amounts to extremism.<sup>37</sup> The 2006 legislation implementing the Convention extends this further to prohibit any “justification” of extremist activity.<sup>38</sup>

### *The Netherlands*

The Bill on the Penalisation of Glorifying Serious Crimes is currently under consideration in the Dutch Parliament. It would insert a new Article 173h in the Criminal Code to make criminal under certain circumstances the glorification, extenuation, playing down, and denying of serious crimes, where the person concerned knows or could have known that his statements could cause a serious disturbance of public order. In addition to crimes of terrorism, it would also apply to war crimes, crimes against humanity, torture and genocide. The draft law has an apparently wide scope, making criminal the playing down of terrorist crimes, without a clear requirement of intent to incite. Moreover, the requirement for the offence to be committed is that the speech should cause a risk, not of an act of terrorism, but of a serious disturbance of public order, a lesser requirement, which is more likely to allow for disproportionate interferences with freedom of expression.

### *Belgium*

A draft law on incitement and *apologie du terrorisme* was published on 28 June 2004, and remains under consideration in the Belgian Parliament. The proposal refers to the “difficulty in prohibiting and punishing glorification of terrorism without limiting fundamental rights and freedoms such as freedom of assembly and association and freedom of expression.” Article 3 of the draft law aims to introduce a new Article

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<sup>35</sup> Act No. 153-FZ

<sup>36</sup> Article 1 (1)

<sup>37</sup> Article 1 (3)

<sup>38</sup> Press Release, ICJ Eminent Jurists Panel, *Russia: Leading Jurists Assess Counter-terrorism Measures and Protection of Human Rights*, 1 February 2007

141quater in the Penal Code,<sup>39</sup> making criminal “inciting to terrorism or glorifying terrorism”. The offence is based on the definition of terrorism in Article 137 of the Penal Code and also extends to “every individual or collective enterprise with the aim of seriously disrupting public order by means of intimidation or terror.”

An important safeguard is provided by Article 141ter of the Penal Code,<sup>40</sup> which states that: “no provision of this Title may be interpreted as aiming to limit rights or fundamental freedoms, such as the right to strike, freedom of association, assembly or speech ... and the rights as *inter alia* laid down in articles 8 to 11 of the ECHR.” This provision would need to be rigorously applied to ensure that the otherwise wide scope of the offence is restricted to comply with freedom of expression.

**Question 13:** *Keeping in mind the generic nature of the Framework Decisions of the EU, how would you view the possibility of amending Article 4 of the EU Framework Decision on Combating Terrorism in order to achieve the following:*

- *Strengthen the prevention of incitement, aiding and abetting commission of terrorist attacks, particularly via the internet;*
- *Avoid unjustified or abusive incrimination of acts or behaviour which should not be considered as terrorist offences.*

The ICJ does not consider it necessary to amend Article 4 of the Framework Decision to broaden the scope of the prohibition on incitement to terrorism. The ICJ recalls the general principle, set out in the Berlin Declaration, that “in combating terrorism, states should apply and where necessary adapt existing criminal laws rather than create new, broadly defined offences”. This principle is also reflected in the Declaration on freedom of expression and information in the media in the context of the fight against terrorism, Committee of Ministers of the Council of Europe, of March 2005 which cautions against introducing “new restrictions on freedom of expression and information in the media unless strictly necessary and proportionate in a democratic society and after examining carefully whether existing laws or other measures are not already sufficient.”<sup>41</sup> On a national level, the ICJ is concerned that offences of incitement to terrorism, have been enacted where they are not necessary in practical terms, but where their main purpose is to make a political statement.

In the view of the ICJ, a wide definition of incitement in a framework decision would risk unjustified and discriminatory interference with rights to freedom of expression at a national level, and would also be difficult to apply in practice, and likely to be counter-productive in alienating minority communities. In light of current developments in European national jurisdictions, EU action would be best directed at ensuring that Article 4 of the Framework Decision as it currently stands is read and applied in a way that is human rights compliant.

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<sup>39</sup> Under Title I ter. – Terrorist Offences

<sup>40</sup> Introduced by the law of 19 December 2003.

<sup>41</sup> Adopted by the Committee of Ministers on 2 March 2005 at the 917<sup>th</sup> meeting of the Ministers’ Deputies.

**The ICJ considers that strong, effective and human rights compliant national laws of incitement to acts of terrorism would best be achieved not by further EU legislation, but by non-legislative clarification of the current requirements of Article 4, and by support for effective national implementation of existing obligations to prohibit incitement to acts of terrorism, in a way that ensures human rights compliance. In this regard, there is an important potential role for EU agencies, such as the new EU Fundamental Rights Agency, to monitor the implementation of Article 4 and support national authorities in the drafting and application of incitement laws that are both effective in preventing terrorism, and human rights compliant.**

**If, however, a new definition of incitement is to be enacted in EU law, then the ICJ considers that it should be subject to the following conditions:**

- That there must be subjective intent to incite an act of terrorism;**
- That there must be a causal link to a violent act of terrorism, or an imminent risk of such an act;**
- That the offence of incitement must be linked with a definition of terrorism sufficiently precise that it allows for legal certainty;**
- That the offence of incitement to terrorism should not extend to incitement to offences which are not directly linked to violent acts of terrorism, for example offences of funding organisations involved in terrorism, or to offences which do not fall within the meaning of terrorism, such as public order offences;**
- That the offence must not criminalise justification or glorification of terrorism where it amounts to explanation or discussion of the circumstances leading to terrorism, or debate on the causes of terrorism or the ideology of groups linked with terrorism.**

**In the view of the ICJ, such limitations are necessary at a national level to avoid unjustified or abusive application of the criminal law. More broadly worded offences of indirect incitement are likely to lead to disproportionate interferences with freedom of expression and to give rise to discriminatory application of the law, as well as to a perception of bias against particular groups.**