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OHCHR GUIDANCE NOTE

Defining ‘Terrorism’ in National Criminal Legislation

PURPOSE OF THE GUIDANCE NOTE

The present note aims to offer technical advice to OHCHR colleagues to inform their engagement with national authorities on defining terrorism in domestic criminal legal frameworks. The advice is based on

existing international guidance, international human rights law principles, and lessons learned from the human rights impacts generated due to broad and vague definitions of terrorism.

01 STATES OBLIGATION TO PREVENT AND PROTECT FROM ACTS OF TERRORISM

Under international human rights law, States have a legal obligation to prevent human rights abuses, including acts of terrorism, to protect all individuals in their territory and subject to their jurisdiction from such abuse, and to provide effective remedies including accountability. This obligation also extends to situations of armed conflict and situations where the State has lost control over parts of its territory. This general legal obligation entails a more specific duty to criminalize, investigate and prosecute certain violent conduct, including terrorist acts, in addition to taking appropriate measures to prevent the harm caused by private persons or entities¹, and to assist the victims of attacks.

02 STATES OBLIGATION TO CRIMINALIZE ACTS OF TERRORISM

The duty to prohibit certain forms of violent conduct is explicitly codified in relevant human rights treaties. With respect to the right to life, the Human Rights Committee has highlighted that States parties to the International Covenant on Civil and Political Rights must include effective criminal prohibitions in their legal frameworks on all manifestations of violence or incitement to violence that are likely to result in a deprivation of life, such as terrorist attacks. The right to liberty and security of person further requires States to prevent and prosecute acts such as hostage taking and physical violence that may not necessarily be life threatening.

Several of the sectoral treaties related to terrorism include obligations to prohibit, criminalize or establish jurisdiction over certain acts commonly associated with terrorism, such as hijacking, hostage-taking, bombings, and attacks against certain critical infrastructure.² Additionally, relevant Security Council resolutions impose an obligation on all Member States to criminalize terrorist acts. Specifically, in resolution 1373 (2001), the Security Council: *'Decides ... that all States shall ... ensure that ... terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.'*³

03 ABSENCE OF A TREATY-BASED DEFINITION OF TERRORISM

Despite many attempts by States, a universally accepted legal definition of terrorism remains absent. Since the 1960s, States have adopted a series of sectoral treaties which cover issues ranging from the seizure of aircraft to hostage-taking to terrorist bombings and the financing of terrorism.⁴ While these treaties recognize certain acts as offences, they do not classify them as acts of "terrorism" as such, thereby omitting a definition of terrorism. Moreover, negotiations for the adoption of the Comprehensive Convention on International Terrorism have been ongoing since 1996, but efforts have stalled.

As in the past, major controversies with respect to the definition include how to classify self-determination movements and the question of so-called 'State terrorism'. Some regional conventions distinguish acts of terrorism from those carried out by liberation movements for self-determination, such as the OAU Convention on the Prevention and Combating of Terrorism, the Arab Convention on the Suppression of Terrorism, and the Convention of the Organisation of the Islamic Conference on Combating International Terrorism. However, such delineation is not found in international treaties. Moreover, States continue to have diverging opinions on how to identify State-sponsored actions.⁵

Despite the foregoing, the international community, through international law, the General Assembly, and the Security Council, have repeatedly stressed that any measure taken to counter terrorism, including in relation to the codification of criminal offences, must be in accordance with international law, including international human rights law and humanitarian law, where applicable, without exception. With respect to criminalizing acts of terrorism, the international community has urged States, as part of their international human rights obligations, to ensure that terrorism and related offences are narrowly defined, are limited to conduct that is genuinely terrorist in character according to best practice standards, satisfy the principle of legality (discussed in part 4 below), and do not violate fundamental rights and freedoms, including the right to liberty and freedoms of expression, peaceful assembly, association and political participation.

Additionally, General Assembly resolution 49/60 (1994) (Declaration on Measures to Eliminate International Terrorism) as well as Security Council Resolution 1566 (2004) and the International Convention for the Suppression of the Financing of Terrorism (1999) have elaborated prerequisite components of the crime of terrorism,⁶ without defining terrorism as such.

Acts of terrorism as reflected in Security Council Resolution 1566 (2004), para 3

(1994) (Declaration on Measures to Eliminate International Terrorism) ... criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism..." (Declaration on Measures to Eliminate International Terrorism) as well as Security Council Resolution 1566 (2004) and the International Convention for the Suppression of the Financing of Terrorism (1999) have elaborated prerequisite components of the crime of terrorism, without defining terrorism as such.

In addition, to fill the definitional gap, the UN Special Rapporteur on counter terrorism and human rights proposed, in 2010, a model definition of terrorism.⁷

Model Definition of Terrorism according to the Special Rapporteur on Counter Terrorism and Human Rights (2010)

Terrorism means an action or attempted action where:

1. The action:

- a.** Constituted the intentional taking of hostages; or
- b.** Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or
- c.** Involved lethal or serious physical violence against one or more members of the general population or segments of it;

and

2. The action is done or attempted with the intention of:

- a.** Provoking a state of terror in the general public or a segment of it; or
- b.** Compelling a Government or international organization to do or abstain from doing something;

and

3. The action corresponds to:

- a.** The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
- b.** All elements of a serious crime defined by national law.

A variety of domestic and regional definitions of terrorism have been developed. However, many of them use broad and open-ended language, resulting in their application to acts beyond what should be considered terrorist in nature.

04 PRINCIPLE OF LEGALITY IN CRIMINAL LAW

Any criminal prohibition - including of terrorism- must comply with the principle of legality. This principle is enshrined in Article 11(2) of the Universal Declaration of Human Rights and in treaty law.⁸ It requires that criminal laws are not applied retroactively and adhere to the principle of legal certainty, including in times of national emergency. Legal certainty demands *clarity of the laws and foreseeability of the judicial interpretation of the offence and the penalty*.

Clarity and accessibility of the law allows individuals to understand the prohibited conduct and organize their behaviour accordingly. The element of foreseeability of judicial interpretation is crucial to prevent discriminatory or arbitrary enforcement of the law.

The UN Human Rights Committee has described the principle of legality as '*the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or mission took place*'.⁹

Nonetheless, domestic definitions of terrorism in many States tend to be vague or overly broad, in ways that do not respect the principle of legality. This has created uncertainty as to what actions are considered criminal or terrorist; overextension of the terrorist conduct to encompass crimes that, while serious, are not genuinely terrorist in nature; inconsistency in the application of the law by those entrusted in executing the law; and unlawful restrictions on rights, such as liberty and security, expression, peaceful assembly, and association.¹⁰

In this context, OHCHR and UN human rights mechanisms have recorded many cases in which broad and/or vague definitions of 'terrorism' have resulted in penalizing behaviour that is protected under international human rights law- such as free speech, media freedoms and legitimate protest activity - leading to shrinking civic space. In other instances, OHCHR has reported about the wrongful association of principled humanitarian action with 'terrorism', made possible due to broad and vague definitions of offences related to terrorism and terrorist organizations and their implementation. Similarly, a UN global survey has confirmed in 2021 that States use broad and vague definitions of terrorism to criminalize acts, including non-violent conduct, well beyond those envisaged by international counter-terrorism instruments and best practice international standards.¹¹



05 ESSENTIAL COMPONENTS OF THE CRIME OF TERRORISM

To distinguish the crime of terrorism from other crimes, the definition of terrorism and the acts identified as terrorist acts should comprise the following cumulative elements:¹²

a. Actus reus/material element – the definition should clearly state the prohibited conduct or behaviour that the law seeks to prevent. In defining terrorism, that means setting out an act of violence that causes or is intended to cause a serious outcome, namely death, serious bodily injury, or the taking of hostages. The *actus reus* must not be ambiguous and must not include undefined terms, such as “*disrupting public order*”, “*undermining societal security and state stability*”, “*obstructing the basic system of governance or some of its provisions*”, or undermining “*fundamental structures*” of a state. It must never include acts that are not violent, as this risks resulting in the criminalization of discourse critical of the government and other legitimate activities. Restricting terrorist acts to those resulting in serious consequences is crucial to exclude actions that involve mere property damage - such as that occurring in the context of exercising the right to peaceful assembly - that does not cause death or serious personal injury. In addition, including open-ended language in the list of terrorist acts, such as ‘*any other similar act that threatens the stability or security of the country*’, or ‘*any other act intended to cause harm to the country*’ should be avoided. Experience shows that such formulations – that is not limited to a violent terrorist outcome - gives the authorities undue discretion to abusively interpret the prohibited conduct;

b. Mens rea/mental element – similarly, the terrorism crime in legislation should be sufficiently clear to exclude acts where the accused did not

have the intention to commit a terrorist act, as defined above. In other words, the terrorist crime must not include a lesser standard of liability such as negligence, recklessness, or strict or absolute liability. For example, criminalizing ‘*travel to terrorist-controlled areas*’ may include an intent to commit the act defined (in domestic legislation) as terrorist, that is to travel, but fails to include a clear intention to engage in a terrorist act that causes death or serious injury, as required in the material element above. This raises concerns about regulating individuals’ presumed intentions and criminalizing conduct that does not meet the threshold of criminal punishment;¹³ and,

c. Terrorist purpose element – legislation should clearly set out what is considered a ‘terrorist purpose’ and this should be consistent with the formulation used in existing international guidance, in particular the Terrorist Financing Convention, Security Council Resolution 1566 (2004), and the model definition promoted by the Special Rapporteur. Namely, the terrorist purpose should be to provoke a state of terror in the general public or in a group of persons or particular persons (or alternatively, to intimidate a population) or compel a government or an international organization to do or to abstain from doing any act. The purpose element is essential to distinguishing terrorism from other serious violent crimes, such as organized crime. Terms such as ‘*undermining social order*’ or ‘*harming national unity*’ that broaden the terrorist purpose should not be used, to avoid extending the scope of terrorism offences to protected behaviour under international human rights law, such as free speech and peaceful assembly.

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A CHECKLIST OF COMMON HUMAN RIGHTS ISSUES IN COUNTER-TERRORISM LEGISLATION AND RELATED RECOMMENDATIONS

- **Restricting the application of death penalty to the most serious crimes;** death penalty – in retentionist States – may be imposed only for the most serious crimes, and even then, only in the most exceptional cases and under the strictest conditions. This rule is applicable to terrorism related offences, especially where preparatory-type offences are remote from the commission of violent terrorist acts by other members of a terrorist group, or where the person's participation in terrorism is minor. According to the Human Rights Committee, death penalty may only be imposed for crimes that result in the loss of life, and that crimes not resulting directly and intentionally in death, such as attempted murder, can never serve as the basis for imposing death penalty.¹⁴ Nonetheless, many offences that fail to meet the "most serious crimes" threshold remain punishable by death under national counter-terrorism legislation.

- **Separating ancillary offences from the main terrorism offence;** many States have adopted inchoate and/or ancillary crimes – such as "*threats*" to commit a terrorist act, "*attempts*" to do so, "*complicity*" in terrorist acts, and "*conspiracy*" to commit terrorism. To avoid conflating offenses of lesser gravity with the act of committing terrorism, it is recommended to classify them as distinct offenses. Where appropriate, such offences could be introduced as stand-alone ancillary crimes. At any event, ancillary offences should be clear, precise accessible, and non-retroactive to meet the legality principle. Distinguishing the main offence from the ancillary ones is also important to ensuring that penalties are proportionate to the severity of the conduct. Proportionality in sentencing becomes even more critical when considering the use of the death penalty for terrorism-related offences in retentionist States.

- **Guaranteeing harmony in criminal legislation;** States have different ways in which terrorism-related offences are incorporated in their domestic legal frameworks. Some incorporate terrorism-related offences in the criminal and other related codes, others enact counter-terrorism specific laws, and some do both. To avoid arbitrary application of

counter terrorism legislation, it is recommended that the definition of terrorism/terrorist acts is harmonized across national criminal legislation and always meets the minimum prerequisites, established above.

- **Ensuring all terrorism-related offences conform to the principle of legality;** States have adopted a variety of inchoate, ancillary and preparatory offences, such as "*encouragement*," "*glorification*," "*support*," or "*justification*" of terrorism, as well as "*association with*" or "*membership in*" a terrorist group, or offences relating to training, recruitment and financing. These offences are typically based on the primary legislative definition of terrorism. When the primary definition is vague or broad, the application of ancillary offenses may likewise raise concerns about legality and could also result in undue restrictions on human rights. The mental elements of such offences are also sometimes establishing a lower level of liability than an "intention" to commit the offence. To prevent such outcomes, it is recommended that the definition of terrorism – contained in the primary legislation and in terrorism-related offences – strictly adhere to the principle of legality in criminal law.

- **Including exclusionary clauses to appropriately narrow the definition;** as explained above, in many jurisdictions terrorism offences unduly extend to conduct that is not genuinely terrorist in nature or is even protected under international law. To address this concern, it is advisable, where appropriate, that States introduce clauses that exclude certain acts from otherwise being classified as acts of terrorism or ancillary terrorist offences.¹⁵ Concretely, conduct such as legitimate human rights defence and principled humanitarian action, carried out in compliance with international law, could be included in exclusionary clauses. For example, some States have commendably excluded '*an act committed in pursuance of a demonstration, protest or stoppage of work*' or '*acts of advocacy, protest, dissent or industrial action*' provided these acts are not intended to result in loss of human life or serious bodily harm. Another State has exempted from the ban on association with terrorist organizations those that do so '*only for the purpose of providing aid of*

a humanitarian nature'. Moreover, a few jurisdictions exclude the activities of armed forces— State and non-State – that are governed by (or alternatively in accordance with) international humanitarian law', which is also considered a good practice,¹⁶ and such clauses are found in six recent sectoral terrorism instruments.

- **Prior human rights assessment of draft counter-terrorism legislation;** when counter-terrorism legislation is being drafted, they should be subject to human rights assessments in advance, and when adopting them the government or the parliament should provide appropriate legislative guidance on their interpretation to ensure consistency with international human rights and humanitarian law.

- **Review of counter-terrorism legislation by stakeholders;** given the definitional gap and the proven impact of counter-terrorism legislation on human rights, periodic review and human rights-impact assessment of such legislation is considered a good practice. They help mitigating the human rights risks and could bring the definition of terrorism closer to international standards. States may choose to indicate in the counter terrorism legislation a specific timeframe for the periodic review. Additionally, to ensure the success of such review, it is key to meaningfully involve relevant stakeholders, including civil society actors and impacted communities.

¹ CCPR/C/21/Rev.1/Add.13, para. 8.

² See e.g. Convention on offences and certain other acts committed on board aircraft, Tokyo 14 September 1963 (1963 Tokyo Convention) article 3; Convention for the suppression of unlawful seizure of aircraft, The Hague 16 December 1970 (1970 Hague Convention) article 4; Convention for the suppression of unlawful acts against the safety of civil aviation (with Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization at Montreal in September 1971), Montreal 23 September 1971 (1971 Montreal Convention) article 3; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Annexed to General Assembly resolution 3166 (XVIII) of 14 December 1973 (1973 Protected Persons Convention) article 3; International Convention against the taking of hostages, 17 December 1979 (1979 Hostages Convention) article 2; Convention for the suppression of unlawful acts against the safety of maritime navigation, Rome 10 March 1988 (1988 Rome Convention) article 5; Protocol for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf (1988 Rome Protocol) article 3; Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991 Plastic Explosives Convention) articles II – III; Convention on the Safety of United Nations and Associated Personnel, New York, 9 December 1994 (1994 UN Personnel Convention) article 10; International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997 (1997 Terrorist Bombings Convention) article 4; International Convention for the Suppression of the Financing of Terrorism, New York 9 December 1999 (1999 Terrorist Financing Convention) article 4; International Convention for the Suppression of Acts of Nuclear Terrorism, New York, 13 April 2005 (2005 Nuclear Terrorism Convention) article 5.

³ S/RES/1373(2001), para. 2(e). See also S/RES/2341(2017), para 27

⁴ See full list of United Nations terrorism instruments here: [International Legal Instruments | Office of Counter-Terrorism](#)

⁵ See e.g. Marcello Di Filippo, 'The definition(s) of terrorism in international law' in Ben Saul (ed.), Research Handbook on International Law and Terrorism (Edward Elgar Publishing 2020), p. 6; A/HRC/55/48, para 40; and GA/L/3634, 6 Oct. 2021

⁶ GA Resolution 49/60 Annex, para. 3. Reiterated by the General Assembly in subsequent resolutions, such as A/RES/70/120 para. 4; the International Convention for the Suppression of the Financing of Terrorism (1999), Art. 2.1.(b); and, S/RES/1566 (2004), operative para. 3

⁷ A/HRC/16/51, Practice 7. Model definition of terrorism

⁸ ICCPR art. 15; CRC, art. 40(2)(a); ECHR art. 7; ACHR art. 9; ACHPR art. 7 (2); ICRC, customary IHL study, rule 101.

⁹ CCPR/C/21/Rev.1/Add.11, para 7

¹⁰ Nowak's CCPR Commentary: ICCPR 3rd ed, pp. 98, 149, 247-8, 265, 436-7

¹¹ https://www.un.org/securitycouncil/ctc/sites/www.un.org.securitycouncil.ctc/files/ctc_1373_gis.pdf

¹² Reports by the UN Secretary General and High Commissioner for Human Rights repeatedly highlighted human rights gaps in national definitions of terrorism or acts of terrorism. Relevant reports can be accessed [here](#).

¹³ e.g. A/HRC/28/28, para 49

¹⁴ CCPR/C/GC/36 para. 35.

¹⁵ See Counter-Terrorism Executive Directorate, "CTED analytical brief: a commentary on the codification of the terrorism offence", June 2024, p. 17

¹⁶ A/79/324, paras 14 and 60



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