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CONSULTATION OF THE PARTIES TO THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM [CETS NO. 196] AND ITS ADDITIONAL PROTOCOL [CETS NO. 217]

8th Meeting

Tuesday, 21 November 2023, online

THEMATIC ASSESSMENT REPORT ON THE IMPLEMENTATION OF ARTICLE 2 OF THE ADDITIONAL PROTOCOL TO THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM (CETS No. 217)

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1. Introduction

1. The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217) (hereinafter referred to as "the Protocol") was opened for signature in Riga on 22 October 2015 and entered into force on 1 July 2017. As of 14 September 2023, the Protocol has been ratified by 30 States and by the European Union. In addition, 12 States have signed but not yet ratified the Protocol.

2. At its 6th meeting, on 25 November 2021, the Consultation of the Parties decided to devote its next assessment round to the implementation of the Protocol, starting with Article 2 thereof.

3. Article 2 concerns participation in an association or group for the purpose of terrorism and obliges Parties to criminalise the activities of individuals recruited to terrorist associations or groups. The provision stipulates that:

   "*1 For the purpose of this Protocol, "participating in an association or group for the purpose of terrorism" means to participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group.*

   2 Each Party shall adopt such measures as may be necessary to establish "participating in an association or group for the purpose of terrorism", as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law."

4. The Consultation of the Parties agreed on a questionnaire template for the assessment of Article 2 (see Annex II) containing a series of questions grouped under the following main headings:

   - The transposition of Article 2
   - Conditions and safeguards in respect of the application of Article 2
   - Jurisdiction in respect to commission of the offence from Article 2
   - Implementation of Article 2
   - Additional information

5. Taking into consideration the breadth of the questionnaire it was decided at the 6th meeting that the responses would be submitted in two parts, first responding to Question 1 of the Transposition section, while the second responding to all other questions.

6. This template questionnaire was distributed to Parties and Signatories to the Protocol. All of them were asked to send in their replies to Question 1 of the Transposition section by 28 February 2022, and to Questions 2 – 7 by 28 February 2023. A total of 30 Parties, Signatories and other States submitted their replies (see Annex I).

7. Following the decisions taken at its 6th Consultation meeting on 25 November 2021, the Consultation of the Parties examined the replies to the questionnaire and prepared the present thematic assessment report.

8. The thematic assessment report contains an analysis and synthesis of the state of implementation of Article 2 of the Protocol by the responding Parties, Signatories and other States based on the replies received to date, as well as certain general and specific

recommendations to Parties adopted by the Consultation of the Parties. The recommendations provided by the Consultation of the Parties are only binding for Parties to the Protocol.

9. Thus, this report does not attempt to provide a detailed comparative analysis of all relevant aspects of the criminal law systems in the 30 responding States, but instead provides a snapshot of the state of implementation of Article 2 thereby enabling the Council of Europe Committee on Counter-Terrorism (CDCT) to address possible shortcomings in the Protocol itself or its interpretation.

2. Descriptive Part

10. This chapter offers a synthesis of the 30 replies received and provides a general overview of the state of implementation by responding States regarding the provisions contained in Article 2 of the Protocol.

11. The Consultation of the Parties takes note that none of the Parties that have participated through the submission of their questionnaires have made declarations or reservations with regard to the provisions of the Protocol covered by this thematic assessment report.

Article 2

12. Article 2 is one of the essential provisions of the Protocol. It requires Parties to criminalise participation in the activities of an association or group for the purpose of committing, or contributing to the commission of one or more terrorist offences by the association or the group. Such participation needs to be intentional and unlawful. The “intent” requirement is to be understood in the context of national legislation. In addition to this general requirement, the Article 2 requires a further subjective element, that of terrorist purpose.[1]

13. The Explanatory Report to the Protocol further clarifies some of the requirements set under Article 2. As the “activities” referred to in paragraph 1 must have as their purpose the contribution to the commission of one or more terrorist offences by the association or group, or the commission of one or more such offences on behalf of the association or group, criminalisation of the mere passive membership of a terrorist association or a group, or the membership of an inactive terrorist association or group, is not required under Article 2. Effectively, Article 2 envisages a behaviour at a stage preceding the actual commission of a terrorist offence but already having the potential to lead to the commission of such acts. The conditions under which the conduct in question is criminalised need to be foreseeable with legal certainty. Such behaviours may come as a result of contacts established via the Internet, including social media, or through other IT-based platforms, in addition to more traditional ways of establishing contacts.

14. Lastly, the Protocol gives the Parties the liberty to define the terms “group” and “association”. In the words of the Explanatory Report "Article 2 does not define the precise nature of the association or group, as the criminalisation depends on the commission of terrorist offences by the group regardless of its officially proclaimed activities. It should be noted that there is no [single] internationally binding definition of a “terrorist association or group”. For the purposes of paragraph 1, a Party may qualify or define the associations or groups within the meaning of this provision, including by interpreting the terms “association or group” to mean “proscribed”

[1] Council of Europe, Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, 22 October 2015.

(i.e. prohibited by law) organisations or groups in accordance with its domestic law."[2] The terms could, but don't need to refer to groups or associations prohibited by law.

3. Analytical Part

15. This chapter focuses on identifying and providing comments on main approaches and trends in the way responding States have implemented Article 2 of the Protocol.

The transposition of Article 2:

General remarks

16. All respondent jurisdictions have introduced a form of Article 2 offence in their legislation. While great majority has opted for a broader language of the offence akin to that in the Additional Protocol (e.g. Hungary, France, Czech Republic, Albania, the Netherlands, Andorra, Switzerland, Italy), at least one jurisdiction has opted for enumeration of the types of contributions within the context of participation in an "association or group", an approach that could be seen as providing greater degree of legal foreseeability of criminalised behaviour (e.g. Finland). One respondent has taken the approach whereby complicity, attempt, preparation and conspiracy charges related to the offences transposing Article 1 of the Convention can be used in addition to the separate standalone offence related to participation in an association or group for the purpose of terrorism (Sweden).

17. While, as stated earlier, Article 2 of the Protocol does not require criminalisation of mere membership in a "group or association" a number of responding jurisdictions noted a possibility for imposing liability on members not actively or directly involved in criminal activity of the "group or association" (e.g. Armenia, Austria, Albania, Bosnia and Herzegovina, France, Czech Republic, Italy, San Marino, Portugal, Poland, Lithuania, Latvia, Romania). That said, a few stressed at the same time that proof of some action related to participation or contribution to fulfilment of the aims of the "group or association" would be needed to deduce the existence of the required level of intent. This approach would seem to coincide with that of other jurisdictions where even the mere entry into a group or association as a member could suffice for the purpose of an Article 2 offence, provided that such entry would be of significant value for an "association or group" (e.g. Germany).

18. Similarly, a large majority of respondents noted a possibility for Article 2 offence charges even in case of non-action, i.e. omission (e.g. Belgium, Hungary, Spain, Armenia, Czech Republic, the Netherlands, Italy, Germany, San Marino, Romania), several highlighting, at the same time, that this approach has however not yet been tested before the courts. Contrary to this, few jurisdictions reported not having this possibility under the current legislation (e.g. Finland, Andorra, Poland, the Russian Federation).

19. No respondent indicated facing specific challenges in transposing Article 2 into their respective domestic legislation. Several jurisdictions (e.g. France, Germany and Italy) specified that this is due to the fact that such or similar offence already existed in their legal system before the entry into force of their respective obligations based on ratification of CETS No. 217. One respondent (Bosnia and Herzegovina) referred to the issue arising from subsequent court interpretation of

[2] *Ibid, para 37*

the constituent elements of the offence, as transposed, namely the knowledge requirement (see more below).

Constitutive elements

Group or association

20. In terms of the understanding of the constitutive elements of the Article 2 offence, that of "group or association", left to the Parties to define by the Protocol, the review of practices shows that all jurisdictions have such clarifications by virtue of law or jurisprudence. In terms of the organisational forms covered by Article 2 offences, it is possible to see that the concepts go beyond those envisaged by the Protocol to also include an "organisation", "entity", "community", or combination thereof with a "group or association".

21. Majority of respondents refer to a "group" in their criminal codes. This term is generally understood as a formation of at least two or three persons, established for a certain period of time, that acts in a coordinated manner with the purpose of committing one or more of the terrorist offences. In addition to these elements several jurisdictions also require a certain degree of internal organisation visible from division of activities among members (e.g. the Czech Republic) and/ or which consists of established management and division of roles (e.g. Poland).

22. Jurisdictions that refer to an "association" in place of or in addition to a "group", or other modalities of association, either envisage similar basic requirements as that for a "group" or pose lesser requirements for qualification. For example, a minimum number of members, typically required for groups, might not be legally prescribed (e.g. France and San Marino) and/or the requirement for its duration may be lowered to also include formations that are in the process of coming into being (e.g. France). Existence of an associations seems typically not to require proof of certain level of internal organisation, as may be the case with groups. One respondent (Estonia) represents an exemption to this practice. In Estonia, an association would be understood as requiring a higher degree of organisation, elsewhere present for a "group", while a "group" would be understood to imply "at least two persons agree to commit an offence jointly, each of them shall be held liable as a principal offender (joint principal offenders)." (Art. 21(2) of the Penal Code of Estonia).

23. Contrary to this, a large majority of jurisdictions envisaging an "organisation" within the context of an Article 2 offence as a standalone concept or one in addition to "groups" typically require more proof of structure and internal ties. This includes a requirement that a collective structure is serious and binding (e.g. Spain), exhibits internal hierarchy and/or distribution of tasks (e.g. Spain, Switzerland, Norway, Romania), professionalism and ability to impose power within the organisation (e.g. Switzerland), has certain premises/facilities, and/or practices meeting regularly (e.g. Norway). Contrary to this, two jurisdictions that also refer to an "organisation" in this context reported not requiring such additional level of proof, but rather taking an approach substantively parallel to that of countries that envisage "groups" per law where the difference would lie only in the terminology used (the Netherlands and Germany).

24. One jurisdiction envisages a concept of "community" in place of a "group" or "association", which appears to require a proof of a greater degree of organisation, structure, and resilience than all other jurisdictions. This includes proof of specific level of organisation, inclusive of subunits formed according to the territorial and functional principle, and characterised not only by durability but also resilience to the effects of different internal and external factors on its

existence (the Russian Federation). At the same time, one respondent (the Russian Federation) distinguishes between “terrorist community” and “terrorist organisation”, with the former differing from the latter merely by the fact that “terrorist organisation” is specifically prescribed by a court decision at the request of the prosecutor’ office and is referred to the most heinous terrorist organisations, such as Al-Qaida or ISIL.

25. Following the approach taken by the Protocol, great majority of respondents noted that relevant formations would need to meet the Article 2 offence requirements to be considered as “terrorist”, which does not necessarily imply having to be formally designated as such on a national, regional or international level. One respondent (Bosnia and Herzegovina) reported conflicting views on this matter between the courts and the prosecutor’s offices.

26. An inquiry into the extent to which the duration of the existence and the activities of the association or a group plays a factor in the ability to apply Article 2 offence showed that for majority of jurisdictions some degree of duration of the existence of the group or association is a prerequisite (e.g. Austria, Belgium, Hungary, the Russian Federation, the Czech Republic, the EU, Norway, Poland, Serbia). The expected length varies from jurisdiction to jurisdiction, as well as depending on the type of the organisational structure that one is discussing (i.e. group, association, or organisation). Few do not envisage a temporal requirement by law (e.g. Armenia, the Netherlands, Andorra, Italy) or also explicitly envisage covering groups or associations in the making (e.g. France). That said, even in jurisdictions that do not pose a “duration in time” requirement by law, the duration of operations may become relevant in the court assessment of the existence of other elements of a group or an association (e.g. the Netherlands). Duration may also be one of the elements that differentiates between different organisational types envisaged by law, e.g. groups v. organisations (e.g. Spain) or the offence that would be charged, i.e. shorter duration would lead to opting for charges involving preparatory offences than an Article 2 charge (e.g. the Czech Republic). Contrary to this, duration of the activities is not likely to be of significance for the qualification, as noted by several jurisdictions (e.g. Germany, San Marino, Romania).

Activities

27. In terms of the aim of the activities of an association or group, as envisaged by Article 2 of the Protocol for all respondents the activities should be aimed at commission or contribution to the commission of terrorist offences and, more precisely, those classified as such per national law in each of the jurisdictions, inclusive of preparatory acts. Similarly, great majority of the respondents noted not requiring that such terrorist acts/offences indeed take place for one to be processed for participation in a group or an association. An attempt is largely seen to suffice. Few jurisdictions highlighted that for them participation in a terrorist group or association is a separate offence, with its own constitutive elements, not subordinate to commission of any of the other terrorist offences, including attempt (e.g. France, Switzerland, Romania). One jurisdiction (e.g. Sweden), with a mixed regime for processing the activities envisaged under Article 2, noted that in case of applicability of one possible charge (complicity), the commission of terrorist offence/s would be required.

28. An inquiry into whether participation in activities of an association or group aimed at collecting or providing funds for terrorist purposes or aimed at contributing to provision or collection of such funds are treated under Article 2 or other offences, identified four approaches to the issue. For majority of respondents, such participation would be qualified under other criminal offences,

namely those related to the financing of terrorism (e.g. Albania, Estonia, Hungary, Spain, Finland, Andorra, Italy, Moldova, San Marino, the Russian Federation). At least two respondents highlighted a different approach whereby such activity would be qualified as an Article 2 offence if committed by members of the group, as opposed to when committed by non-members (e.g. the Czech Republic and Lithuania). Few jurisdictions noted opting for cumulative charges, whereby individuals would face investigation and prosecution for both Article 2 and financing of terrorism offences (e.g. Austria, Bosnia and Herzegovina, France, Norway). Lastly, some jurisdictions (e.g. Belgium and Germany) noted a possibility for the qualification to be one under an Article 2 offence or financing of terrorism offence, depending on whether the funds being collected are for the purpose of one person or a group.

29. Great majority of jurisdictions would take the same approach, as described in para 28, in case of an individual who would contribute financially to the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by an association or the group. One jurisdiction highlighted that its approach would differ depending on whether the contribution would come from a member or a non-member (e.g. the Czech Republic). In case of the former, an Article 2 offence would apply. In case of the latter, the charge would be financing of terrorism one. Few jurisdictions clarified that this scenario would fall under an Article 2 offence, whereas the one discussed previously could be categorised as either an Article 2 or financing of terrorism offence or just the latter, depending on the facts of the case (e.g. the Netherlands, Switzerland, Germany, Lithuania). Two jurisdictions noted also having a separate offence applicable to this scenario (e.g. Italy and Romania).

Mens rea

30. In line with CETS 217, all respondents envisage intent as the requisite *mens rea* for Article 2 offence, namely regarding participation in an association or a group. When it comes to the perpetrator's state of mind vis-à-vis the goal of the group or association, approaches vary. While some respondents report not requiring specific *mens rea* with respect to the terrorist offences planned to be perpetrated by the association or group, i.e. the goal of the organisation (e.g. France, Switzerland, the Netherlands), others reported posing such a requirement, existence of either direct or indirect intent, or extending the criminal intent requirement applicable to participation also to the goal of the group or association (e.g. Belgium, Sweden, Germany, Portugal, Lithuania, the Russian Federation). Few jurisdictions highlighted that the degree of criminal intent required (i.e. direct or indirect intent) may also vary depending on the role of an individual within the organisation (e.g. Poland).

Applicability

31. While in all responding jurisdictions natural persons would incur criminal liability for an Article 2 offence, this is not the case everywhere for legal persons, despite almost all jurisdictions stating having the capacity to apply sanctions in case of such activities. Where criminal liability would not be considered for legal entities, sanctions could be imposed in administrative or other proceedings based, for example, on criminal responsibility of a person with a leading position within the legal person (e.g. Sweden, Italy, Germany). While vast majority of respondents envisage criminal liability of legal entities (e.g. 19 respondents, including Hungary, Spain, Finland, Austria, France, Sweden), two envisage administrative sanctioning (e.g. Italy and Germany). For one it is somewhat unclear whether the process would be criminal or civil (e.g. Poland), while for one it is uncertain if sanctioning would at all be possible (e.g. Andorra).

Sanctions

32. In line with the Protocol, legislation of all respondents provides proportionate sanctions within the parameters of their respective regimes. Imprisonment is by default a sanction to be applied to natural persons, that could be imposed alone or accompanied by other types of sanctions. Fines are predominantly reserved for legal entities, with some jurisdictions envisaging other sanctions, such as permanent or temporary bans on activities (e.g. Italy).

33. When it comes to sanctions or measures that could be imposed on an association or a group whose involvement in terrorism is established through a final judgement, seizure and confiscation of proceeds and/or instrumentalities of crime appears to be most widely represented (e.g. Bosnia and Herzegovina, Estonia, Hungary, Spain, Armenia, Austria, Sweden). Fewer responding jurisdictions also indicated a possibility to apply other types of measures such as banning, dissolution or interdiction of activities, provided that certain conditions regarding the legal standing of the group or association are met, namely that it has been officially registered (e.g. Andorra, Czech Republic, France, Germany, San Marino, Switzerland). Such measures are often put in place by virtue of application of other pieces of legislation, and are not necessarily part of the same juridical process (e.g. Switzerland, Germany). One jurisdiction stated not having the ability to impose such other sanctions/measures (e.g. Finland).

Differentiation in standing (e.g. leader, funder v. one of many participants)

34. Jurisdictions that legally recognise nuances of organisational roles namely do so in the aspect of sanctions to be imposed on an individual concerned (e.g. Belgium, Hungary, Italy, Finland, Czech Republic, Portugal, Poland, Romania, Spain). In some jurisdictions this is done through application of different paragraphs of the Article 2 offence or other terrorism offences that reflect such differences (e.g. Finland, Spain, Hungary, the EU), while others make the differentiation through application of more general criminal law provisions reflecting such nuances to an Article 2 offence (e.g. Armenia, Albania, Serbia). Jurisdictions that do not envisage such distinctions in the text of the law still have the ability to do so in practice, where, for example, leaders would receive a higher sentence than other group or association members (e.g. Norway). Roles most frequently envisaged by legislations of respondent jurisdictions are that of a founder, leader, a “middle manager” and a member. Some jurisdiction envisages also criminal liability for a person who promotes a terrorist group or association (Portugal, Spain and San Marino). Persons who serve as recruiters for the group or association may in some jurisdictions face sanctions under an Article 2 offence (e.g. Germany) or a different offence, i.e. recruitment for terrorism (e.g. Finland).

Conditions and safeguards in respect of the application of Article 2:

35. Great majority of respondents highlighted that the conditions and safeguards set forth by Article 8 of the Additional Protocol are included in international instruments to which they are a party (e.g. European Convention on Human Right, International Covenant on Civil and Political Rights, and Charter of Fundamental Rights of the European Union), as well as in their respective legal systems, starting from their constitutions, specific human rights legislation and national criminal law and criminal procedure codes. Accordingly, the human rights guarantees are enforceable before courts. In addition, a number of respondents highlighted that the criteria of proportionality and necessity are strictly respected in criminal proceedings related to terrorist offences.

36. More generally, several respondents referred to specific national institutions (e.g. Institut fédéral pour la protection et la promotion des droits de l'homme in Belgium, Conseil Constitutionnel in France) whose role is to monitor and safeguard these principles in the elaboration and application of the law, including antiterrorist legislation. When it comes to specific practices concerning transposition and application of Article 2, one respondent (Norway) noted an analysis done by the Ministry of Justice and Public Security on the harmonisation of Article 2 offence with national human rights guarantees at the time of the transposition. Another respondent (Belgium) highlighted that the competent courts have to date either annulled certain amendments to existing terrorist offences or have narrowed down their interpretation precisely for the purpose of ensuring that there was no interference with human rights guarantees.

Jurisdiction

37. By and large, respondents referred to the obligatory grounds for assuming jurisdiction for an Article 2 offence under CETS 196, such as the principle of territoriality, inclusive of a national ship or a vessel, and the principle of nationality of the perpetrator. Nationality of the victim is another frequently cited ground for assuming jurisdiction among the respondents.

38. Concerning the territoriality principle, legislation of several respondent States specifically highlights that the territoriality principle applies even if the offence was only partially committed on its territory (e.g. France, Italy, Lithuania). On the other hand, several pieces of legislation specify the limitation of the territoriality principle regarding members of diplomatic missions and, in such cases, refer to applicability of multilateral or bilateral rules dealing with the issue of diplomatic immunity (e.g. Latvia and Lithuania). Concerning aircrafts, at least one respondent (France) noted ability to assume jurisdiction even in cases where the aircraft is not registered in France, but lands in France after the commission of the offence.

39. In addition to the active nationality principle, many respondents also envisage proceedings to be initiated against persons with (habitual) residence in a given State (e.g. Austria, Belgium, Germany, Spain, Norway), or when it is committed on behalf of the legal entity based in that respondent State (e.g. Austria, Hungary, Spain, Norway). Proceedings may however also be held against a foreign national, without no residence in a respondent State, for crimes committed abroad, provided that the alleged perpetrator is in the custody of the country in question and cannot be extradited to the state that would normally assume jurisdiction due to the threat for life or no guaranteee of a fair trial (France).

40. While several respondents specifically envisage attacks on State or government facilities at home or abroad as a jurisdictional basis, elsewhere this basis of jurisdiction would stem from a broader definition of a territoriality principle or other basis in relevant legislation (e.g. Bosnia and Herzegovina, Hungary).

41. Four respondents specifically highlighted possible applicability of universal jurisdiction in application of Article 2 offence (Estonia, Finland, Romania and Sweden). Another appears to have indicated the same possibility for crime carrying certain weight, provided this would be considered in the public interest (Norway). The assessment criteria for the "public Interest" consideration would include how serious the offence is, what connection the offender has to the country in question, and to what extent the offence affects the country's interests.

Case-law regarding implementation of Article 2

42. While more than a half of the respondents noted not having had cases involving an Article 2 offence, including due to the fact that the offence was only recently introduced in the legal system, the remaining respondents referred to relevant case-law and the manner in which it has shaped the understanding of the constituent elements of the offence.

43. For instance, two respondents (France and Spain) reported how successive case law allowed to establish with more accuracy the concept of “participation” in a terrorist group or association. Accordingly in France it is not necessary to be proactively involved in the commission of a specific crime or even to be aware of the exact nature of the group’s criminal goals to be considered a member of a terrorist organisation. In Spain, persons who are not members of a group or an association and who sporadically carry out acts of collaboration, are held responsible pursuant to aiding and abetting charges, while those who, belonging to the group or association, carry out actions in support of the group or association, are held responsible under an Article 2 offence.

44. In several jurisdictions (e.g. Germany, Netherlands and Spain), the case law also provided an opportunity to clarify the “group or association” requirement. For example, while Spain requires existence of “permanence, stability and submission to the dictates of the organisation” for the group to exist, while in Germany, such entities must have a basic “planning and formation of will” but no “group identity” is required. In the Netherlands, “it is not required that the organisation concerned has any formal (legal) status”, nor “that there is a certain degree of hierarchy within the organisation” (for instance, an internet forum).

45. As expected, court jurisprudence in a number of jurisdictions (e.g. Italy, France, Spain) contributed also to shaping an understanding of the “activities” considered as participation, even minor, in a terrorist group or association. Such activities include telephone exchanges, travel or organisation of travel for terrorist training, spreading of propaganda materials, incitement to violent action, participation in recruitment processes, and provision of financial support.

46. Lastly, national jurisprudence was also critical in getting a clearer understanding of the “intent” requirement, lying behind the perpetrators’ acts under Article 2. For instance, in Germany: “in regard to the acts of the participation as a member and recruiting members, contingent intent is not sufficient. When participating as a member, the willingness of the offender to continue to participate in the life of the association and the awareness of consensual involvement are further required”. The French case law also specifies that “there is no need to show that a person who has taken part in a terrorist group has specific, concrete knowledge of the preparation of terrorist crimes by that same group: mere membership of the group is sufficient”. In Norway, in the case of one individual promoting a terrorist organisation's message, including by incitements to terrorist acts on social media, “the Supreme Court found that the incitements to terrorist acts showed that his intent to commit the offences was sufficiently concretised to convict him of attempted contribution to terrorist acts, and not of incitement to terrorist acts”. In Bosnia and Herzegovina, the court practice has established that for an Article 2 offence to exist, the perpetrator would have to know “that the funds collected or provided will be used for the commission of a criminal offense by terrorist association or individual terrorist”, and that a lower threshold of “could have known” would not suffice.

47. In addition to clarifying the constituent elements of the Article 2 offence, the court jurisprudence was also instrumental in delineating the field of application of an Article 2 offence versus other offences, as reported by the respondents. For example, in Spain, an Article 2 offence is understood as a phase preceding the commission of other terrorist offences, from the moment the group or organisation is created for one of the purposes expressly set forth. Once elements of another terrorist offence also become relevant, there is room for concurrence of offences. In France, concurrent charging of an Article 2 offence is possible with the offence of financing of terrorism.

Challenges encountered in investigating or prosecuting under charges related to Article 2

48. Responding States cited a number of challenges for investigations and prosecutions of an Article 2 offence, linked to the factual way in which this type of offence has been carried out, specificities that may arise in concrete setting, established case-law, as well as problem that tend to be applicable to investigation and prosecution of terrorist offences more broadly.

49. One challenge cited by several respondents (e.g. Belgium, Norway, Poland and Portugal) stems from the fact that an Article 2 offence may in part or fully be committed abroad. Such a scenario makes it particularly difficult to gather information and evidence on activities under investigation and to present them at court by relying on formal mutual legal assistance mechanisms. Such difficulties increase when terrorist acts are committed in the context of armed conflicts (Belgium) or in non-recognised territories (Norway). This context also often hinders efficient and safe testimonies by witnesses, and creates particular challenges in cases of the death – official or not – of the preparator in a conflict zone.

50. Another cited challenge lies in the use of Article 2 offence for investigation and prosecution of acts committed by individuals (e.g. France, Sweden). Challenges to detection and investigation in such cases may derive from limitations of the legal framework or from the simple fact of reduced contacts of the individual in question with co-perpetrators, which makes it hard to find information and evidence on all constituent elements of the offence.

51. The role played by women within terrorist organisations, including ISIL/Daesh, also brought into question the ability to determine whether this role could be considered as inside the scope of the offence described under Article 2 or not. The various roles played by women within these groups (ranging from actively taking part in violent actions to simply taking care of terrorist fighters' household and family) made it particularly difficult to efficiently prosecute these women in certain jurisdictions (e.g. Belgium and Norway), especially in cases where it is not clear whether they acted under coercion or not.

52. Speaking more broadly, Italy raised the issue of the use of special investigation techniques and the extensive knowledge required to understand, investigate and prosecute terrorist acts that is frequently facilitated by engagement of external experts, such as interpreters. This can prove to be extremely complex, keeping also in mind that some might be reluctant to cooperate because of potential pressure/retaliation from terrorist groups. Sweden also explained that, due to the major threat that terrorism represents for national security, investigation would often have to start at a very early stage to prevent the terrorist act from being committed, making it difficult to gather crucial evidence and potentially having an adverse impact when seeking proper conviction during the prosecution phase.

53. Proving the requisite level of intent may also pose a specific challenge. As noted by Bosnia and Herzegovina, in these types of cases it may be difficult to prove that a person supporting and organisation or a group "knew", as opposed to "could have known", that his/her specific contribution would be used for a commission of a specific offence.

54. A number of respondents also highlighted how encountering such challenges has helped shape national legislation in a way to ensure more efficient and effective investigations and prosecutions. In response to the challenge of dealing with terrorism and violations of international humanitarian law, Belgium revised its counterterrorist framework to allow certain acts committed in the context of armed conflicts to be incriminated as terrorist acts. Similarly, responding to the need to properly address individual acts of terrorism, France revised its legislation introducing a new provision allowing for proper treatment of such cases.

4. Conclusion

55. It follows from Article 26 of the Vienna Convention on the Law of Treaties (1969), that:

"Every treaty in force is binding upon the Parties to it and must be performed by them in good faith."

Article 27 of the aforementioned Vienna Convention further stipulates that:

"A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. […]."

The extent to which a State Party observes these two basic binding principles of international treaty law are at the very core of the assessment of the implementation of any international treaty, including the Protocol.

56. Being an instrument of public international law, the Protocol, insofar as it is not considered to be self-executing, requires to be transposed into the domestic law of the Parties. The transposition of its provisions is indeed deemed necessary due to the legal obligation it imposes on Parties to provide for the criminalisation of certain terrorist activities, as well as the application of human rights obligations and various procedural and other safeguards.

57. That said, the Protocol does not require Parties to harmonise the way in which they transpose the provisions of the Protocol in their domestic law, nor does it require Parties to adapt their domestic legal systems to each other in any specific way. The purpose of the Protocol is, in other words, not to ensure that all Parties introduce exactly identical provisions in their domestic law, but that they transpose the provisions of the Protocol in such a manner that they are able to effectively cooperate with each other on the basis of the Protocol in good faith and for the realisation of its stated aims, cf. the aforesaid Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

58. Against this background, the Consultation of the Parties notes with satisfaction that of the 30 replies submitted to the questionnaire, all have reported transposition of the Article 2 offence into their domestic legislation Differences in approaches are namely visible concerning the understanding of a "group or association" under national legislations, duration requirement, types of participatory activities that would qualify under Article 2, as opposed to other offences, and the criminal intent requirement vis-à-vis the goal of the "group or association". Almost all such differences have been shaped by relevant national case-law, in some instances resulting in changes to relevant criminal law text/s.

59. Irrespective of the frequency of use to date, all respondents reported being capable of assuming jurisdiction over Article 2 offences in line with and, in some instances, beyond the requirements of the Convention. In all such cases, safeguards envisaged under Article 8 of the Protocol would be observed, as warranted by State international obligations, as well as national constitutions and other applicable pieces of legislation.

60. From national practices to date, challenges associated with investigation and prosecution of Article 2 offence appear to namely lie in the cross-border manner of its commission, complicating, to greater or lesser extent, access to information and evidence needed for investigation and prosecution. Other reported difficulties include applicability of the offence to acts committed by lone actors, challenges in applicability to specific scenarios such as the role/s played by women with ISIL/Daesh, and ability to acquire external assistance needed to properly and fully analyse the context and the scope of organisation and participation. In a number of responding States these challenges have led to necessary legislative changes facilitating efficient and effective processing of individuals for crimes committed.

61. On the basis of its analysis on the state of implementation of the aforementioned provisions of the Protocol, the Consultation of Parties makes the following recommendations addressed to Parties:

62. The Consultation of the Parties invites *all Parties,* to give the fullest possible application, in accordance with their domestic law, to the provisions contained in Article 2.

63. In this regard, the Consultation of the Parties underlines the importance of ensuring that Article 2 continues to be implemented in full accordance with the requirements set out in Article 8 of the Protocol.

64. In the same vein, the Consultation of the Parties suggests to all Parties to ensure that they are fully able to apply Article 2 in their relations with other Parties. This entails that Article 2 should be given a sufficiently clear legal basis in domestic law, leaving no room for doubt about the exact extent of the legal obligation undertaken by the Party, and that relevant national case-law does not pose unwarranted limitations in this respect.

Annex I

List of responding Parties and Signatories (in alphabetical order)

1. Albania
2. Andorra
3. Armenia
4. Austria
5. Belgium
6. Bosnia and Herzegovina
7. The Czech Republic
8. Estonia
9. The EU
10. Finland
11. France
12. Germany
13. Hungary
14. Italy
15. Latvia
16. Lithuania
17. Moldova
18. Monaco
19. The Netherlands
20. Norway
21. Poland
22. Portugal
23. Romania
24. The Russian Federation
25. San Marino
26. Serbia
27. Spain
28. Sweden
29. Switzerland
30. Türkiye

Annex II

TEMPLATE

FOR THE ASSESSMENT OF THE IMPLEMENTATION OF ARTICLE 3 OF THE ADDITIONAL PROTOCOL TO THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM [CETS No. 217]

Party to the Convention:

Name of Providing Expert:

The transposition of Article 2 (and in connection to Articles 10[3] and 11[4] of the Convention):

Question 1: A) Please provide the texts of the criminal offence transposing Article 2 of the Additional Protocol into your domestic legislation. If possible, please provide a translation of the exact wording of the provision in question in English or French.

B) Please clarify whether mere membership in an association or a group would be criminalised under Article 2 offence or whether criminal liability requires active participation in an association or a group and contribution to the criminal goals of the association/group.

C) Specify if contribution to criminal goals of an association or a group can consist of non-action (omission), such as abstaining from performing a control function vested with, for example, a public or a bank officer.

D) Please provide the text of your criminal or other legislation, explanatory documents, or information on case-law clarifying how terms “association” and “group” are to be understood for the purpose of the criminal offence in question and clarify

[3] **Article 10 – Liability of legal entities**

1 Each Party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal entities for participation in the offences set forth in Articles 5 to 7 and 9 of this Convention.

2 Subject to the legal principles of the Party, the liability of legal entities may be criminal, civil or administrative.

3 Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

[4] **Article 11 – Sanctions and measures**

1 Each Party shall adopt such measures as may be necessary to make the offences set forth in Articles 5 to 7 and 9 of this Convention punishable by effective, proportionate and dissuasive penalties.

2 Previous final convictions pronounced in foreign States for offences set forth in the present Convention may, to the extent permitted by domestic law, be taken into account for the purpose of determining the sentence in accordance with domestic law.

3 Each Party shall ensure that legal entities held liable in accordance with Article 10 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

the difference between terrorist association and terrorist group, if national legislation or case law provide any.

E) Please provide information on whether an “association” or a “group” have to be formally designated as a “terrorist” association or group for the purpose of this offence.

F) Please clarify whether the duration of the existence and the activities of the association or a group play a factor in the ability to apply Article 2 offence to its participants.

G) If not clear from the text of the provision of the criminal offence, please provide information on terrorist offences to whose commission the activities of the terrorist association or group under this criminal offence would be considered to contribute to.

H) Please provide information on whether the national legislation requires that a terrorist offence/s planned by a group or an association needs to have been committed for a person/s to be prosecuted under the Article 2 offence or contribution to an attempt would also suffice.

I) Please provide information on whether participation in activities of an association or group aimed at collection or provision of funds for terrorist purposes or aimed at contributing to provision or collection of such funds are treated under Article 2 criminal offence or a separate offence;

J) Please provide information on whether contributing financially to activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group would be treated under Article 2 offence or a separate offence;

K) Please provide an explanation of the required *mens rea* under the Article 2 offence pursuant to domestic legislation and case law.

L) If not clear from the text, please also provide information on whether the offence is applicable to natural and/or legal persons.

M) Please provide information on applicable sanctions, with explanation of a legal maximum and minimum range for applicable sanctions in your respective jurisdiction;

N) Please provide information on whether applicable rules differentiate between various statuses in an association or a group (e.g. leader, funder v. one of many participants).

O) In addition, please provide information as to whether criminal or other legislation allows for administrative and/or financial sanctions (such as banning, proscription, confiscation of the assets/proceeds of the association or group and/or of the participants of the association or group) to be imposed on an association or a group in case the involvement in terrorist activities by the association or the group is established through a final judgment.

Question 2: Please describe if you have encountered any specific legal problems in transposing Article 2 into your domestic legislation, including a short description of the nature of the problems encountered and solution identified.

Conditions and safeguards in respect of the application of Article 2

Question 3: Please provide information on how the conditions and safeguards set forth by Article 8 of the Additional Protocol are to be observed in case of charges for Participating in an association or group for the purpose of terrorism.

Jurisdiction in respect to commission of the offence from Article 2

Question 4: Please provide information on grounds for assuming jurisdiction over the Article 2 offence, having in mind the requirements of Article 14 of the Convention.

Implementation of Article 2

Question 5: Please provide information about any case law from your domestic courts concerning the application of Article 2 in your domestic legislation.

Question 6: Please provide information on any challenges encountered in investigating or prosecuting persons under these charges.

Additional information

Question 7: Do you have any other comments on Article 2, or any additional information about the transposition of this provision in your domestic law and/or related practice, which has not been touched upon in your replies to questions 1 – 6 above?