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GROUP OF PARTIES TO THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM [CETS NO. 196]

SUMMARY

OF THE THEMATIC ASSESSMENT REPORT ON THE IMPLEMENTATION OF ARTICLE 5 "PUBLIC PROVOCATION TO COMMIT A TERRORIST OFFENCE" OF THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM (CETS No 196)

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1. Introduction

The Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) was opened for signature in Warsaw on 16 May 2005 and entered into force on 1 June 2007. As of 15 October 2015, the Convention has been ratified by 34 States. In addition, 10 States have signed but not yet ratified the Convention.

At its 6th meeting, on 12-13 November 2014, the Group of Parties to the Convention decided to devote its third thematic assessment report to Article 5 of the Convention.

Article 5 deals with the provision of public provocation to commit a terrorist offence. The provision stipulates that:

> "1 For the purposes of this Convention, "public provocation to commit a terrorist offence" means 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.
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> 2 Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law."

The Group of Parties decided in addition to the assessment of the implementation of Article 5 also to examine the implementation of certain other provisions of the Convention which are linked to the application of Article 5**.**

The Group of Parties also agreed to include a series of questions relating to the application in the States Parties themselves and between them of Article 5. The Group of Parties decided to make it voluntary for States Parties whether or not to reply to these questions.

The Group of Parties agreed on a template for the assessment of Article 5 containing a series of questions grouped under the following main headings:

- The transposition of Article 5
- The transposition in domestic legislation, of the wording ""the distribution, or otherwise making available, of a message to the public (...) advocating terrorist offences" and in particular of the term "public"
- The specification of "indirect incitement (….) whether or not directly advocating terrorist offences".
- Problems in transposing Article 5.
- Possible amendments to Article 5
- The transposition of Articles 8 – 12 in respect of criminal acts pursuant to Article 5
- Additional information

This template questionnaire was distributed to the States Parties to the Convention, which were asked to send in their replies by 4 May 2015. 29 States Parties submitted replies. The Group of Parties examined the replies to the template questionnaire at its meeting on 16 November 2015 and prepared the present thematic assessment report. The thematic assessment report contains an analysis and synthesis of the state of implementation in States Parties based on the replies received, as well as certain general and specific recommendations to States Parties adopted by the Group of Parties.

Thus, the thematic assessment report does not attempt to provide a detailed comparative analysis of all relevant aspects of the criminal law systems in the 29 responding States Parties, but instead

provides a snapshot of the state of implementation of Article 5 and some related provisions thereby enabling the Committee of Experts on Terrorism (CODEXTER) to address possible shortcomings in the Convention itself or its interpretation.

2. Overview of the State of implementation

The transposition of Article 5:

Article 5 has been transposed by the responding States Parties in two different ways:

1. Introducing specific terrorism-related legislation in domestic law which includes provisions concerning Article 5;
2. Subsuming the offence of public provocation under a number of (usually already existing) provisions in domestic criminal law;

It should be underlined, that there is no legal obligation for States Parties under the Convention to transpose Article 5 in their domestic law in a particular manner. Whether a State Party chooses to introduce a new specific provision on the public provocation to commit a terrorist offence in its domestic law, or prefers to rely on already existing provisions, or a combination of such provisions, in its domestic law, for the purpose of transposing Article 5 of the Convention, both approaches fulfil the requirements under international treaty law. The choice remains strictly within the discretion of States Parties, as long as the method of transposition does not affect the ability of a State Party to apply the Convention effectively in its goal to prevent terrorist offences while respecting fundamental human rights. If a State Party relies on existing criminal law provisions, according to which the public provocation for terrorism is considered as an ancillary offence, that State Party must however take special care that the ancillary offences to Article 5 enumerated in the Convention can also be adequately criminalised under its domestic law. In accordance with international standards concerning terrorism, the spirit of the Convention is to recognise the overlap between inciting punishable criminal acts and terrorist offences, but it also highlights numerous differences in nature and impact that need to be legally and specifically framed.

The transposition in domestic legislation, of the wording “”the distribution, or otherwise making available, of a message to the public (…) advocating terrorist offences” and in particular of the term “public”

The information submitted by States Parties on the definition of these terms shows that all States Parties have transposed them into their domestic legislation to cover messages that are easily accessible. With respect to the term ‘public’, most States Parties have adopted this broad approach in their definitions, when made explicit, with different levels of details, however, these differences are not of a nature that would diminish the efficacy of the Convention. It should be noted that the Explanatory Report to the Convention in paragraphs 102 to 104 contains some (non-binding and non-exhaustive) guidance as to the interpretation of the aforesaid terms. The Group of Parties is satisfied with the definitions used by the States Parties as it suits the spirit of the Convention which seeks to prevent potential risks of terrorist offences and therefore the impact of messages that would provoke them and impact on the social climate.

Looking at the used means of communication will not be determinant but is of good guidance when constituting the offence. The increased domestic case-law in this respect will be of utmost importance to specify what is meant in different contexts, in particular when messages are sent on the Internet via restrictive social platforms or private emails including using “coding” which might be interpreted as a private message not easily available but still constituting a danger for the public. The Group of Parties stresses the importance of sharing information on the outcome of relevant cases in this area to set a clearer legal framework per different and new situations stemming from the evolution of communication technologies which may challenge the concept of “public”. With the

explicit reference to “public” in Article 5, the Convention excludes private messages which provoke terrorist offences in accordance with the European Convention on Human Rights (ECHR) and its Article 8 and 10, as by their nature, they do not reveal any intent to harm nor do they potentially harm. In this respect, States Parties which do criminalise such messages should duly justify their reasoning as it contradicts the Convention which provides a legal framework to ensure that the ECHR is protected. Following terrorist attacks, the important increase of cases brought to trial for incitement to commit terrorist attacks is noticeable and justified by the interpretation of broad legal terms and definitions related to Article 5. If domestic legislation interprets Article 5 too broadly, there may be a risk of bringing a high number of cases to court that would also include situations with no probable danger and intention to harm (for example: individuals under the influence of alcohol make a public apology of terrorist acts). The Group of Parties reiterates the importance of establishing or reinforcing domestic provisions to ensure that they meet foreseeability conditions as enshrined in the ECHR and its case-law.

The specification of “indirect incitement (….) whether or not directly advocating terrorist offences”.

The intention of the Convention here is to remedy the existing lacunae of international standards and policies which, before the entry into force of the Convention, only criminalised “direct incitement”. The recognition of the reality of terrorist offences which have not been seen as defined by wide-scale direct calls for action, at least not at the early stages, led to the development of a new type of international response by prohibiting another form of speech: indirect provocation to commit terrorist offences. However, requirements were needed to guarantee freedom of speech. The criteria mentioned in chapter 2 and in particular probable harm or danger are necessary for speech to be restricted and criminalised in accordance with Article 10(2) of the ECHR. On the basis of the received information, the Group of Parties agrees that most responding States Parties have transposed the notion of “indirect incitement” appropriately in their domestic legislation, generally using the general notion of “incitement”. To ensure full respect of Article 10 of the ECHR, the Group of Parties invites all States Parties to also establish the criteria of ‘intent’ and ‘danger’, as referred to in the Explanatory Memorandum at its paragraphs 97-100 to avoid criminalising speech for its content solely rather than intent and impact. On the basis of the received replies, many States Parties do not seem to be applying these criteria but perhaps domestic legislation will be complemented subsequently by definitions given in practice and in the future case-law.

Problems in transposing Article 5

The Group of Parties finally notes that none of the responding States Parties have reported encountering any specific legal problems in the process of transposing Article 5 in their domestic legislation.

Possible amendments to Article 5

The Group of Parties notes firstly, that the majority of responding States Parties do not see any need for amending the provision. Some States Parties highlighted the need to amend possibly this provision to include ICTs in relation to public provocation to commit a terrorist offence. The Group of Parties will remain mindful of the need to provide complementary support to States Parties with practical guidance on the impacts of ICTs in the future.

The transposition of Articles 8 – 12 in respect of criminal acts pursuant to Article 5

The Group of Parties takes note that all responding States Parties apply Article 8 in full, thus not making the commitment of the offence of public provocation to commit a terrorist offence dependant on the actual commission of a terrorist act. The Group of Parties considers that, due to the inherent dangerousness of any act of public provocation to commit a terrorist offence – whether ultimately successful or not, and regardless of whether a terrorist act is in the end committed as a result of that act– it is of the utmost importance to provide for criminal sanctions in all cases of

public provocation to commit a terrorist act. The drafters of the Convention have been very clear in this regard, cf. paragraph 127 of the Explanatory Report, and consequently a State Party has no margin of appreciation when it comes to transposing Article 8 in its domestic law.

The Group of Parties notes with satisfaction that States Parties have in practice adopted a very uniform approach to the criminalisation of the ancillary offences enumerated in Article 9.

This is mainly due to the fact, that these ancillary offences are of a common nature and hence already form part of the general provisions of the criminal codes of most States Parties.

The Group of Parties is satisfied that Article 10 has been transposed by all responding States Parties in their domestic legislation. Even if some differences in the approach can be observed from the replies submitted by States Parties, these differences do not appear to pose any real, practical hindrance to the proper application of the Convention between States Parties.

The Group of Parties takes note that all responding States Parties have met the legal requirements laid down in Article 11, paragraphs 1 and 3.

Concerning the implementation of Article 11, paragraph 2, (previous convictions pronounced in foreign States for offences set out in the Convention) the Group of Parties takes note of the fact that States Parties are only obliged to transpose this provision to the extent permitted by domestic law. Some States Parties have implemented this provision in such a way that they allow for their courts to take into account previous convictions for offences under the Convention pronounced in virtually any foreign State, while others have adopted a more restrictive approach. The Group of Parties, bearing in mind the importance of bringing terrorists to justice and combat recidivism, wishes however to underline the relevance of the fullest possible application of this provision for the global fight against terrorism.

Additional information

The Group of Parties is fully aware that the added value of any international legal instrument lies in its practical application. Hence, there is a need to establish to which degree States Parties actually make use of the Convention as a legal basis for their co-operation in preventing terrorism.

The Group of Parties takes due note of the fact that a few of the responding States Parties have, on a voluntary basis, submitted information on relevant case law concerning the application of Article 5 where many States Parties have no case law at all in this area. This reveals that time is still needed to make full use of domestic legislation related to Article 5 to bring cases to justice and further define and clarify underlying legal concepts in specific situations. The Group of Parties invites States Parties to continue to share information in this area in the future.

It appears from the replies, that in practice, only very few criminal cases on public provocation of terrorist acts have so far been prosecuted by the competent authorities of States Parties. However, it is important to note the high number of cases that have been brought to justice in some States Parties as a consequence of terrorist attacks. However, a small percentage of alleged offenders were actually found guilty and sanctioned. Access to “immediate trial” procedures in Article 5 related cases is indeed questionable as reasonable time might be needed to address the facts of such cases appropriately. This might be the case in other States Parties with respect to their criminal procedures. The Group of Parties suggests examining, in the future, the means used at national level to identify these types of cases and by whom this is carried out if by anyone, to collect information on existing procedures to bring these to justice and the average timeline to reach different outcomes.

Given the increased use and accessibility worldwide of new ICTs and in particular the Internet which clearly facilitate the preparation of all forms of crimes including terrorist acts, the Group of Parties takes note of the fact that not many cases concern public provocation online. If they do,

they concern processes of a very basic nature such as the posting of texts and videos on the web. It is reasonable to say, that online tools are used in a much more complex, ample and secretive manner to incite terrorist offences. These situations are covered by Article 5 and the related domestic legislation but whether domestic law enforcement mechanisms are empowered to address these is uncertain. The Group of Parties is convinced that domestic case-law in this area will increase and invites States Parties to reflect on and share at a later stage existing measures to react promptly and appropriately to terrorist related cybercrimes.

The Group of Parties welcomes the additional information about the transposition of Article 5 provided by a few States Parties voluntarily which shows the commitment of States Parties to improve their national legal framework to prevent terrorism in all its parameters and complexities.