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"APOLOGIE DU TERRORISME" AND "incitement to terrorism"
Analytical report

Secretariat Memorandum prepared by the
Directorate General of Legal Affairs

Foreword

This document contains the final version of the analytical report by Dr. Olivier RIBBELINK which appears, together with national replies to the questionnaire, in the new Council of Europe publication "Apologie du terrorisme" and "incitement to terrorism". Details of this publication appear overleaf.

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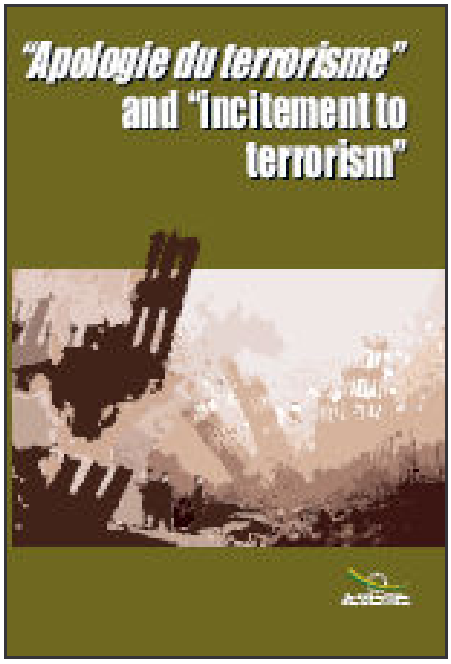

"*Apologie du terrorisme*" and "incitement to terrorism"

Available in July 2004

The fight against terrorism must never lead to a curtailing of the values and freedoms terrorists intend to destroy: the rule of law and freedom of thought and expression must never be sacrificed in this struggle. However, not everything can be justified in the name of such freedom. Contrary to politically- or ideologically-motivated statements, the approval of and incitement to behaviour criminalised by law are not necessarily protected by the freedom of expression.

This report analyses the situation in member and observer states of the Council of Europe and their different legal approaches to the phenomenon of the public expression of praise, justification and other forms of support for terrorism and terrorists, referred to in this publication as "*apologie du terrorisme*" and "incitement to terrorism".

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1. Introduction

Following the terrorist attacks in the United States of America on 11 September 2001, the Committee of Ministers of the Council of Europe, at its 109th Session on 8 November 2001, "agreed to take steps rapidly to increase the effectiveness of the existing international instruments within the Council of Europe on the fight against terrorism by, *inter alia*, setting up a Multidisciplinary Legal Group on International Action against Terrorism (GMT)".

The GMT had the tasks of considering Council of Europe instruments relevant to the fight against terrorism and preparing a report for the Committee of Ministers including additional action that the Council of Europe could implement in order to contribute to the international fight against terrorism.

In its final report of activities submitted to the Committee of Ministers at its 111th Session at ministerial level (Strasbourg, November 2002), the GMT defined a series of priority areas for further action by the Council of Europe as of 2003. Among these priorities was that of research on the concepts of "*apologie du terrorisme*" and "incitement to terrorism".

Following the expiry of the terms of reference of the GMT, the Committee of Ministers approved, in February 2003, the terms of reference of an ad hoc Committee of Experts on Terrorism (CODEXTER), which was called upon to oversee the implementation of these priorities.

2. Background of the study of "*apologie du terrorisme*" and "incitement to terrorism"

As part of the further elaboration of the definition of terrorist offences and the criminal acts related to them, it was deemed important to consider the criminal liability of persons who provide material support to terrorist activities, and persons who provide expert advice and assistance, as well as of persons who publicly "support" terrorism by whatever means.

Also, given the wish to further develop legislation on all aspects of terrorism, as well as the widely, albeit not unanimously, felt need to develop an internationally binding comprehensive convention on terrorism, it was deemed important to study the different national legislations with respect to provisions that criminalise praise, support and justification of terrorists and/or terrorist crimes, as well as "incitement to terrorism".

Although in national legal systems criminal law provisions dealing with such activities are common, if not standard, in relation to the commission of crimes in general, it was considered desirable to undertake a comparative study of national legislations, in order to analyse whether states have specific provisions criminalising such activities in relation to terrorism and, if so, how these provisions are applied in practice. Such an analysis could, *inter alia*, shed light on the question of whether the inclusion of similar specific provisions in a comprehensive convention on terrorism would be recommendable. Another possible outcome could, of course, be that existing non-specific provisions prove sufficient.

The specific crimes referred to in the study have been formulated as "*apologie du terrorisme*" and "incitement to terrorism". The latter, incitement (to commit a criminal offence), is a common offence in criminal law, albeit that the precise wording may differ. However, *apologie* of a crime as such is not. Therefore, in the questionnaire a working definition of "*apologie du terrorisme*" was included with Question 1, which stated that for the purpose of the questionnaire "the wording '*apologie du terrorisme*' could be understood as the public expression of praise, support or justification of terrorists and/or terrorist acts".

Another, but closely related, matter that was widely recognised as deserving close attention was that the criminalisation of the "public expression of opinions" relates directly to the freedom of expression, a fundamental human right. Therefore, specific attention must be given to this potential tension, and to the proper balance between freedom of expression and the need to prevent terrorism.

3. The procedure

In August 2003, the Directorate General of Legal Affairs of the Council of Europe sent out a questionnaire consisting of four questions to all member and observer states of the Council of Europe. The member and observer states were requested to reply by 30 September 2003.

By the first week of October 2003, twenty-one replies had been received from member states and one reply from an observer state, which were subsequently discussed in a draft provisional report. This report, with very preliminary findings, was distributed among the members of the CODEXTER and discussed at its first meeting in October 2003.

Subsequently, twenty additional replies from member states, and three from observers, have been received, thus making a total of forty-one member states and four observers.

4. The questionnaire

The questionnaire, as sent to all member states and Observers, together with an accompanying letter by the Director General for Legal Affairs, consisted of the following four questions.

Question 1
Does your national legislation define "*apologie du terrorisme*"[1] and/or "incitement to terrorism" as a specific criminal offence?

Question 2
If so, how are these offences defined and which sanctions are attached?

Question 3
If not, does your legislation provide for the possibility of sanctioning "*apologie du terrorisme*" and/or "incitement to terrorism" under other (non-specific) criminal offences? How are these offences defined and which sanctions are attached?

Question 4
How are these provisions applied in practice (relevant case-law)?

5. States' replies to the questionnaire

5.1 General

Forty-one replies have been received from member states and four from observer states. Because of the manifest close connection between Questions 1 and 2, many states have answered these questions jointly.

In their replies, many states included excerpts, mostly selected provisions, from national legislation, sometimes, however, in unofficial translation.

For the present report and analysis, use has been made of the replies in the form in which they were received. It must be stressed that not all replies were totally clear and unambiguous in their language and chosen wording.

As a consequence, and although for the report the utmost has been done to convey the content of the replies as correctly as possible, regrettably it cannot be excluded that occasionally the

1. As a working definition for the purpose of this questionnaire, the wording "*apologie du terrorisme*" could be understood as the public expression of praise, support or justification of terrorists and/or terrorist acts.

representation of details of answers may not correspond to the intention of the state's reply as fully as the state may wish or expect.

It should also be noted that this report has been written in English, that is, states' replies in French have been translated into English for the purpose of this study.

A small number of replies make explicit reference, and a few others do so indirectly, to the tension that may result from the designation of "*apologie du terrorisme*" and "incitement to terrorism" as criminal offences, with respect to the safeguarding of fundamental human rights, especially the right to freedom of expression and freedom of thought.

This potential friction is widely recognised and discussed, not only in the states' replies but also, for example, within the Council of Europe, by the Steering Committee for Human Rights (CDDH) and the Steering Committee on the Mass Media (CDMM). The extent to which the states' replies deal with this matter will be dealt with below (see below Section 6).

Several answers emphasise a distinction between lawful and unlawful incitement. That is, publicly expressed incitement with the intent (and the actual risk) that an offence shall be committed is considered unlawful.

Some states have replied that the publication in the media, in particular the press, of bulletins of proscribed (terrorist) organisations, as well as the incitement of unspecified persons (*incertam personam*), or even a general public apology, are, in principle, non-punishable acts.

It is also notable that a number of replies refer to recently, sometimes very recently, adopted legislation, or supplements to legislation, or adaptation of legislation, often as a part of the implementation of obligations under international agreements, for example the International Convention for the Suppression of Terrorist Bombings (United Nations, 1997),[2] the International Convention for the Suppression of the Financing of Terrorism (United Nations, 1999),[3] and the Framework Decision on Combating Terrorism (European Union, 2002).[4]

The wording of specific provisions in these international instruments, especially those that specify acts of terrorism, appears to have been transposed into various national legislations, in many instances quite literally.

5.2 States' replies to Questions 1 and 2

Question 1
Does your national legislation define "apologie du terrorisme" and/or "incitement to terrorism" as a specific criminal offence?

Question 2
If so, how are these offences defined and which sanctions are attached?

5.2.1 General

Of the forty-five states that have replied, only six replied that their national legislation defines "*apologie du terrorisme*" and/or "incitement to terrorism" as a specific criminal offence: Bulgaria, Denmark, France, Hungary, Spain and the United Kingdom.

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2. 1997 International Convention on the Suppression of Terrorist Bombings; General Assembly Resolution 52/164, 15 December 1997
3. 1999 International Convention on the Suppression of the Financing of Terrorism; General Assembly Resolution 54/109, 9 December 1997
4. 2002 Framework Decision on Combating Terrorism, Official Journal of the European Communities, L 164, 22 June 2002

These states refer in their replies to (relatively) recent provisions in their legislation, that is, provisions that either have recently been enacted (for example, through amendment), or having been adopted earlier, have recently entered into force. Some of these provisions are rather detailed and wide ranging.

Because the primary objective of the study is the identification of existing legislation with regard to "*apologie du terrorisme*" and/or "incitement to terrorism", these states' replies will be summarised and discussed rather extensively.

Two other states, Italy and Switzerland, replied to Question 1 that they do not have specific provisions. However, their answers to Question 3 justify their inclusion in this section.

5.2.2 Summary of states' replies to Questions 1 and 2[5]

The Criminal Code of Bulgaria, by means of amendments adopted in September 2002, deals specifically with the punishment of "incitement to terrorism". The Criminal Code, Special Part, Chapter One ("Crimes against the republic"), in Article 108.a, paragraph 1, contains a definition of terrorism and provides for the punishment of terrorism.

Under Chapter Ten ("Crimes against the public order and peace"), Article 320, paragraph 1, provides that "A person who, by preaching before many people, or by distribution of printed works or in any other similar manner, openly abets the perpetration of a crime shall be punished by deprivation of liberty for up to three years, but not by a more severe punishment than that provided for the crime itself."

The following paragraph, Article 320, paragraph 2, states that "open instigation towards perpetration of a crime under Article 108.a, paragraph 1" shall be punished by imprisonment of up to six years. The reply from Bulgaria adds that this "means that Bulgarian criminal law considers 'incitement to terrorism' as a serious offence".

Interestingly, Article 320.a makes it possible to imprison for up to two years "a person who threatens to commit a crime under Article 108.a, paragraph 1, (…) and where such threat might give rise to justified fear of its implementation (…)". To which is added that a court may also rule on probation. It should be noted that the latter provision does not only refer to Article 108.a, but also to a dozen other articles in the Criminal Code.

In Denmark the public and explicit expression of approval of certain specific offences, including terrorist acts, is a punishable offence (Section 136, paragraph 2, of the Danish Criminal Code). This includes mere statements of appreciation and recognition of terrorism.

Generally, incitement to commit an offence is a crime in Denmark, "liable to imprisonment for any term not exceeding four years or, in mitigating circumstances, to a fine" (Section 136.1 of the Criminal Code).

Incitement is covered in Section 23 of the Criminal Code, which criminalises "aiding and abetting", the definition of which was "recently" (no date given) supplemented and broadened by Section 114.b, to include "instigation, advice or action" specifically connected to terrorist acts.

This provision was introduced as part of the implementation of the International Convention for the Suppression of the Financing of Terrorism.

The above-mentioned Section 136, paragraph 2, specifically refers to Chapters 12 and 13 of the Criminal Code, which cover offences against the independence and safety of the state, respectively against the constitution and the supreme authorities of the state. Chapter 13 also

5. For the full text of states' replies, see Appendix I.

contains provisions concerning terrorist acts (Sections 114 to 114.e). This covers approval of terrorist acts directed against both Danish and foreign authorities.

A public and explicit expression of approval may be punished with "imprisonment for any term not exceeding two years or, in mitigating circumstances, to a fine". The penalty "shall apply to any person who has contributed to the execution of the wrongful act by instigation, advice or action". However, this person must have had the intention of contributing to the execution of a concrete offence, that is, the intention of committing criminal offences in general would not be sufficient to constitute an offence under Section 23.

The penalty that applies to aiding and abetting is equal to the penalty that applies to a given offence, subject, however, to reduction when the assistance was of minor importance, only strengthened an existing intention, the offence was not completed, or the assistance failed.

Section 23, supplemented by Section 114.b, now comprises instigation, advice or action, generally any kind of support to terrorist organisations or to an organisation that advances terrorist acts, even if this support is not directly connected to a concrete terrorist act.

This means that a general intention, or general contribution, without any knowledge of a concrete terrorist act, can be punished if that support actually contributed to advancing the criminal activity or purpose. An example, mentioned in the reply by Denmark, would be general professional assistance to a terrorist organisation, even though such assistance is not generally linked with a concrete terrorist act.

The maximum prison sentence for breach of Section 114.b is six years' imprisonment.

The reply from France refers to both the law of 29 July 1881 on the freedom of the press, and the Penal Code. According to Article 24 (as amended on 22 September 2000, entering into force on 1 January 2002) of the law of 29 July 1881, shall be punished with five years' imprisonment and a fine of 45 000 euros, public incitement that has remained without effect to commit attacks on human life, on the integrity of persons and sexual aggression (as defined in Book II of the Penal Code), as well as theft, extortion, defacement and damage that are dangerous for individuals (as defined in Book III of the Penal Code).

The same punishment applies for those who, by the same means, incite crimes against fundamental interests of the state (as mentioned in Title I, Book IV, of the Penal Code), have committed *apologie* of the crimes mentioned above, as well as of war crimes, crimes against humanity, and of crimes and misdemeanours of collaboration with the enemy. It also applies to the direct incitement to commit acts of terrorism (as defined in Articles 421-1 to 422-7, Title II, Book IV, of the Penal Code), and the *apologie* of such acts.

The legal authorities may initiate investigations and proceedings, including in the absence of a formal complaint having been made (Article 65, as amended in 1993, law of 29 July 1881).

Article 421-1 of the Penal Code, as amended in 1996, 1998 and 2000, provides an extensive enumeration of acts of terrorism.

The following articles also define as acts of terrorism, *inter alia*, environmental crimes that endanger the health of persons, animals or nature (Article 421-2, as amended in 1996), participation in a terrorist group (Article 421-2-1, as amended in 1996), the financing of terrorist organisations (Article 421-2-2, as amended in 2001), association with persons guilty of acts dealt with in Articles 421-1 to 421-2-1 (421-2-3, as amended in 2003). This is the only sub-provision that includes a measure of punishment (seven years' imprisonment and a fine of 100 000 euros). For punishments of the acts dealt with in Articles 421-1 and 421-2, see the Appendix.

The Criminal Code of Hungary, in Section 261 of Act IV (entry into force on 1 March 2003), provides for punishment of terrorist acts. The definition in Sub-section 1 of acts of terrorism closely follows the UN conventions of 1997 and 1999, as well as the 2002 European Council Framework Decision on Combating Terrorism. This sub-section is supplemented by Sub-section 9, in which "violent crime against a person and crime of public endangerment that involves the use of firearms" is specified. Sub-section 2 concerns the reduction of punishment for persons who abandon the commission of criminal acts as defined under Sub-section 1 and co-operate with the authorities.

The Criminal Code does not contain a separate provision on "*apologie du terrorisme*". However, as the reply mentions, "verbal justification and support of terrorism" can be punished, but only if the verbal act corresponds to abetting a crime.

An abettor, according to Section 21 of the Criminal Code, is a person who intentionally persuades another person to perpetrate a crime. There should be a causal link between the conduct of the abettor and the commission of the offence itself, in a way that the abettor plays a significant role in the commission of the offence. Therefore, as the reply continues, a person who persuades another person to commit a crime stipulated in Section 261 is punishable for abetting a terrorist act.

Section 261, Sub-section 4, provides that "Any person engaged in plotting or making preparations" for any of these acts is guilty of a crime and shall be punished by five to ten years' imprisonment.

According to Sub-section 5, "Any person who instigates, suggests, offers, joins or collaborates in the commission of the criminal acts defined in Sub-sections 1 and 2, is in a terrorist group or any person who is involved in aiding and abetting such criminal conduct by providing any of the means intended for use in such activities or by providing or raising funds to finance the activities or support the terrorist group in any other form is guilty of a felony and shall be punished by five to fifteen years' imprisonment."

Sub-section 9.b defines "terrorist group" as a group consisting of three or more persons operating in accord for an extended period of time whose aim is to commit the crimes defined in Sub-sections 1 and 2.

As regards punishment, the law makes no distinction between perpetrators and accomplices.

Spain stands out among the states that have replied, because, according to the Spanish reply, the crime of *apologie* has been specifically incorporated as such in Spanish legislation since 1894. Nowadays, there exists a general definition that does not as such constitute a specific offence, but it may amount to "forms of incitement" in certain circumstances and in specific offences, such as "*apologie du terrorisme*" or "*apologie* of genocide".

A definition of *apologie* in general was incorporated in Article 578 of the Penal Code of 1995. The law reform of December 2000 introduced a new, specific type of "*apologie du terrorisme*" in Article 578. This article, entitled "preparatory acts", is part of Title XXII of the Penal Code on crimes against public order, which regulates terrorist crimes in Articles 571-580 of Chapter V.

In a similar fashion, Article 607 of the Penal Code contains a definition of the crime of *apologie* of genocide.

In the preamble to the law, it is considered that punishable acts do not only consist of acts supporting and strengthening very serious criminal activities, but also of clear statements that give way to collective terror that favours terrorist objectives.

The law in Spain distinguishes between incitement and *apologie*, whereby *apologie* must be understood as a phase which follows incitement.

Article 17 of the Penal Code states that conspiracy to commit an offence exists when two or more persons agree on the commission of a crime and decide to do so (paragraph 1); that proposition exists when a person who has decided to commit a crime invites another person to participate in the execution of the crime (paragraph 2); and that conspiracy and proposition shall only be punished in cases expressly provided for in law.

Article 18.1 of the Penal Code provides that provocation exists when "direct incitement" to commit a crime is made by means of printed material, radio broadcasting or any other effective method that facilitates publicity, or before a group of persons.

In Article 18.2 it is stated that *apologie*, for the purposes of the Code, exists in the presentation before a group of persons, or by whatever means of diffusion, of ideas or doctrines that praise a crime or its perpetrator.

Apologie, however, is only a crime of provocation when, by its nature and circumstances, it constitutes a direct incitation to commit an offence.

The above-mentioned Article 578 (preparatory acts) defines "*apologie du terrorisme*" as follows: "Praise or justification by means of media or other methods of diffusion of offences contained in Articles 571-577 of th[e Spanish Penal C]ode, or of those who have participated in the execution of these offences or the realisation of acts which bring with them the discredit, contempt or humiliation of victims of terrorist acts or members of their families shall be punished with one to two years' imprisonment".

As the reply emphasises, Article 578 distinguishes between two types of behaviour: first, the praise or justification of terrorist crimes or their perpetrators through the media or by means of other methods of diffusion; and second, the realisation of other acts causing discredit or contempt for or humiliation to victims of terrorist acts or to members of their families.

In the United Kingdom, under the Terrorism Act 2000, it is an offence to incite, support or recruit the commission of terrorist acts.

This includes inviting "support for a proscribed organisation", in which support is broadly defined and includes (assisting in) arranging or managing a meeting (of three or more persons, in public or private) which is known to support such an organisation, to address a meeting when its purpose is to encourage support for such an organisation, or to be aware that a person belonging to such an organisation will address such a meeting. This can be punished with imprisonment of up to ten years, a fine or both.

It also includes "directing a terrorist organisation", at any level (which may be punished with imprisonment for life); "possession for terrorist purposes", that is, possession of an article and in circumstances that give rise to a reasonable suspicion that its purpose is connected with the commission, preparation or instigation of an act of terrorism (imprisonment not exceeding ten years, a fine or both); "inciting terrorism overseas" under which it is an offence to incite acts of terrorism, wholly or partly outside the United Kingdom, where the act if committed in the United Kingdom would constitute a number of offences as listed in the act, for example murder and wounding with intent (the penalty corresponds with the act that is incited).

Furthermore, it is an offence to provide training, or financial or material support for purposes of terrorism under the Terrorism Act 2000. The following offences can be punished with imprisonment for a term not exceeding fourteen years, a fine or both:

- "fund-raising": to invite another to provide money or other property, or to receive or provide money or other property, intending or having reasonable cause to suspect that said money or property should or may be used for purposes of terrorism;

- “use and possession”: to possess money or other property intending or having reasonable cause to suspect that said money or property should or may be used for the purposes of terrorism;

- “funding arrangements”: to enter into or become concerned in an arrangement as a result of which money or other property which is known or suspected will or may be used for the purposes of terrorism is made available, or is to be made available, to another;

- “money laundering”: to enter into or become concerned in an arrangement which facilitates the retention or control by another of terrorist property (for example, concealment, removal from jurisdiction or transfer).

Terrorist property is defined as money or other property which is likely to be used for the purposes of terrorism; proceeds of the commission of acts of terrorism; proceeds of acts carried out for the purpose of terrorism; and any money paid in connection with the commission of terrorist acts. It also covers property obtained by or in return for acts of terrorism. It includes any resources of a proscribed organisation, including money for non-violent purposes such as the payment of rent and bills.

Finally, it is an offence to provide instruction or training in the use of firearms, explosives or chemical, biological or nuclear weapons; to receive instruction or training in the making or use of the above; and to invite another to receive such instruction or training, where it is for the purposes of terrorism. Such offence shall be liable to imprisonment for a term not exceeding ten years, to a fine or to both.

Two states replied to Question 1 that there are no specific provisions in their national legislation regarding “*apologie du terrorisme*” and/or “incitement to terrorism”. Nevertheless, the content of these two replies justifies that they are added to this section.

The reply by Italy refers to Article 302 of the Criminal Code, which deals with a general rule on incitement to commit intentional offences against the internal and international person of the state. This article refers to “intentional offences envisaged by Chapters 1 and 2, Title 1, Book II”. These offences include the following: association with a view to terrorism and international terrorism; assistance to the associates (Article 270 *bis* and *ter*); attacks with a view to terrorism (Article 280); and kidnapping with a view to terrorism (Article 289 *bis*).

Article 302 provides that “Any person who incites another person to commit one of the intentional offences” mentioned, “shall be punished, if the person incited does not agree to commit the offence or agrees but the offence is not committed, by imprisonment from one to eight years. In any event, the punishment shall be less than half the punishment prescribed for the offence incited”.

It should be noted that incitement addressed to unspecified persons (incitement to *incertam personam*) or a public *apologie* in relation to the offences referred to in Article 302 is not punishable in Italy, since the repeal in 1999 of Article 303 of the Criminal Code.

Incitement is only a separate offence and can be punished only when the offence is not committed, that is, when the incited person does commit or attempt to commit the offence, the inciter becomes an accomplice under the general rules on complicity.

Switzerland states that there are no specific provisions with regard to “*apologie du terrorisme*” or “incitement to terrorism”. However, the reply clearly states that “incitement to acts of terrorism” is an offence, as well as attempts to incite such acts (Article 24 of the Penal Code, no mention of penalty).

The preparation of acts of murder, assassination, arson, etc., is punishable (Article 260 *bis* of the Penal Code, maximum prison sentence five years). Also, public incitement to commit a crime is an offence (Article 259 of the Penal Code, maximum prison sentence three years).

Incitement is understood as the public expression of a certain insistence, which is by its form and content likely to influence the will of the addressee. It is added that it can be imagined that certain cases of *apologie* of terrorism would equally fall within the sphere of application of Article 261 *bis* of the Penal Code, which prohibits racial discrimination.

Almost all other states reply that their national legislation does not contain specific provisions that define "*apologie du terrorisme*" and/or "incitement to terrorism" as specific criminal offences. However, almost invariably, these states point out that through their general legislation (Criminal Code, Penal Code, Penal Act, constitution) it is possible to prosecute these offences.

Even when terrorism and/or terrorist acts as such are not defined in the national legislation, the law describes and penalises specific acts as crimes and/or criminal offences, regardless of political and/or religious motivation, thus bringing terrorist acts under criminal offences as described in the law. This includes the perpetrator as well as accomplices, helpers, etc.

Thus, many replies point out that according to their national legislation incitement to commit a criminal act is an offence, and that this includes all criminal acts, therefore including terrorist acts.

5.3 States' replies to Question 3

Question 3
If not, does your legislation provide for the possibility of sanctioning "apologie du terrorisme" and/or "incitement to terrorism" under other (non-specific) criminal offences? How are these offences defined and which sanctions are attached?

5.3.1 General

In general terms, almost all states have national legislation that provides for the possibility to prosecute and punish persons for either one or more of the following offences: instigation to commit a crime, incitement to commit a crime, conspiracy, complicity to a crime, aiding and abetting, preparation, procuring, financing (including fund-raising), (joint) participation, criminal collaboration, etc.

Not all states have legislation that deals specifically with terrorism, but the replies indicate that these states can nevertheless deal with terrorist acts and terrorists on the basis of general criminal law, including the above-mentioned provisions.

A number of states' replies suggest that their national legislation deals with terrorism and terrorist acts as such, other states appear to refer to legislation with respect to terrorist acts committed within their territory, while still others refer to specific provisions that deal with international and transborder terrorism.

It is not always clear whether the latter also includes, for example, support for terrorist activities outside the territory of the state, for example fund-raising for terrorist organisations or groups residing and/or active in another state.

Several states mention legislation that specifically declares it an offence to incite acts of terrorism outside their national territory, some even have jurisdiction over activities (such as incitement, conspiracy, terrorist acts) that entirely take place outside their national territory.

The variety in terminology used for persons, other than the actual perpetrator of the terrorist act, who are involved, in one way or another, before, during or after the commission of that act (for example, abettor, inciter, accomplice, instigator, etc.) is worth noting.

It is difficult to tell to what extent this may be influenced by the translation of the relevant provisions of national legislation into either English or French. For example, the use and meaning of "incitement" and "instigation" is sometimes confusing.

Several states specifically refer to terrorist organisations and/or terrorist groups, or, more specifically, to incitement to found such an organisation or group, or render assistance to terrorist organisations. In most cases the numerical requirement for such a group to exist under the law is three persons or more. However, there is also legislation that describe terrorist groups as consisting of two or more persons.

5.3.2 Summary of states' replies to Question 3

The new Criminal Code of Armenia (which entered into force on 1 August 2003) proscribes terrorism as a criminal offence. Chapter 7 of the Criminal Code deals with the criminal responsibility of "accomplices" to an offence: organiser, instigator or assistant, under which offences of *apologie* or incitement can be dealt with.

The reply by Austria refers to Section 275 of the Penal Code, called "*Landzwang*", which provides for imprisonment of up to three years for whoever frightens the population or a large section (of persons) by means of a threat of an attack against life, health, bodily integrity, freedom or property. The reply notes that "*Landzwang*" can be translated as "terror" or "acts of terror".

The punishment may be increased up to between six months and five years, if the offence leads to a serious or enduring disturbance of public life, serious damage to economic life or to the death of a person or serious bodily injuries of a considerable number of persons, and even up to between one and ten years if it leads to the death of a considerable number of persons or to the destitution of many persons.

Persons who instigate another person to commit an offence, as well as any person who contributes to its commission by aiding and abetting, will face the same level of punishment as the immediate offender (Section 12 of the Penal Code).

Furthermore, Section 282 of the Penal Code provides that whoever instigates a criminal offence, including "*Landzwang*" (or terror, as described above) in a publication, on the radio (or on TV) or by any other means that might make this message available to the broad public, is to be punished by imprisonment of up to two years, if that person may not be punished more seriously for participating in the offence itself, according to Section 12 of the Penal Code.

The same punishment applies for a person who publicly approves of an intentionally committed criminal offence "in a way that might insult the general sense of law or that might incite the commission of such offences".

Finally, the reply mentions that provisions against terrorist groups (Section 278.b of the Penal Code), and against the financing of terrorism (Section 278.d of the Penal Code), may also apply. These provisions, however, are not elaborated any further.

Article 1 of the Counter-Terrorism Law of 1999 of Azerbaijan defines "terrorism", "terrorist", "terrorist group", "terrorist organisation" and "terrorist activity". The latter means "an activity involving the organisation, planning, preparation or commission of terrorist acts" including, *inter alia*, "incitement of people to terrorism".

According to Article 214, the terrorist offence may be perpetrated with "aggravating circumstances", which increases the penalty from eight to twelve years to ten to fifteen years or life imprisonment. "Commission of the criminal action by a group of persons, organised group or criminal faction (criminal organisation) having acted upon a criminal conspiracy", *inter alia*, is mentioned as an "aggravating circumstance".

According to Article 32.4, an "abettor" is a person who procures a crime to be committed by means of soliciting, contracting, threatening or by other means. An abettor is subject to criminal prosecution alongside the perpetrator.

Apologie as such does not entail criminal liability, although facilitating the commission of any crime shall be considered aiding the crime. It is added that "*apologie du terrorisme*" could also be referred to by implication, in relation to the financing of terrorist activity.

Article 12.3 makes it possible to prosecute any person, irrespective of nationality, for involvement in terrorism and other crimes punishable in accordance with international agreements, and irrespective of the location where the crime took place.

Belgium refers to new legislation on terrorist offences, which was put before parliament in October 2003. This, together with provisions in the Penal Code on participation (Article 66) and aiding and abetting (Article 67), will be applicable to acts of terrorism, and will allow for the sanctioning of "*apologie du terrorisme*" and "incitement to terrorism".

Article 66 provides that those who, *inter alia*, have directly co-operated; have helped with the execution of the crime or misdemeanour; have by whatever method (gifts, promises, threats, etc.) directly incited it; or have directly incited the crime or misdemeanour, through speeches in meetings or in public, or by whatever other means, even when such incitement has remained without effect, will be punished as the principals of the crime or misdemeanour.

Article 67 stipulates that those persons who have given instructions; have procured arms or other means, in full knowledge of their purpose; or have knowingly aided or abetted the perpetrator(s) shall be punished as accomplices to the crime or misdemeanour.

Finally, once the crime of terrorism has been incorporated in the Penal Code, it will also become possible to prosecute "*apologie du terrorisme*" and/or "incitement to terrorism" independently from the prosecution of the principal author of the crime, on the basis of Article 1 of the law of 25 March 1891.

This article provides that "Anyone who, either by speeches in meetings or in public places or by any written or printed text, by images or emblems which have been posted, distributed or sold, put on sale or exhibited in public, has directly incited another person to commit an act qualified in law as a crime, without this having been followed by any effect, shall be punished with imprisonment from eight days to three years and a fine of 50 to 3 000 euros."

The Criminal Law of Bosnia and Herzegovina does not contain sanctions on "*apologie du terrorisme*", but Article 30 does provide that a person who deliberately motivates another person to commit a crime will be punished in a similar way to the person who committed the crime. Where the crime is punished with three years' imprisonment or more, the "motivator" will be punished even when the crime is not attempted.

Article 31, on the responsibility of a "contributor", determines that this responsibility is the same as if he or she had done it himself or herself, but that the punishment could be more lenient.

The extensive and detailed reply by Canada discusses various general sections in the Criminal Code that make a person criminally liable for furthering the commission of a crime, even though that person has not actually committed the crime or the crime has not been committed at all.

Under Section 21.1 of the Criminal Code, every one is a party to a crime if the person actually commits it; does or omits to do anything for the purpose of aiding any person to commit it; or abets any person in committing it.

Aiding means to assist or help the person committing the crime, while abetting includes encouraging, instigating, promoting or procuring the crime to be committed at the time that it is committed.

Under Section 22.1, when a person counsels another person to be a party to an offence, and the other person is afterwards a party to the offence, the person who counselled is a party to that offence. Section 22.3 defines "counsel" to include "procure, solicit or incite". And Section 22.2 provides that every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling.

These sections, however, only apply when the crime is actually committed. When the crime is not committed, the counsellor is not treated as a party to a crime, but, instead, criminally liable for the separate offence of counselling the commission of a crime.

Section 24 deals with attempting to commit a crime, and Section 465 with conspiracy to commit a crime. The latter includes jurisdiction over conspiracies where the unlawful agreement or its objects take, or are to take, place outside Canada.

Sections 7.3.72 and 7.3.73 of the Criminal Code defines terrorist activity as "an act or omission that is committed in or outside Canada and that, if committed in Canada, is an offence referred to in different sub-sections of Section 7 of the Code that implement various United Nations conventions relating to the suppression of terrorism".

It is added that an act or omission also "includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission (…)".

Thus, a person who incites another to commit an act or omission that constitutes terrorist activity engages in terrorist activity, which can be severely punished.

Counselling (like inciting) a terrorist offence, as defined in the Criminal Code, is also a terrorist offence.

In addition, the Anti-Terrorism Act has created new crimes regarding conduct that furthers acts of terrorism, for example participating in or contributing to any activity of a terrorist group (Section 83.18); facilitating terrorist activity (Section 83.19); instructing to carry out activity for a terrorist group (Section 83.21); instructing to carry out terrorist activity (Section 83.22.1); and harbouring or concealing a terrorist (Section 83.23). These provisions, however, do not deal with "*apologie du terrorisme*" or "incitement to terrorism".

In Croatia, incitement to a criminal act is an offence, and this includes international terrorism. The instigator of a criminal act can be given a similar punishment to the perpetrator, and under certain circumstances it is possible for the instigator to be punished more severely than the perpetrator. Preparation and procuring of terrorist acts are offences (Article 187.a of the Penal Code, one to eight years' imprisonment). Also, threatening to commit a terrorist act is an offence (one to five years' imprisonment).

The Penal Act of the Czech Republic sanctions public incitement to a criminal offence or to "mass non-compliance with an important obligation imposed under law" (Section 164, maximum prison sentence two years), as well as "connivance to a criminal offence" (Section 165, maximum prison sentence one year), which refers to "whoever connives publicly to a criminal offence or who

praises publicly the perpetrator of a criminal offence." The same punishment will be imposed for those who reward or compensate the perpetrator, or raise funds for such a reward or compensation.

Section 51.I.a of the Criminal Code of Cyprus makes it an offence to print, publish or make a statement to any assembly calculated or likely to encourage recourse to violence on the part of any of the inhabitants of the Republic. The encouragement of recourse to violence is a necessary ingredient of the offence and, the reply adds, it is therefore doubtful whether mere praise of terrorist activity falls within the ambit of this section.

Also, Section 57 proscribes advocacy or encouragement by speech or writing or otherwise of acts declared to be unlawful under Section 63. These are acts aimed at the overthrow of the constitution or the established government by violent means.

Other possibly relevant provisions are Section 20, which makes any person who procured or incited the commission of a crime also liable as a principal offender, and Section 370, according to which "inciting or inducing another to commit a crime is an offence *per se*, irrespective of the fact that the crime is not, eventually, committed".

However, the reply by Cyprus adds, it appears that this presupposes clear incitement and/or inducement, and that it does not seem that mere praise of terrorist activity would come within the scope of the statute.

In Estonia, "incitement to terrorism" could be punished according to Section 22.2 of the Penal Code, which provides that "An abettor is a person who intentionally induces another person to commit an intentional unlawful act." Section 22.4 determines that the punishment for an "accomplice" is the same as for the "principal offender". It is added that this punishment could be up to life imprisonment, a sanction on terrorism prescribed in Section 237 of the Penal Code, which also leaves open the possibility of imprisonment for between three and twelve years.

The reply also states that "*apologie du terrorisme*" is criminalised in paragraph 151 of the Penal Code (maximum prison sentence three years), which deals with public incitement to hatred or violence, which, according to the reply, also covers the expression of support or justification of an act of terrorism, as defined in paragraph 237 of the Penal Code.

Chapter 34.a of the Penal Code of Finland deals with terrorist offences, mostly in general and only marginally in relation to *apologie* or incitement, except in relation to a terrorist group, in particular Section 4 on "Promotion of the activity of a terrorist group".

Apart from that, the new Chapter 5 on "Attempt and complicity" (entry into force at the beginning of 2004), provides, in Section 5 on "Instigation", that "A person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt at such an act is punishable for incitement to the offence as if he or she was the offender."

Section 1 on "Public incitement to an offence" of Chapter 17 ("Offences to the public order") deals with incitement through the mass media or publicly in a crowd or in a generally published piece of writing or other presentation. However, in an explanatory part the government stated that the expression of opinions or otherwise speaking in favour of a terrorist group may not be punished as "promotion of the activity of a terrorist group", within the meaning of Section 4 of Chapter 34.a, nor as any other terrorist offence. In this respect, the reply continues, reference was made to the need to guarantee respect for the freedom of expression.

According to the section on "Accessory in a criminal offence" in the general part of the Criminal Code of "the former Yugoslav Republic of Macedonia", instigation is defined as a form of accessory (Article 23), which shall be punished as if the instigator had perpetrated the crime himself or

herself: “Instigation as a form of accessory consists of premeditated instigation of somebody else to commit a criminal offence.”

The method of instigation is of no relevance, and not defined in the Criminal Code, nor is it necessary that the perpetrator knows the instigator. Instigation by more than one person implies “co-instigation”. An accomplice is not liable for excessive actions by the perpetrator.

“Unsuccessful instigation” is a separate category, which can be punished when a criminal offence of the more serious category is involved, with a punishment of at least five years’ imprisonment. Generally, however, unsuccessful instigation may lead to a mitigated punishment.

The reply announces that it is envisaged to supplement the Criminal Code with a new Article 394.a providing for a new criminal offence: terrorist organisation. The draft provisions indicate that public call, instigation or support for creating a terrorist organisation is punishable conduct, that is it does not focus on terrorist acts as such.

The Criminal Code of Georgia sanctions assistance rendered to terrorist organisations of a foreign state or under foreign control (Article 328, ten to fifteen years’ imprisonment). According to the reply there is no possibility of sanctioning “*apologie du terrorisme*” or “incitement to terrorism” under other provisions, because “In the Georgian criminal legislation ‘analogy of law’ cannot be used.”

In Germany, “incitement to terrorism” can be punishable under several provisions of the Penal Code. According to Section 130, Sub-section 1, paragraph 1, a person is punishable, if he or she, in a manner that is capable of disturbing the public peace, incites hatred against sections of the population or calls for violent or arbitrary measures against them (incitement of the people, three months to five years’ imprisonment).

Sub-section 2 makes punishable the dissemination, public display, posting or presentation of such calls in writing or other forms of imaging or making them otherwise accessible (maximum prison sentence three years or a fine).

The reply by Germany also mentions that the formation of, or participation in, a terrorist organisation could be considered “incitement to terrorism” (Section 129.a, Sub-section 1). Support of, or recruitment for, a terrorist organisation is also punishable (Section 129.a Sub-section 3). According to Section 129.b this can also be punished if the terrorist group is a foreign group acting abroad with no links to Germany.

Furthermore, it is punishable to incite a person to commit a crime (Section 26), to declare willingness to commit a crime or to accept an offer or to agree to commit a terrorist crime (Section 30, Sub-section 2).

Finally, incitement to the commission of a terrorist act or the justification or praise of such an act could be considered incitement to the commission of a crime (Section 26), or as aiding and abetting with respect to a specific terrorist act (Section 27).

The reply by Greece specifically refers to three provisions in the Penal Code. It is possible to sanction publicly causing or inciting disobedience against the laws or the decrees or any other legal orders of the authorities (Article 183, maximum prison sentence three years); publicly causing or inciting the commission of a felony or misdemeanour (Article 184, maximum prison sentence three years); or public praise in any way of a committed crime, thereby endangering public order (Article 185, maximum prison sentence three years).

The Holy See replies that “(…) given the specific nature and particular aims of the Holy See, as compared with other countries, there is no legislation as such which treats the questions of an apology for or “incitement to terrorism””. It adds that both “*apologie du terrorisme*” and “incitement

to terrorism" are covered, even if indirectly, by the strongest condemnation of terrorism, and that Pope John Paul II on several occasions has stressed that "the attribution of religious motives in justification of an act of terrorism constitutes blasphemy (the profanation of God's name)".

In Ireland, incitement involves the offence of soliciting another person to commit a crime, encompassing both persuasive as well as coercive forms of encouragement.

Section 3 of the Criminal Law Act 1976 makes it a specific offence to incite or invite another person to join an unlawful organisation, the latter being, *inter alia*, any organisation that engages in, promotes, encourages or advocates the attainment of any particular object by violent, criminal or other unlawful means (maximum prison sentence ten years).

Section 7.1 of the Criminal Law Act 1997 provides that any person who aids, abets, counsels or procures the commission of an indictable offence, that is, a more serious offence, shall be indicted, tried and punished as a principal offender.

Ireland adds that the application of Section 3 of the Criminal Law Act 1976 will be extended to include terrorist groups, whether based inside or outside the state. Also, the definition of an unlawful organisation will be extended to include terrorist groups that engage in, encourage or advocate the commission of a terrorist activity in or outside the state.

In Japan, it is punishable to incite or instigate a criminal offence, such as insurrection, for example by the distribution of documents or by broadcasting. A person who incites an act of terrorism may be punished as a co-principal (joint action in the commission of a crime). An instigator who causes another person to commit a crime shall be dealt with as a principal. A person who assists a principal is an accessory.

The Criminal Law of Latvia differentiates the criminal liability of persons according to the form of involvement in the commission of the criminal offence. Latvia differentiates between "participation" (jointly, knowingly, directly committing an intentional criminal offence) and "joint participation" (when a person took part but was not the direct perpetrator; this includes organisers, instigators and accessories). The measure of punishment differs accordingly.

In Latvia, public support, praise or justification of terrorism as such fall under freedom of speech, to the extent that they are not related to the actual perpetration of a crime and criminal conduct cannot be inferred from the person's behaviour.

The reply by Liechtenstein refers to the reply by Austria since Sections 275, 282, as well as 278.b and 278.d of the Liechtenstein Penal Code contain the same provisions as the Austrian Penal Code (see above).

However, it is added that Section 283 of the Liechtenstein Penal Code also punishes hate speech and public denial or justification of genocide or crimes against humanity with imprisonment for a term of up to two years.

In Lithuania, freedom of expression does not include instigation of violence (Article 25 of the Constitution). The reply states that the organisation of a group for terrorist activities is a crime, and that accordingly when incitement is used as a method to form such a group, this is a completed offence under paragraph 5 or paragraph 6 of Article 250 of the Penal Code.

However, "when incitement is used only to abet one or more persons to commit a terrorist activity, and no group is formed (…), a general rule of accomplices to a crime is applied". In the latter case, the inciter is also liable when the offence is unsuccessful, or does not take place. The organisation of a group is always considered a completed crime, whether successful or not.

Article 66 of the Penal Code of Luxembourg also considers as principals and co-principals of a crime or offence those persons who, either by speeches in public meetings or in public places, or by publishing and posting materials (whether or not in print), regardless of whether they were sold or freely distributed, have directly incited its commission.

Apart from this article there are several other articles that deal with terrorist acts and terrorist groups, for example the new (12 August 2003) Articles 135-1 to 135-4, or with crime in a more general manner, without referring to activities that could be designated as *apologie* or incitement.

In Mexico, "incitement to terrorism" can be sanctioned under Articles 13, 139 and 142 of the Federal Penal Code. Paragraph V of Article 13 deals with "instruction" to another person to commit a crime. Article 142 criminalises the instigation, incitement or invitation to commit terrorism, as an offence against national security. Article 139 criminalises terrorism. The sanction is the same for the main offender and for participating in the offences, namely two to forty years of imprisonment.

Over the last years, Moldova has introduced specific laws with regard to terrorism, but the Penal Code does not specifically define "*apologie du terrorisme*" or "incitement to terrorism". Nevertheless, "incitement to terrorism" can be dealt with as a form of participation in an offence.

According to Article 42, an instigator is a person who, by whatever means, causes another person to commit an offence. Article 83 determines that the organiser and the accomplice of an intentionally committed offence will be punished with the punishment foreseen for the principal of the offence.

The reply by the Netherlands states very clearly that "*apologie du terrorisme*" is not a specific criminal offence, "nor is the creation of such an offence envisaged since that would seriously infringe the constitutional freedom of expression". Similarly, "incitement to terrorism" is not a criminal offence, nor is the creation of such an offence envisaged. However, there is a proposal to criminalise the unauthorised "recruitment for armed combat", similar to unauthorised recruitment for foreign armed forces.

"*Apologie du terrorisme*" could only be punished if it coincided with infringement of an interest protected by criminal law, for example if it constituted a criminal insult or discrimination.

"Incitement to terrorism" might in many cases be prosecuted under the general criminalisation of incitement to violence (Articles 131 and 132 of the Criminal Code, maximum prison sentence five years), or, "depending on the situation", incitement to genocide (paragraph 2 of Article 3 of the International Crimes Act, maximum prison sentence twenty years).

Norway has adopted new anti-terror legislation that makes it a serious criminal offence to be an accomplice to terrorist acts (Article 147.a), or to directly or indirectly finance (Article 147.b) terrorist acts. Any person who instigates the commission of such a crime is an accomplice and liable to the same penalty as the perpetrator.

Article 147.a holds any person who plans or prepares terrorist acts by conspiring with another person for the commission of such an act liable to imprisonment for a maximum of twelve years.

The new legislation must be read in conjunction with the existing Section 140 of the Penal Code, which criminalises any person who publicly urges or instigates the commission of a criminal act or extols such an act or offers to commit or to assist in the commission of it, or who is an accessory to any of these.

Polish law does not provide for terrorism as a specific type of offence. However, terrorist acts may be prosecuted pursuant to various provisions concerning other types of offence. For example, "*apologie du terrorisme*" may be prosecuted as "praising publicly the commission of an offence"

(Article 255.2 of the Penal Code, fine or maximum prison sentence of one year), while incitement may be prosecuted under provisions such as, *inter alia*, attempt on the life of the president of the republic (Article 134); assault upon a foreign head of state, or the head of a diplomatic representation (Article 136); internationally causing a catastrophe which endangers public safety (Article 163); or taking control of a ship or aircraft (Article 166).

It should be noted that Poland plans an amendment to the Penal Code, introducing a definition of the term “act of terrorism” as well as of qualified types of terrorist offences to the code.

The Penal Code of Portugal criminalises public instigation to a crime (Article 297, maximum prison sentence three years or a fine) and public *apologie* of a crime (Article 298, maximum prison sentence six months or a fine). Also, a person “who promotes any terrorist organisation or association” shall be punished (Article 300, paragraph 1, five to fifteen years’ imprisonment), where “promote” must be seen to include active participation in its constitution, organisation of human and material resources, as well as the spreading of ideas and motives by any means of communication.

The reply specifically mentions special parts in the Penal Code of Portugal which deal with crimes against peace and humanity and crimes against the state.

Also, it is a crime to incite civil war or a change of the rule of law by violent means (Article 326, imprisonment of between one and eight years).

In this connection, mention should be made of Article 330 which criminalises public incitement, by means of public communications, and with the intent to achieve collective disobedience of the law, the public order, or to incite political struggle by violent means, with the object to destroy, change or reverse by violent means the rule of law (maximum prison sentence two years).

Article 324 of the Criminal Code of Romania defines the offences of ‘public incitement and apology of crime’, as acts of ‘urging the public orally, in writing, or in any other way, not to observe the laws or to commit acts that are considered crimes’. This is punishable with imprisonment of between three months and three years. However, when the act is committed by a civil servant, or by any person who carries out an important state activity or any other important public activity, the punishment is imprisonment for a period of one to five years.

The punishment for public incitement that results in the performance of a crime will be the punishment provided for that crime. The reply specifically mentions that public praise of those who have committed crimes, or the crimes committed by them, will be punished with imprisonment of between three months and three years.

Terrorist acts are defined and sanctioned in Emergency Government Ordinance 141/2001, as amended by Law 472/2002, and although this does not include “incitement to terrorism” as such, it can be sanctioned in accordance with the General Part of the Criminal Code. For example, Article 24 of the Criminal Code defines an instigator as a person who intentionally induces another person to commit any act sanctioned by criminal law.

Although the Criminal Code of the Russian Federation does not include specific provisions that deal with ”*apologie du terrorisme*”, several articles deal with instigation, abetting and public appeal to extremist activity. Instigation (Article 33) is the offence of soliciting a person to commit a concrete crime, and must be distinguished from ‘public appeals to realisation of extremist activity’ (Article 280). Public appeals are addressed to a broad audience and the character of the criminal act is not always precisely determined. However, the reply specifies that under the Federal Law on Suppression of Extremist Activity of 2002, extremist activity is an activity of public and religious associations, or other organisations, or mass media, or physical persons, directed at the planning, organisation, preparation and fulfilment of actions directed at the realisation of terrorist activity. A public appeal to ‘realise’ such an activity is itself considered an extremist activity. Furthermore, the

Law on Mass Media of 1991 prohibits the use of the mass media for the realisation of extremist activities.

Instigation to commit an act of terrorism is covered by the definition of terrorist activity in the Russian Federal Law on Suppression of Terrorism of 1998.

Article 33 of the Criminal Code deals with abetting and distinguishes between 'intellectual abetting' and 'physical abetting'. According to the reply, '[i]ntellectual abetting is characterized by the mental influence of the abettor on the will of the future perpetrator with a view to strengthening his determination to commit a crime', while physical abetting is characterized by rendering physical assistance to the perpetrator.

San Marino replies that there exists the non-specific offence of "instigation to a crime". There exists a general provision that allows for the sanctioning of this "crime" (Article 289 of the Penal Code). The punishment of three months to one year can be raised to between six months and one year, where "means of mass media" were used in the commission of the offence.

Under the law of Serbia and Montenegro there is only a notion of "accessory to a criminal offence" in cases where more than one person, aware of joint action, takes part in the commission of a criminal offence.

According to the Basic Criminal Code, "accessory to a criminal offence" can take one of the following forms: "co-commission of a criminal offence" (Article 22); "incitement" (Article 23); and "aiding and abetting" (Article 24).

A co-offender, as well as an instigator and abettor, will be held criminally responsible within the limits of his or her intent. When such a person voluntarily prevents the commission of the offence he or she may be exonerated.

A person who creates or uses an organisation, group, etc., for the purpose of committing a criminal offence shall be criminally responsible for all the criminal offences resulting from that organisation (Article 26).

If no criminal offence is committed, the "mastermind" shall be held responsible under Article 254, that is, for "conspiracy to commit criminal offences defined by a federal law".

The Criminal Code of the Slovak Republic, in Section IV on "Certain forms of criminal collaboration", criminalises the public instigation to the commission of a crime (Section 164, maximum prison sentence two years or a fine), as well as public approval of a criminal offence or public praise for the commission of an offence (Section 165, maximum prison sentence one year or a fine).

The Criminal Code of Slovenia, in its General Part, Chapter Two on "Criminal offence and criminal liability, Item 3 – Participation in a criminal offence, provides in Article 26 that anybody who intentionally incites another person to commit a criminal offence shall be punished as if he or she had committed it.

When the punishment for the offence is three years or more, the person who has intentionally incited another person shall be punished for the criminal attempt even if there has never been an actual attempt to commit the offence.

In November 2003, a new Law on Amendments to the Criminal Code was presented to parliament, under Article 300 of which, *inter alia*, "the denial, diminishment, approval or advocating of genocide or other criminal offences against humanity" will be incriminated. Paragraph 2 of Article 300 will be applicable also for the perpetrators who deny, diminish, approve or advocate international terrorism.

In 2002 and 2003, Sweden introduced two new acts in order to comply with international obligations. The first act (on punishment for financing serious crimes, entered into force on 1 July 2002) makes it punishable to collect, provide or receive money or funds with the intention that they should be used, or in the knowledge that they are to be used, in order to commit serious crimes (maximum prison sentence two years).

The other new act (on criminal responsibility for terrorist crime, entered into force on 1 July 2003), *inter alia*, makes punishable attempts, preparation or conspiracy to commit a terrorist crime or failure to disclose such a crime.

Under Section 4 of Chapter 23 of the Penal Code, complicity is punishable. Punishment shall be imposed on a person who furthers the crime by advice and deed, and on a person, not the perpetrator, who induces another to commit the act, for instigation of the crime or otherwise for aiding the crime.

Finally, Sweden mentions "inciting to rebellion" (Chapter 16, Section 5 of the Penal Code), while referring to (orally or in publication) urging or attempting to entice others to commit a criminal act.

The reply by Turkey refers to two provisions (Article 6 and Article 7) in the Prevention of Terrorism Act of 1991, relating to acts of aiding and supporting terrorism, which, however, mostly concern legislation with regard to announcements of terrorist offences, publications (of declarations or leaflets emanating from terrorist organisations), etc. The second paragraph of Article 7 comes the closest, stating that it is an offence, *inter alia*, "to make propaganda of those organisations that incite violence or other kinds of terror methods (…)".

The Ukrainian reply states that, according to the Ukrainian Penal Code (Article 258), the inciter of a crime is considered an accomplice to this crime and can be held responsible for it.

Pursuant to Article 27, Part IV of this Code, an inciter is a person who, by means of bribery, threat, force or by other means, influences another person to commit a crime, including an act of terrorism.

Consequently, the Law on Combating Terrorism (2003) punishes "incitement to terrorism". This law also prohibits propaganda or vindications impeding, or calling on individuals to impede, antiterrorist action (Article 17, part II), although there is no criminal responsibility for "*apologie du terrorisme*". However, such acts might fall under the scope of Article 300 of the Penal Code if it is considered as "propaganda of violence and inhumanity".

5.4 States' replies to Question 4

Question 4
How are these provisions applied in practice (relevant case-law)?

5.4.1 General

In the replies to Question 4 answers are given in relation to both the application of the specific provisions on "*apologie du terrorisme*" and/or "incitement to terrorism", as discussed above in paragraph 5.2 on Questions 1 and 2, and the application of the provisions discussed in relation to Question 3 (Section 5.3 above).

Several states reply that relevant data are not available, for example due to the very general nature of the question and/or the offences involved (for example, complicity), or because the specific data from local/regional courts are not available at the national level, or because there is no case-law (yet) in respect of legislation that has recently become applicable.

In fact, many replies simply state that no data are available, others just refrain from answering Question 4.

To give some examples, Armenia states that it is too soon for practical application; Denmark replies that there is no case-law regarding Section 136, and no case-law yet regarding Section 114.b, because that section is too recent; Estonia replies that there have not been cases, because no acts of terrorism have been committed; and Slovenia answers that there is no case-law with regard to "incitement to terrorism", because no such criminal offences have been detected until now.

Some states mention that in the past there have been procedures involving what could be called abuse of freedom of the press or similar offences. These cases appear to tend to end in either (conditional) discontinuance of the proceedings, changes to other sections of the law not relating to terrorism, or end without convictions. The outcome of the judicial proceedings, however, is not always mentioned.

Nevertheless, a very small number of states' replies refer to relevant case-law relating to the prosecution of "*apologie du terrorisme*" and/or "incitement to terrorism".

5.4.2 Summary of states' replies to Question 4

Some of the more specific replies to Question 4 are summarised in the following paragraphs.

Austria reports four convictions under Section 275 of the Penal Code ("*Landzwang*") in the last ten years: one in 1993, two in 1994, and one in 1997. There have been slightly more convictions under Section 282 of the Penal Code ("instigation to criminal offences and approval of criminal offences"), but it is unknown how many of these, if any, are related to terrorism.

Azerbaijan mentions two cases before the Serious Crime Court. The first (No. 54, 2001) involved a foreign national, who was accused, *inter alia*, of complicity, financing of terrorism and preparation for crime. According to Article 63.3 (accumulated sentencing) he was sentenced to ten years' imprisonment. The reply makes clear that the suspect was convicted for involvement in the preparation of terrorist acts to take place outside the territory of Azerbaijan.

The second case (No. 74, 2002) involved several persons who were accused of crimes such as "public calls against the state", "preparation for crime", and "terrorism". In the sentence, reference was made, *inter alia*, to conspiracy "to make calls for overthrowing the constitutional, democratic and secular system of Azerbaijan by open violence as well as to disseminate leaflets with these calls", as well as preparing for terrorist activities.

France reports four convictions in relation to *apologie* of terrorist acts between 1992 and 2001 (later data not yet available): one in 1994, one in 1995 and two in 2001. Even after the terrorist attacks of 11 September 2001 there have been only a few cases.

When it concerns a "press offence" (*infraction de presse*), according to the Court of Cassation, it must be dealt with as an offence of a political nature, for which imprisonment is not permitted, and which authorises France to refuse extradition.

In a broad interpretation of the notion of "*apologie du terrorisme*", the Court of Cassation has assimilated the *apologie* of a perpetrator of a terrorist act with the *apologie* of the act itself.

Since the entry into force of the new legislation in Hungary, on 1 March 2003, one case has been filed under suspicion of terrorism; the case is still pending.

In Ireland, Section 3 of the Criminal Law Act 1976 has been applied in practice. The reply mentions one particular case in which the defendant was found guilty of inciting others to join an unlawful organisation and was sentenced to five years' imprisonment.

Poland mentions one case in 2001 under Article 255.2 of the Penal Code, involving praise of terrorist offences, which ended in a conditional discontinuance of the proceedings.

In Portugal there has been almost no case-law on public incitement or public *apologie*. Mention is made of a case of "abuse of the freedom of the press" and a case related to terrorism, where journalists reported on a press conference by a certain organisation. Neither case has resulted in a conviction.

The Russian Federation mentions that in 2003 the Moscow City Court found a person guilty of intellectual abetting. During a hostage crisis in a theatre in 2002, this person had informed the terrorists by telephone about the actions and positions of counter-terrorist forces, as well as advised the terrorists on concrete actions to take in the event of an attempt to free the hostages.

In Sweden the new acts have not (yet) found their way into the courts. However, there is mention of some cases involving the crime of "inciting to rebellion".

Spain reports considerable developments in case-law over the last years. However, there have not been too many instances where this specific offence has been applied. The reply gives an estimate of about a dozen cases with even fewer convictions.

The application of the concept of "*apologie du terrorisme*" can be found in Judgment 2/1997 of the Supreme Court. According to this judgment, this offence requires the praise of a concrete crime or of its principals, whereby the crime must be presented as a legitimate alternative to the constitutional order. It does not concern "mere ideologically motivated statements", but the approval of criminal behaviour, that is, of criminal offences as described in criminal law.

When these conditions are not fulfilled the manifestations must be considered as the exercise of the freedom of expression. The court added that the expression of adhesion to a political programme or ideology could never be considered to constitute the crime of *apologie*.

However, according to the judgment a second condition must be fulfilled, not for constitutional reasons but from a legislative point of view. It is not enough for the expression of *apologie* to defend a criminal activity; it must also be possible to consider it dangerous insofar as it may incite others to commit the offence.

Switzerland refers to a judgment of the Federal Tribunal in 1985, which confirms a judgment of the Court of Zurich, in which a person was sentenced to six months' imprisonment for posting an incitement to 'autonomous grey cells' to 'start working', clearly inviting the reader to commit arson and cause damage to property.

6. States' replies and human rights

It is widely recognised that there is a need to maintain a balance between the fight against terrorism and, generally, the need to prevent terrorism, through the penalisation of support for terrorism and terrorists, on the one hand, and freedom of expression, on the other.

A number of states' replies refer to the possible tension, or even the infringement of human rights, in particular the freedom of expression, which may result from making "*apologie du terrorisme*" a specific criminal offence.

Nevertheless, the fact that only a few states make such an explicit reference, and even fewer do so implicitly, is remarkable, because the sensitivity of the relation between prosecution of "*apologie du terrorisme*" and, in particular, freedom of expression was explicitly mentioned by the GMT in relation to the proposal to study "*apologie du terrorisme*" and "incitement to terrorism".

In an explanatory text with Chapter 17 on “Offences against public order”, Section 1 on “Public incitement to an offence” of the Penal Code of Finland, which deals with incitement through the mass media or publicly in a crowd or in a generally published piece of writing or other presentation, the Government of Finland stated that expression of opinions or otherwise speaking in favour of a terrorist group may not be punished as “promotion of the activity of a terrorist group” within the meaning of Section 4 of Chapter 34.a, nor as any other terrorist offence. In this respect reference was made to the need to guarantee respect for the freedom of expression.

It is worth recalling that the French law of 29 July 1881, with all its amendments, is actually a law on the freedom of the press.

Greece points to the difficulties with the application of the provisions of the Penal Code relating to incitement, “because when they are applied, they usually concern (…) journalistic articles”, which raises delicate questions concerning the freedom of the press. It is added that convictions are rare and imprisonments even fewer, if any.

The reply by Ireland specifically states that Article 40.6.1 of the Constitution guarantees the right of citizens to express their convictions and opinions freely, subject to public order and morality. The same article also provides that organs of public opinion shall not be used to undermine public order or the authority of the state, the latter not including criticism of the policy of the government.

The reply by Italy to Question 4 emphasises that existing case-law on incitement to commit offences “has provided an interpretation that is compatible with the constitutional principle of the free expression of thoughts (Article 21 of the Constitution)”.

In the opinion of the Italian Constitutional Court, incitement can only be punished when there is an “actual risk” that the incited person will commit the offences provided for in Article 302 of the Criminal Code. Thus, “unlawful incitement” is perpetrated only when, on the basis of a decision on merits, incitement can induce the person incited to commit the crime.

If not, or in case of a long interval between the incitement and the commission of the offence, there is lawful incitement, covered by the constitutional right to free expression of thought. The example given by Italy as illustration of the latter refers to the publication of texts by Red Brigade prisoners.

The Lithuanian Penal Code does not criminalise the public expression of praise, support or justification of terrorists and/or terrorist acts. However, “it is an offence when such support manifests itself in prior-agreed aiding or abetting to the principals” (Article 24 of the Penal Code), or when “it falls within the definition of ‘the rendering of (…) other types of assistance to a group for terror activities’ (paragraph 5 or paragraph 6, Article 250 of the Penal Code)”.

In Latvia public support, praise or justification of terrorism as such fall under the freedom of speech, to the extent that they are not related to the actual perpetration of a crime and criminal conduct cannot be inferred from a person’s behaviour.

The Netherlands explicitly state that “’*apologie du terrorisme*’ is not a specific criminal offence at this moment, nor is the creation of such an offence envisaged since that would seriously infringe the constitutional freedom of expression.”

Portugal emphasises the thin line between these specific crimes and the exercise of the fundamental rights of freedom of expression and freedom of thought.

Spain, one of the states that have specific legislation regarding “*apologie du terrorisme*”, explicitly adds to its reply to Question 1 that “obviously” the objective of the law is not to prohibit praise or defence of ideas and doctrines, even when these diverge from the constitutional framework. And even less so does the law purport to make illegal the expression of opinions about historical or current events.

The objective, according to Spain, is the criminalisation of the glorification of terrorists or terrorist methods, which are manifestly illegitimate "from every constitutional viewpoint", as well as of "the particularly perverse behaviour of those who slander or humiliate victims of terrorism, thus aggravating the suffering of their families". These acts, Spain states, provoke "the perplexity and indignation of society" and clearly deserve to be punished.

7. Concluding remarks

7.1 Specific provisions on "*apologie du terrorisme*" and/or "incitement to terrorism"

In their replies, most states emphasise that under their national legislation incitement of another person to commit a crime is a criminal offence. That includes all criminal acts, thus including terrorist acts.

States that do not have specific provisions regarding terrorism will therefore be required to use those provisions that criminalise, for example, murder, arson, hostage-taking, extortion, etc. Clearly, such terrorist crimes are also common crimes.

However, from the replies it also becomes clear that an increasing number of states have introduced terrorism and terrorist acts as specific crimes in their national legal system, for example as part of the implementation of the 1999 International Convention for the Suppression of the Financing of Terrorism.

From that perspective it is a logical development that either the provisions that deal with incitement will be amended to cover "incitement to terrorism", or that the specific parts or sections of the law that deal with terrorism will also include "incitement to terrorism".

Belgium can be mentioned as an example of a state that is presently introducing legislation on terrorist offences in the Penal Code. It follows from the Belgian reply that this legislation is needed in order to be able to prosecute persons under the existing articles of the Penal Code, dealing with participation and complicity respectively.

Interestingly, Belgium adds that this will then also make it possible to prosecute "*apologie du terrorisme*" and/or "incitement to terrorism", independently of the prosecution of the principal author.

There is a notable tendency to consider terrorism and terrorist acts, because of their specific characteristics, as more than just crimes and criminal acts commonly found in national criminal legislations. This tendency has been and is strengthened by the successive international instruments adopted within, for example, the United Nations, the European Union and, of course, the Council of Europe.

Terrorism is increasingly defined in relation to the goals and intentions of the terrorist and the terrorist act. That is, as Article 2.1.b of the 1999 International Convention for the Suppression of the Financing of Terrorism puts it, "when the purpose of [the] act, by its nature or context, is to intimidate a population, or to compel a government or international organisation to do or to abstain from any act".

In this connection, a number of states' replies also qualify attempts to undermine public order and/or public safety, etc., as a crime, the incitement of which is a criminal offence.

Several states refer to the criminal offence of incitement to hatred or discrimination, for example, on grounds of race, sex, religion, etc. The same holds true for incitement to genocide. This can never be considered a legitimate act, nor can these be political or politically motivated. Certain

crimes are excluded from the possibility to claim that they are political offences for which extradition can be refused.

Within the framework of the Council of Europe this has been affirmed in the 1977 European Convention on the Suppression of Terrorism,[6] as amended by its 2003 Protocol[7] (not yet in force), which was developed and prepared by the GMT.

The revised Convention deals with offences as defined and described in the United Nations conventions on terrorism, as well as attempts to commit any of these offences, complicity and incitement (albeit phrased slightly differently).

As has been noted before, states have criminal law provisions with regard to incitement to a crime. Notwithstanding this common and widespread use of the notion of incitement, of the forty-five states that replied, only eight can be deemed states with legislation that specifically criminalises "incitement to terrorism", as referred to in Questions 1 and 2, and only three of these (Denmark, France and Spain) also mention "*apologie du terrorisme*" as a specific crime. And, as indicated above, Belgium intends to become the fourth state to do so.

All the other states' replies, with the exception of the reply by the Holy See, make it clear, albeit not always in explicit language, that the states (can and/or will) deal with these crimes through the use of existing non-specific provisions.

However, it cannot always be deduced from the replies whether the states themselves consider these non-specific provisions sufficient and adequate when dealing with terrorism. There is only limited case-law (see Section 5.4 above), although one could probably also say that there is a fortunate lack of experience with the application of these provisions.

"*Apologie du terrorisme*", as the working definition provided in Question 1 for the purpose of the questionnaire clarifies, "could be understood as the public expression of praise, support or justification of terrorists and/or terrorist acts".

Only three states have replied that they have specific provisions in their national legislation that mention "*apologie du terrorisme*" as a specific crime. Here the essence of these replies is repeated, in as far as they concern "*apologie du terrorisme*".

In Denmark, the public expression of approval of certain specific offences, including terrorist acts, is a punishable offence. This includes mere statements of appreciation and recognition of terrorism. However, a person must have had the intention to contribute to the execution of a concrete offence, that is, the intention to commit criminal offences in general will not be sufficient to constitute an offence.

In France, not only public incitement (including without effect) to commit attacks against human life, against the integrity of persons and sexual aggression, as well as theft, extortion and defacement and damage that are dangerous for individuals, is a criminal offence. The same applies to the incitement, by the same means, of crimes against the fundamental interests of the state, to *apologie* of the crimes mentioned above, as well as of war crimes, crimes against humanity and crimes and offences of collaboration with the enemy. It also applies to the direct incitement to commit acts of terrorism and to the *apologie* of such acts.

The most developed reply dealing with "*apologie du terrorisme*" was given by Spain. In Spain, the Penal Code contains a definition of the crime of "*apologie* of genocide". In the preamble of the law it is considered that the punishable acts do not only consist of acts supporting and reinforcing very

6. 1977 European Convention on the Suppression of Terrorism [ETS No. 90].
7. 2003 Protocol amending the European Convention on the Suppression of Financing [ETS No. 190].

serious criminal activities, but also of clear statements that give way to collective terror and favour terrorist objectives.

The law in Spain distinguishes between incitement and *apologie*, whereby *apologie* must be understood as a phase which follows provocation. Provocation exists when "direct incitement" to commit a crime is made by means of printed material, radio broadcasting or another effective method that facilitates publicity, or before a group of persons.

Apologie, for the purposes of the Penal Code, exists in the presentation before a group of persons, or by whatever means of diffusion, of ideas or doctrines that praise a crime or its perpetrator. *Apologie*, however, is only a crime of provocation when, by its nature and circumstances, it constitutes direct incitement to commit a crime.

In the Spanish Penal Code, "*Apologie du terrorisme*" is defined as: "Praise or justification by means of media or other methods of diffusion of crimes contained in (…) [the Spanish Penal C]ode, or of those who have participated in the execution of these offences, or the realisation of acts which bring with them the discredit, contempt or humiliation of victims of terrorist acts or members of their families (…)."

These replies, with the exception of the reply by Spain, do not specifically mention the role of the media in relation to *apologie*. However, several states, in the provisions in their legislation regarding incitement to crime, explicitly refer to the media as a possible means of inciting to crime. A few replies mention procedures against the media, in particular the printed media, on the accusation of incitement. It should also be mentioned, however, that, according to these replies, many of these procedures did not result in convictions.

Even though case-law appears limited, the examples given tend to relate to the dissemination by the media of information about or originating from (suspected or convicted) terrorists and/or terrorist organisations. Suffice it here to recall Principle 8 of the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information,[8] which states: "Expression may not be prevented or punished merely because it transmits information issued by or about an organisation that a government has declared threatens national security or a related interest."

7.2 *Apologie*, incitement and freedom of expression

The "Guidelines on human rights and the fight against terrorism",[9] adopted by the Committee of Ministers of the Council of Europe, stress unequivocally that it is not only possible, but also absolutely necessary, to fight terrorism while respecting human rights and the principle of the rule of law.

The Guidelines recognise, as is also elaborated in the accompanying "Texts of reference", that it can be necessary to interfere with certain rights, but only when this is provided for by law. It is also recognised that in certain circumstances temporary derogations of certain obligations may be unavoidable, while other rights and/or obligations cannot be derogated from, such as the right to life, and the prohibition of torture or inhuman or degrading treatment or punishment.

The Guidelines also reaffirm the obligation of states, and of the Council of Europe member states in particular, to respect the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[10] and the case-law of the European Court of Human Rights.

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8. 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, published by ARTICLE 19, London, ISBN 1 870798 89 9, November 1996.
9. Guidelines on human rights and the fight against terrorism, as adopted by the Committee of Ministers of the Council of Europe on 11 July 2002.
10. 1950 European Convention on Human Rights and Fundamental Freedoms [ETS No. 5]

During the discussions within the framework of the Council of Europe, and particularly within the GMT, about the treatment of "*apologie du terrorisme*" and "incitement of terrorism" as criminal offences in the fight against terrorism, much attention has been given to the potential friction that may occur with fundamental human rights, especially the freedom of expression, as provided for in Article 10 of the ECHR.

Article 10 of the ECHR, which is not mentioned in the Guidelines, is as follows:

> "Article 10 – Freedom of expression
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Without entering into an extensive discussion on grounds for derogation and the procedures involved, it should be recalled that, as stated in Article 10, paragraph 2, the exercise of the freedom of expression can be restricted, but under certain strict conditions only. As the Court has confirmed in its case-law,[11] the restrictions must be prescribed by law, and be well defined, and thus provide for predictability. The limitation must be necessary in a democratic society, must be proportionate to its legitimate aim and purpose, there must be a pressing social need and the grounds for limitation must be relevant and sufficient. Similar conditions on the restriction of the freedom of expression can be found in Article 19, paragraph 3, of the International Covenant on Civil and Political Rights (ICCPR).[12]

It is evident that the Court values the right to freedom of expression, in particular of political ideas, very highly. Freedom of expression constitutes one of the essential foundations of a democratic society and it applies, as the Court has repeatedly confirmed, also to information, opinions and ideas that are not favourably received, that is, controversial ideas and opinions that offend, shock or disturb the state or any section of the population. In a related manner, one can also refer to the right to access and receive information.

Restrictions may be imposed for reasons of national security, public order and public safety. Many states have legislation, in accordance with their international obligations, that criminalises and prohibits incitement to violence, advocacy of national, racial or religious hatred, racial discrimination, genocide (see, for example, Article 20 of the ICCPR and Article 4 of the United Nations International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[13]). Nevertheless, as Principle 6 on "Expression that may threaten national security" of the

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11 See, *inter alia*, Sunday Times v. the United Kingdom (Hudoc reference REF00000169; Application number 00006538/74; 26/04/1979), Handyside v. the United Kingdom (Hudoc reference REF00000084; Application number 00005493/72; 07/12/1976), Open Door & Dublin Well Woman v. Ireland (Hudoc reference REF00000374; Application numbers 00014234/88 and 00014235/88; 29/10/1992), Otto-Preminger-Institut v. Austria (Hudoc reference REF00000482; Application number 00013470/87; 20/09/1994), Barthold v. Germany (Hudoc reference REF00000017; Application number 00008734/79; 25/03/1985), Müller and others v. Switzerland (Hudoc Reference REF00000072; Application number 00010737/84; 24/05/1988), Barfod v. Denmark (Hudoc reference REF00000015; Application number 00011508/85; 22/02/1989), Lingens v. Austria (Hudoc reference REF00000108; Application number 00009815/82; 08/07/1986).

12. 1966 International Convention on Civil and Political Rights, 999 UNTS 171, in force 1976.

13. 1966 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, in force 1969.

1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information clearly puts it, punishing expression as a threat to national security is only permitted when the government can demonstrate that the expression is intended to incite violence, is likely to incite such violence, and that there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Not surprisingly, most states emphasise important qualifications to the application of their provisions on incitement. Thus, most of the replies that specifically discuss *apologie* and incitement agree that *apologie* is not identical to incitement. Nevertheless, although *apologie* and incitement are definitely not the same, there is sometimes a thin line separating them. As, for example, the reply by Spain makes very clear, *apologie* may well become incitement, while *apologie* is only a crime of "provocation" when it constitutes direct incitement to commit a crime. Similarly, Denmark emphasises that *apologie* is only a criminal offence when it contributes to the execution of the act.

A proper judgment will to a great extent depend on the quality and integrity of the judicial system. Evidently, for those who will be affected by the restrictions and/or limitations, an effective remedy before a national authority must be guaranteed, in accordance with Article 13 of the ECHR, as well as the right to a fair trial (Article 6 of the ECHR). This was reaffirmed in the above-mentioned "Guidelines on human rights and the fight against terrorism".

7.3 Final remarks

There is an obvious and well-recognised danger in criminalising the expression of ideas and opinions we do not like, by connecting or even identifying them with criminal offences.

Criminalising the *apologie* of terrorism, as the *apologie* of a crime, may raise difficulties in relation to the protection of the fundamental human right of freedom of expression.

However, as Article 10 of the ECHR provides in its paragraph 2, the exercise of this freedom carries with it duties and responsibilities which may be subject to such […] restrictions or penalties that are prescribed by law and are necessary in a democratic society, in the interests of national security, for the prevention of disorder or crime, […] and the protection of the reputation or rights of others.

Therefore, when these conditions are fulfilled, the criminalisation of "*apologie du terrorisme*" and of *"*incitement to terrorism*"* could constitute a legitimate measure under international human rights law, in accordance with the case-law of the European Court of Human Rights.

Then again, the introduction of intent (and/or purpose, nature, context) of the terrorist and terrorist acts in criminal law provisions may further weaken the already fine line between the expression of undesirable opinions and ideas, in particular when these involve terrorism, and actual incitement to terrorist crime. Careful consideration should therefore be given to the introduction of any such provisions.

Moreover, it is to be expected that the introduction in member states of the Council of Europe of specific anti-terrorism legislation along these lines will, inevitably and undoubtedly, give rise to complaints under the ECHR.

As the states' replies make clear, the majority of states have apparently thus far been able to do without specific provisions dealing with "*apologie du terrorisme*" and *"*incitement to terrorism*"*. Therefore, the question can be asked whether there is indeed a pressing need to introduce specific legislation in this sense.

Against this background, the following questions can also be put forward. The first question concerns the phenomenon of *apologie*, that is, how to deal with the public expression of support, justification or praise of terrorists and terrorist acts. It is recalled that of the replying states with

specific legislation that have suffered terrorist attacks in recent years, Spain and France criminalise "*apologie du terrorisme*", and the United Kingdom and Italy do not as such.

The second question is to what extent there is a need for a specific provision on "incitement to terrorism". For most states it is, to this day, apparently still sufficient that general provisions on incitement to crime also cover "incitement to terrorism".

Moreover, it should be recalled that the introduction of "incitement to terrorism" as a specific criminal offence follows from the introduction of terrorism as a specific crime into those legislations that did not specify terrorism as a specific crime before. Similarly, a state that already incorporates the criminal offence of *apologie* of a crime in its legislation will also apply that provision to *apologie* of the crime of terrorism.