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NOTE ON THE SHANGHAI CONVENTION ON COMBATING TERRORISM, SEPARATISM AND EXTREMISM

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Based on the English version of the Shanghai Convention on Combating Terrorism, Separatism and Extremism available on the website of the Shanghai Cooperation Organization.



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EXECUTIVE SUMMARY

The [Shanghai Convention on Combating Terrorism, Separatism and Extremism](#) (hereinafter “the Shanghai Convention”) is a very broadly cast framework for co-operation between states, which is extraordinary in its scope, by covering, within one single regional convention, terrorism, so-called “extremism” and “separatism”, which are substantially different from one another in their nature and scope.

Certain aspects of the definitions of “terrorism”, “separatism” and so-called “extremism” in the Shanghai Convention, and the scope of supportive or preparatory acts, are vague, overly broad and open-ended, not specifying the required mental element of criminal offences, and thus raising concerns as to respect for the principle of legality and specificity of criminal law and international human rights standards. The most fundamental problem from a human rights perspective is the requirement to criminalize so-called “extremism” or “separatism”, on account of their inherently vague and subjective nature, and the broad range of conduct that may be captured by such terms and their potential impact on freedom of thought, conscience, religion or belief, expression, association, peaceful assembly, political participation and self-determination. Moreover, the lack of binding definitions of such terms and the ability of State Parties to adopt their own national definitions in the context of the Shanghai Convention has been considered as particularly problematic at the international level.

More broadly, the lack of acknowledgement of the need to protect and respect human rights and fundamental freedoms, and of any requirement to ensure that co-operation is rendered, and the Convention is implemented, in accordance with international human rights law is striking. There is no reference to the need to ensure due process to protect human rights in relation to the prosecution of terrorist offences, or procedural safeguards in respect of extradition and detention. Similarly, the Shanghai Convention is silent as to other key elements of an effective counter-terrorism strategy in respect of which co-operation may be important, including rehabilitation and reintegration, special provisions concerning women, or the handling of child suspects or other persons in a vulnerable situation.

The most serious human rights ramifications may be that the Convention is a framework for co-operation in the enforcement of national laws governing conduct defined as “terrorism, separatism or extremism” in the State Parties, including extradition and cross-border information-sharing, irrespective of whether the said national laws/definitions are human-rights compliant and whether they contain the procedures and safeguards inherent in international human rights law.

Finally, the Shanghai Convention’s human rights impact/implications also need to be considered in the light of the Convention’s practical implementation and interpretation to date in the particular State Parties to the Convention. In that respect, there have been several reports issued by international bodies acknowledging the existence of human rights violations in the name of preventing and combatting terrorism and so-called “extremism”, for instance use of torture, arbitrary detention, lack of access to a defense lawyer, and other fair-trial violations as well as undue restrictions on media freedom, freedom of expression and access to information, freedom of peaceful assembly and of association, freedom of religion or belief, repression/persecution of human rights defenders and of political opposition.

As part of its mandate to assist OSCE participating States in implementing OSCE commitments, the OSCE/ODIHR reviews, upon request, draft and existing legislation to assess their compliance with international human rights standards and OSCE commitments and provides concrete recommendations for improvement.

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I. INTRODUCTION

1. On 2 July 2020, the OSCE Mission to Bosnia and Herzegovina (BiH) forwarded to the OSCE Office for Democratic Institutions and Human Rights (ODIHR) a request from the BiH Ministry of Security to provide an expert legal analysis of the human rights compliance of the [Shanghai Convention on Combating Terrorism, Separatism and Extremism](#) (hereinafter “the Shanghai Convention”). This Convention is open for ratification by countries that are not signatories to the Shanghai Cooperation Organization (SCO).¹
2. ODIHR agreed to prepare a Note on the Shanghai Convention to analyze its compliance with OSCE human dimension commitments and international human rights standards.
3. This Opinion was prepared in response to the above request. ODIHR conducted this assessment within the framework as established by the OSCE Bucharest Plan of Action for Combating Terrorism.²

II. SCOPE OF THE NOTE

4. The scope of this Note covers only the Shanghai Convention, with a view to analyze its compliance with OSCE human dimension commitments and international human rights standards. Thus limited, the Note does not constitute a full and comprehensive review of the other international conventions elaborated under the Shanghai Cooperation Organization (SCO) to deal with terrorism, “extremism” and separatism.³
5. The ensuing legal analysis is based on international and regional standards, norms and recommendations as well as relevant OSCE human dimension commitments. While not being the primary purpose of this Note, the Shanghai Convention’s human rights impact/implications also need to be considered in the light of the Convention’s practical implementation and interpretation to date in the State Parties to the Convention, or more broadly in terms of counter-terrorism efforts in these countries.
6. Moreover, in accordance with the *Convention on the Elimination of All Forms of Discrimination against Women*⁴ (hereinafter “CEDAW”) and the *2004 OSCE Action Plan for the Promotion of Gender Equality*⁵ and commitments to mainstream a gender perspective into OSCE activities, programmes and projects, the Note integrates, as appropriate, a gender and diversity perspective.
7. The Note is based on the English version of the Shanghai Convention available on the website of the Shanghai Cooperation Organization.⁶ Errors from translation may result.

¹ The original signatories, who founded the Shanghai Cooperation Organization (SCO) in 2001, were the Republic of Kazakhstan, the People’s Republic of China, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan and the Republic of Uzbekistan. In 2017, full membership to the SCO was granted to India and Pakistan.

² See, *OSCE Bucharest Plan of Action for Combating Terrorism*, [Annex to OSCE Ministerial Council Decision MC\(9\).DEC/1](#), Bucharest, 3-4 December 2001, par 18.

³ These include for instance the SCO Convention on Countering Extremism, adopted at the summit in Astana, and the Convention of the Shanghai Cooperation Organization against Terrorism.

⁴ *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter “CEDAW”), adopted by General Assembly resolution 34/180 on 18 December 1979. Ukraine deposited its instrument of ratification of this Convention on 12 March 1981.

⁵ See *OSCE Action Plan for the Promotion of Gender Equality*, adopted by Decision No. 14/04, MC.DEC/14/04 (2004), par 32.

⁶ Available at <<http://eng.sectsc.org/load/202907/>>.

8. In view of the above, ODIHR would like to stress that this review does not prevent ODIHR from formulating additional written or oral recommendations or comments on respective subject matters in the future.

III. LEGAL ANALYSIS

1. RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS AND OSCE HUMAN DIMENSION COMMITMENTS

9. Respect for human rights for all and the rule of law should constitute the fundamental basis of the prevention and fight against terrorism.⁷ The protection and promotion of all human rights, as well as effective counter-terrorism measures are complementary and mutually reinforcing objectives,⁸ which is also the very essence of the OSCE's comprehensive concept of security. As such, there is international recognition of the importance of counter-terrorism legislation and practices complying with international law, including international human rights standards.
10. International standards on the fight against terrorism are enshrined in a number of international legal instruments, which focus on different aspects. The *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*⁹ focuses on attacks against specific protected persons, the *International Convention against the Taking of Hostages*.¹⁰ The *International Convention for the Suppression of Terrorist Bombings*,¹¹ as well as the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*¹² are aimed at the protection of the entire population. More specifically, the *International Convention for the Suppression of the Financing of Terrorism*¹³ focuses on the financial assets of terrorist organizations, while the *International Convention for the Suppression of Acts of Nuclear Terrorism*,¹⁴ and the *Convention on the Physical Protection of Nuclear Material*¹⁵ both deal with the use of hazardous materials for the purposes of terrorism. Finally, another category of international legal instruments addresses in particular the hijacking of aircraft by terrorist organizations, and violent acts committed at airports,¹⁶ on ships, or on fixed maritime platforms.¹⁷

⁷ See OSCE, *Charter on Preventing and Combating Terrorism*, 10th Ministerial Council Meeting, Porto 2002, pars 5-7. See also UN, *Global Counter-Terrorism Strategy and Plan of Action* (2006), Pillar IV. See also the *Joint Statement* of the UN High Commissioner for Human Rights, the Secretary General of the Council of Europe and ODIHR Director (29 November 2001).

⁸ UN High Commissioner for Human Rights, *Report on the protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/4/88, 9 March 2007, par 2.

⁹ UN, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, adopted on 14 December 1973.

¹⁰ UN, *International Convention against the Taking of Hostages*, adopted on 17 December 1979.

¹¹ UN, *International Convention for the Suppression of Terrorist Bombings*, adopted on 15 December 1997.

¹² UN, *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, adopted on 1 March 1991.

¹³ UN, *International Convention for the Suppression of the Financing of Terrorism*, adopted on 9 December 1999.

¹⁴ UN, *International Convention for the Suppression of Acts of Nuclear Terrorism*, adopted on 13 April 2005.

¹⁵ *Convention on the Physical Protection of Nuclear Material*, adopted on 3 March 1980.

¹⁶ These include: the *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, adopted on 14 September 1963; the *Convention for the Suppression of Unlawful Seizure of Aircraft*, adopted on 16 December 1970; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, adopted on 23 September 1971; and the *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted on 24 February 1988.

¹⁷ See the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, adopted on 10 March 1988; and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf*, adopted on 10 March 1988.

11. The international framework also includes a number of UN Security Council Resolutions¹⁸ as well as several resolutions adopted by the UN General Assembly on a number of different matters related to the fight against terrorism.¹⁹ International efforts in the field of counter-terrorism are also governed by the framework of the United Nations' (UN) [Global Counter-Terrorism Strategy and Plan of Action](#) (2006).²⁰ The UN Strategy specifies that measures to ensure respect for human rights for all and the rule of law are the fundamental basis of the prevention and fight against terrorism.²¹ These international human rights obligations are in particular embodied in the *International Covenant on Civil and Political Rights* (ICCPR),²² the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),²³ the *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW),²⁴ the *UN Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment* (CAT),²⁵ and the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD),²⁶ as interpreted and elaborated by relevant treaty-based and other international human rights monitoring bodies.
12. Within the Council of Europe (CoE), the *European Convention on Human Rights and Fundamental Freedoms* (hereinafter "the ECHR"), the developed case law of the European Court of Human Rights (hereinafter "the ECtHR") in the field of counter-terrorism, and other CoE's instruments are also of relevance.
13. On the regional level, the European Union (EU) has developed a holistic counter-terrorism response, i.e., the [EU Counter-Terrorism Strategy](#) (2005), which commits the EU to combating terrorism globally, while respecting human rights. On 15 March 2017, the EU also adopted the [Directive 2017/541 on Combating Terrorism](#), to cover more comprehensively conducts related to terrorism and to ensure that all Member States criminalize conducts such as training and travelling for terrorism, as well as financing terrorism, while providing protection, support and guaranteeing the rights of victims of terrorism.
14. At the OSCE level, the participating States have also condemned terrorism and agreed to take effective measures to prevent and suppress it, while complying with international human rights and rule of law standards. OSCE participating States have explicitly stressed that strong democratic institutions, respect for human rights and the rule of law are the foundation for such protection,²⁷ as also set out more specifically in the *2001 Bucharest Plan of Action for Combating Terrorism*.²⁸ In the *Athens Ministerial Council Decision on Further Measures to Support and Promote the International Legal Framework against Terrorism* (2009),²⁹ participating States further recognized the need to incorporate universal anti-terrorism conventions and protocols into national criminal, and, where applicable, also administrative and civil legislation, thereby making acts of terrorism punishable by appropriate penalties. OSCE participating States have also

¹⁸ Including [Resolutions 2178\(2014\)](#) and [2396\(2017\)](#) on so-called "foreign terrorist fighters"; and [1373\(2001\)](#) on threats to international peace and security caused by terrorist acts; see also <<https://www.un.org/sc/ctc/resources/security-council/resolutions/>>.

¹⁹ For an overview, see <<https://www.un.org/sc/ctc/resources/general-assembly/resolutions/>>.

²⁰ See <<https://www.un.org/counterterrorism/ctif/en/un-global-counter-terrorism-strategy>>.

²¹ *ibid.* Pillar IV of the Plan of Action (Annex to the 2006 UN Global Counterterrorism Strategy).

²² *UN International Covenant on Civil and Political Rights* (hereinafter "the ICCPR"), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966.

²³ *UN International Covenant on Economic, Social and Cultural Rights* (hereinafter "the ICESCR"), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966.

²⁴ *UN Convention on the Elimination of All Forms of Discrimination against Women* (hereinafter "the CEDAW"), adopted by the UN General Assembly by Resolution 34/180 of 18 December 1979.

²⁵ *UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (hereinafter "the UN CAT"), adopted by the UN General Assembly by Resolution 39/46 of 10 December 1984.

²⁶ *International Convention on the Elimination of All Forms of Racial Discrimination* (hereinafter "the CERD"), adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965.

²⁷ See the [Overview of OSCE Counter-Terrorism Related Commitments](#) (as last updated in March 2018).

²⁸ *Op. cit.* footnote 3 (2001 OSCE Bucharest Plan of Action for Combating Terrorism).

²⁹ [OSCE Ministerial Council Decision No. 2/09 of 2 December 2009](#).

consistently/repeatedly reaffirmed their commitments to respect and protect human rights while countering terrorism.³⁰

15. Other specialized documents of a non-binding nature provide useful and practical guidance and examples of good practices in terms of human-rights compliant national counter-terrorism legislation.³¹
16. Regarding so-called “*separatism*”, its prohibition has no basis in international standards and it does not correspond to the offences under the Universal Anti-Terrorism Instruments listed in par 10 *supra*. At the same time, “*separatism*” is intrinsically linked to the principle of respect for the territorial integrity of a state³² and the peoples’ right to self-determination enshrined in Article 1 of the ICCPR and Article 1 of the ICESCR.³³ Claims of self-determination generally imply demands for rights to be exercised within boundaries of existing states. As noted by the UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, “[*t*]he principle of equal rights and self-determination, as laid down in the Charter of the United Nations, does not grant an unlimited right of secession to populations living in the territory of an independent sovereign State [...] The right of secession unquestionably exists, however, in a special, but very important case: that of peoples, territories and entities subjugated in violation of international law”.³⁴
17. As regards so-called “*extremism*”, there is also no consensus at the international level on its legal definition,³⁵ and as such, there is no universal international obligation to take measures to counter so-called “*extremism*” *per se*. It is only in the context of the Shanghai Cooperation Organization, that two conventions, legally binding on a limited number of states which ratified them, contain some definitions of so-called “*extremism*”, i.e., the [Shanghai Convention on Combating Terrorism, Separatism, and Extremism \(2001\)](#)³⁶ and the 2017 [Convention of the SCO on Combating Extremism](#).³⁷ There are, however, numerous initiatives and approaches at the international, regional and multilateral levels

³⁰ See e.g., [OSCE Consolidated Framework for the Fight against Terrorism](#), adopted by Decision No. 1063 of the Permanent Council, at its 934th Plenary Meeting on 7 December 2012; [OSCE Ministerial Declaration on Preventing and Countering Violent Extremism and Radicalization that Lead to Terrorism](#) (2015); and [OSCE Ministerial Council Declaration on Strengthening OSCE Efforts to Prevent and Counter Terrorism](#), MC.DOC/1/16, 9 December 2016.

³¹ These included e.g., the reports of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereafter “UN Special Rapporteur on Counter-Terrorism and Human Rights”), available at <<https://www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx>>; and reports and other documents produced by treaty-based and other international human rights monitoring bodies, available at <<https://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>>; ODIHR, [Countering Terrorism, Protecting Human Rights: a Manual \(2008\)](#); ODIHR and the OSCE Secretariat’s Transnational Threats Department / Strategic Police Matters Unit (TNTD/SPMU), [Practical Manual for Law Enforcement Officers on Human Rights in Counter-Terrorism Investigations](#) (2013); OSCE TNTD/SPMU-ODIHR, [Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach](#) (2014); ODIHR, [Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework](#) (2018); UNODC, [Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism](#) (2019); UN Counter-Terrorism Implementation Task Force’s [Basic Human Rights Reference Guide on Conformity of National Counter-Terrorism Legislation with International Human Rights Law](#) (2014); and UN OHCHR, [Factsheet on Human Rights, Terrorism and Counter-Terrorism](#) (2008).

³² CSCE/OSCE, Helsinki Final Act (1975), Article IV. See also UN General Assembly [Resolution 1514 \(XV\)](#), which states that “[*a*]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”; and [Resolution 2625 \(XXV\)](#) which provides that the right of peoples to self-determination cannot be construed “as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”.

³³ Article 1 of the ICCPR and Article 1 of the ICESCR state that “[*a*]ll peoples have the right of self-determination” and “[*b*]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. See also CSCE/OSCE, Helsinki Final Act (1975), Article VIII, where OSCE participating States committed to “respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States”.

³⁴ UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, The right to self-determination: historical and current development on the basis of United Nations instruments (1981), E/CN.4/Sub.2/404/Rev. 1, par 173.

³⁵ See e.g., UN Special Rapporteur on Counter-Terrorism and Human Rights, [2015 Thematic Report](#), A/HRC/31/65, 22 February 2016, paras 11 and 21, noting that “[*d*]espite the numerous initiatives to prevent or counter violent extremism, there is no generally accepted definition of violent extremism, which remains an ‘elusive concept’”.

³⁶ See <<http://www.cfr.org/counterterrorism/shanghai-convention-combating-terrorism-separatism-extremism/p25184>>.

³⁷ Shanghai Cooperation Organization, [Convention of the Shanghai Cooperation Organization to Combat Extremism](#) (Astana, 9 June 2017). Article 2 par 1 (2) of the Convention defines “extremism” as: “ideology and practices aimed at resolving political, social, racial, national and religious conflicts through violent and other unconstitutional actions”.

on preventing and countering “*violent extremism*”, though there is also no universally agreed definition of the term “*violent extremism*”.³⁸

18. At the OSCE level, with the *2008 Ministerial Council Decision on “Further Promoting the OSCE’s Action in Countering Terrorism”*,³⁹ participating States expressly committed to countering violent extremism and radicalization that lead to terrorism (VERLT), which is directly connected with violence and terrorism, and as such is clearly distinct from so-called “*extremism*”. These commitments have been reaffirmed, in particular, in the [2012 OSCE Consolidated Framework for the Fight Against Terrorism](#) and the [2015 Ministerial Declaration on “Preventing and Countering Violent Extremism And Radicalization that lead to Terrorism”](#).⁴⁰

2. BACKGROUND AND GENERAL COMMENTS

19. Generally speaking, legal frameworks prohibiting terrorism, “separatism” and so-called “extremism”, and the powers in response, are such that they could be used in a manner that may affect the exercise of the full array of civil, political, economic and social rights. Particular issues generally arise in relation to the rights to life (Articles 6 of the ICCPR and 2 of the ECHR), liberty and security of person (Articles 9 of the ICCPR and 5 of the ECHR), not to be subjected to arbitrary or unlawful interference with one’s private life, family, home or correspondence, nor to unlawful attacks on one’s honour and reputation (Articles 17 of the ICCPR and 8 of the ECHR), freedom of thought, conscience and religion or belief (Articles 18 of the ICCPR and 9 of the ECHR), freedom of expression (Articles 19 of the ICCPR and 10 of the ECHR), freedom of peaceful assembly and freedom of association (Articles 21-22 of the ICCPR and 11 of the ECHR) and non-discrimination. All of these rights are also part of the OSCE commitments, which OSCE participating States committed to adhere to.⁴¹ Any limitation to those rights that allow for restrictions⁴² must comply with the requirements provided in international human rights instruments, i.e., (i) be “*prescribed by law*” and as such be clear, accessible and foreseeable; (ii) pursue a “*legitimate aim*” provided by international human rights law for the right in question; (iii) be “*necessary in a democratic society*”, and as such respond to a pressing social need and be proportionate to the aim pursued; and (iv) be non-discriminatory.

³⁸ See e.g., for an overview, <<https://www.unodc.org/e4j/en/terrorism/module-2/key-issues/international-approaches-to-pve-and-cve.html>>.

³⁹ OSCE Ministerial Council, *Decision on “Further Promoting the OSCE’s Action in Countering Terrorism”*, MC.DEC/10/08, 5 December 2008.

⁴⁰ See OSCE, *Permanent Council Decision No. 1063*, PC.DEC/1063, 7 December 2012; and OSCE, *Ministerial Declaration on Preventing and Countering Violent Extremism and Radicalization that lead to Terrorism*, MC.DOC/4/15, 4 December 2015.

⁴¹ For an overview of OSCE human dimension commitments, see ODIHR, *Human Dimension Commitments (Thematic Compilation)*, 2012, 3rd Edition.

⁴² There are rights that are absolute, i.e., rights that can never be suspended or restricted under any circumstances, which include: the rights to be free from torture and other cruel, inhuman or degrading treatment or punishment (see Article 2 par 2 of the UN 1984 Convention against Torture and Cruel, Inhuman or Degrading Treatment and Punishment (UNCAT) and *OSCE Copenhagen Document* (1990), par 16.3)), from slavery and servitude, from imprisonment for inability to fulfil a contractual obligation; the prohibition of genocide, war crimes and crimes against humanity; the prohibition against the retrospective operation of criminal laws; the right to recognition before the law; the prohibition of arbitrary deprivation of liberty and the related right of anyone deprived of his or her liberty to bring proceedings before a court in order to challenge the legality of the detention (see UN Human Rights Committee (CCPR), *General Comment no. 35 on Article 9 of the ICCPR* (2014), par 67; and Working Group on Arbitrary Detention, *Report to the UN Human Rights Council*, A/HRC/22/44, 24 December 2012, pars 42-51); the requirement of competence, independence and impartiality of a tribunal and the fundamental principles of fair trial, including the presumption of innocence (CCPR, *General Comment no. 32 on Article 14 of the ICCPR* (2007), pars 6 and 19); and the principle of *non-refoulement* (see Article 4 of the UNCAT; CCPR, *General Comment no. 20 on Article 7 of the ICCPR*, 10 March 1992, par 9; and ECtHR case-law which incorporates this absolute principle of non-refoulement into Article 3 of the ECHR, see e.g., *Soering v. United Kingdom* (Application no. 14038/88, judgment of 7 July 1989), par 88; and *Chahal v. United Kingdom* [GC] (Application no. 22414/93, judgment of 15 November 1996), pars 80-81).

2.1. Background

20. The Shanghai Convention is a very broadly cast framework for co-operation between states, signed on 15 June 2001,⁴³ prior to the proliferation of standards and responses to terrorism (and later “*violent extremism*”) after 9/11. It is extraordinary in its scope, by covering, within one single regional convention, terrorism, so-called “extremism” and “separatism”. The primary objective of this Convention is to establish a co-operation framework “in the area of prevention, identification and suppression” of acts of terrorism, “separatism” and “extremism”, as well as defining these act as “extraditable offences” (Article 2 (1) and (2) of the Shanghai Convention).
21. It was the first instrument adopted by the newly formed SCO and forms part of the counter-terrorism framework under the auspices of the SCO, which also includes the *SCO Convention on Countering Extremism*⁴⁴ and the *Convention of the Shanghai Cooperation Organization against Terrorism*,⁴⁵ as well as the *2016-2018 SCO Member States Programme on Cooperation in Combating Terrorism, Separatism and Extremism* and the Regional Anti-Terrorist Structure of the SCO (RATS). While the preambles of the two above-mentioned later Conventions on “extremism” and terrorism respectively do refer to the Shanghai Convention, the definitions of key legal terms are not the same and appear *prima facie* to be much broader than the ones stated in the Shanghai Convention.⁴⁶ The Shanghai Convention, and relevant human rights concerns, should be understood in the context of this broader transnational framework.
22. As mentioned above, the Shanghai Convention’s human rights impact/implications also need to be considered in the light of the Convention’s practical implementation and interpretation to date in the particular State Parties to the Convention, or more broadly in terms of counter-terrorism efforts and countering so-called “extremism” in these countries. While not under-estimating the existence of potential terrorist threats⁴⁷ and recognizing the importance of legal and institutional counter-terrorism frameworks, legislation and practices must comply with international human rights standards. In that respect, in the State Parties to the Shanghai Convention, there have been several reports issued by international bodies acknowledging the existence of human rights violations in the name of preventing and combatting terrorism and so-called “extremism”, for instance use of torture, arbitrary detention, lack of access to a defense lawyer, and other fair-trial violations as well as undue restrictions on media freedom, freedom of expression and access to information, freedom of peaceful assembly and of association, freedom of religion or belief, repression/persecution of human rights defenders and of political opposition.⁴⁸

⁴³ The Shanghai Convention was signed by the Republic of Kazakhstan, the People’s Republic of China, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan, and the Republic of Uzbekistan on 15 June 2001 in Shanghai, and entered into force on 29 March 2003.

⁴⁴ Opened for signature on 9 June 2017, which has entered into force following the fourth ratification.

⁴⁵ See [2815 UNTS](#), pages 112-126. The Convention was opened for signature on 16 June 2009, and entered into force on 14 January 2012; Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan have ratified this Convention.

⁴⁶ For instance, Article 1(1)(2) and (3) of the *Convention of the Shanghai Cooperation Organization against Terrorism* defines “terrorism” as “an ideology of violence and the practice of influencing decision-making by the authorities or international organisations either by committing or by threatening to commit acts of violence and/or other criminal acts intended to intimidate the population and cause harm to persons, to society or to the State”, and a “terrorist act” as “an act to intimidate the population and endanger human life and health, intended to cause substantial damage to property, or trigger environmental disasters or other serious consequences in order to achieve political, religious, ideological and other aims by Volume 2815, I-49374 113 influencing the decisions of authorities or international organisations, as well as any threat to commit such acts”. Article 2 par 1 (2) of the [Convention of the Shanghai Cooperation Organization to Combat Extremism](#) defines “extremism” as: “ideology and practices aimed at resolving political, social, racial, national and religious conflicts through violent and other unconstitutional actions”.

⁴⁷ See e.g., regarding “foreign terrorist fighters”, UN SC Counter-Terrorism Committee Executive Directorate (UN CTED), [Implementation of Security Council Resolution 2178 \(2014\) by States affected by foreign terrorist fighters](#) (2016), especially pars 39-42.

⁴⁸ See e.g., *ibid.* especially par 44 (2016 UN CTED [Implementation of Security Council Resolution 2178 \(2014\)](#)); OSCE, OSCE Media Freedom Representative concerned by new amendments to Anti-Terrorism Law in Kyrgyzstan, 6 May 2020, <<https://www.osce.org/representative-on-freedom-of-media/451582>>; CCPR, [Concluding observations on the third periodic report of Tajikistan](#), UN Doc. CCPR/C/TJK/CO/3, 22 August 2019, pars 23-24 and 51; UN Special Rapporteur on Counter-Terrorism and Human

2.2. Absence of Human Rights Reference, Principles or Benchmarks

23. The Shanghai Convention contains firm obligations of co-operation amongst members of the SCO, but **it does so without acknowledgement of the need to protect and respect human rights and fundamental freedoms. The lack of any requirement to ensure that co-operation is rendered, and the Convention is implemented, in accordance with international human rights law is striking.** Arguably, while this may not have been uncommon to omit references to human rights in international counter-terrorism documents at the time of developing the Shanghai Convention (see e.g., the UN SC Resolution 1373), it has since become widely acknowledged that the goals of combatting terrorism and ensuring human rights are complementary and mutually reinforcing.⁴⁹ This is reflected, for instance, in the UN *Global Counter-Terrorism Strategy* (2006).⁵⁰
24. While the Convention includes some references of a general nature to international law obligations,⁵¹ such references are not included consistently and do not explicitly refer to international human rights, humanitarian and refugee law, for example. Given the human rights implications of co-operation in this field, the lack of any reference to human rights or specifically referring to the relevant international treaties, which could provide further guidance, sends a strong negative message. Moreover, there are no indications of benchmarks for compliance, or reference to what those international obligations would require in terms of co-operation. Notably, while imposing certain obligations on State Parties (such as extradition, information-sharing, etc.), the Convention does not envisage exceptions to co-operation, which would allow states to respect their human rights obligations and comply with other norms of international law, thus potentially creating conflict with obligations under international treaties (see Sub-Section 4 *infra*). In addition, as noted below, the substance of certain provisions such as wide-reaching obligations to share information on open-ended and ill-defined groups of persons on unspecified grounds, are at odds with human rights obligations (see Sub-Section 4.2 *infra*). More broadly, **the absence of human rights commitments is rendered far more problematic alongside the amorphous terms, vague definitions and broad discretion afforded to State Parties.**
25. As mentioned above, any limitation to those rights that allow for restrictions must comply with certain requirements provided in international human rights instruments for the rights in question (see par 19 *supra*). Moreover, access to an effective remedy must be provided. All these aspects and safeguards are missing from the Shanghai Convention. Nor is there any provision within the Convention to safeguard legitimate activities, especially the exercise of human rights and fundamental freedoms and activities of human rights and

Rights, [Report on her visit to Kazakhstan](#), UN Doc. A/HRC/43/46/Add.1, 22 January 2020, pars 9 and 14-15; see also: ‘Kazakhstan: UN expert urges reform of law and practice on terrorism and extremism’, 17 May 2019, [UN News](#), where the targeting of political opponents and suppression of civil society through the use of these anti-extremism laws have been raised as a particular concern; CCPR, [Concluding observations on the fifth periodic report of Uzbekistan](#), 1 May 2020, CCPR/C/UZB/CO/5, pars 20-21, 30, 42 and 44; UN Special Rapporteur on freedom of religion or belief, Report on the mission to Uzbekistan, 22 February 2018, A/HRC/37/49/Add.2, pars 49-52, 67 and 100 (g) and (h); UN Special Rapporteur on freedom of religion or belief, [2014 Report on the Mission to the Republic of Kazakhstan](#), A/HRC/28/66/Add.1, 23 December 2014, pars 44-51; CCPR, [Concluding Observations on the 6th Report of the Russian Federation](#), CCPR/C/RUS/CO/6, 24 November 2009, par 17, which refers to “reports of extraditions and informal transfers by the State party to return foreign nationals to countries in which the practice of torture is alleged while relying on diplomatic assurances, notably within the framework of the 2001 Shanghai Convention on Combating Terrorism, Separatism and Extremism” and pars 7 and 24. See also, even if from outside the OSCE region, [Communication of UN Special Rapporteurs on China](#), [OL CHN 18/2019](#), 1 November 2019.

⁴⁹ UNSG, [Uniting against terrorism: recommendations for a global counter-terrorism strategy](#), UN Doc. A/60/825, 27 April 2006, par 5; [UNSC Resolution 2178](#) (2014), UN Doc. S/RES/2178 (2014), 24 September 2014, Preamble.

⁵⁰ UNSG, [Uniting against terrorism: recommendations for a global counter-terrorism strategy](#), UN Doc. A/60/825, 27 April 2006, par 1.

⁵¹ See e.g., Articles 1, 2, 9 and 16 of the Shanghai Convention.

humanitarian organizations,⁵² or create exceptions or exclusion clauses for example, as one sees in some other contexts.⁵³

26. Finally, **while introducing terrorism and other related definitions, as well as the obligation to co-operate in the respective areas, the Shanghai Convention regrettably contains no reference to various key elements of an effective and human rights compliant counter-terrorism strategy in respect of which co-operation may be important.** These include, for instance, **rehabilitation and reintegration,⁵⁴ special provisions in respect to women, or the handling of child suspects or other persons in a vulnerable situation,** which is particularly pertinent in light of citizens returning to State Parties from conflict zones such as in Syria and Iraq.

2.3. Scope of the Shanghai Convention

27. The Shanghai Convention is unusual in drawing together under one convention three concepts, terrorism, “separatism” and “extremism”, which are substantially different from one another in their nature and potential scope. Moreover, the Convention purports to establish a connection between such concepts, but fails to elaborate on the content of this relationship.
28. Each term is defined in Article 1(1). In other provisions of the Convention, specific references are made to Article 1(1),⁵⁵ meaning that the three types of behaviours are treated on an equal footing. It may be that the Convention relies on the perceived legitimacy of internationally endorsed co-operation against international terrorism to cover much broader and distinct phenomena including actions of a more political nature (“separatism”) or certain ideologies or expression of thought or ideas (“extremism”).

2.4. Criminalization of Terrorism, “Separatism” and “Extremism”

29. Article 1(1) of the Shanghai Convention provides that terrorism, so-called “extremism” and “separatism” are acts “*criminally prosecuted in accordance with the national laws of the Parties*”, while Article 3 requires that such acts “*should entail punishment proportionate to their gravity*”. This implies that such acts already are or should be criminalized.
30. **It is questionable whether “extremism” and “separatism” should fall within the scope of criminal law, the legitimacy of which depends on it being used sparingly, *ultimo ratio*. Banning and prosecuting so-called “extremism” and “separatism” risks criminalizing the mere expression of opinion or ideas, thus potentially violating the rights to political debate and participation, freedom of opinion and expression, and**

⁵² For instance, exceptions to ensure that those engaged in genuine human rights and humanitarian work are not unduly restricted in their work and to protect legitimate activity of lawyers, human rights defenders, teachers, doctors or journalists. See e.g., UN Special Rapporteur on Counter-terrorism and Human Rights, [2019 Report](#), A/HRC/40/52, par 75 (f); and *op. cit.* footnote 31, pages 26-28 (2018 ODIHR “FTFs” Guidelines). See also UN Special Rapporteur on Human Rights Defenders, [2013 Report](#), UN Doc. A/HRC/25/55, 23 December 2013, par 54, where the UN Special Rapporteur has highlighted that, consistently with the *Declaration on the Right and Responsibility of Individuals, Groups or Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, states bear positive obligations to create all required conditions to ensure the right to promote and strive for human rights and ensure a “*safe and enabling environment for human rights defenders*”. Exemptions for humanitarian relief organizations by other states may be instructive, such as in the New Zealand Terrorism Suppression Act 2002, sections 9(1) and (2), which explicitly allow for the provision of food, clothing and medicine, even to designated terrorist entities as far as is necessary to satisfy essential needs. Other states’ laws provide explicit exemptions for humanitarian work in conflict zones; see e.g., Article 260 (4) of the Swiss Criminal Code which states that financing terrorism does not apply if “it is intended to support acts that do not violate the rules of international law on the conduct of armed conflicts”.

⁵³ See e.g., EU [Directive 2017/541](#) on Combating Terrorism of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, par 11, which states: “By contrast, merely visiting websites or collecting materials for legitimate purposes, such as academic or research purposes, is not considered to be receiving training for terrorism under this Directive”.

⁵⁴ [UNSC Resolution 2178](#) (2014), UN Doc. S/RES/2178 (2014), 24 September 2014, par 4. See also *op. cit.* footnote 31, page 29 (2018 ODIHR “FTFs” Guidelines).

⁵⁵ E.g., in Articles 2, 3, 5, 6, 7, 10 of the Shanghai Convention.

potentially the right to self-determination (see further details in Sub-Sections 3.2 and 3.3 *infra*).

31. Views expressed which cannot be read as an incitement to violence defined in accordance with international human rights standards or be construed as liable to incite to violence should be protected by freedom of expression,⁵⁶ and should as such not be prohibited or criminalized (see Sub-Section 3.4 *infra*, especially par 65 on incitement). Moreover, as emphasized at the international level, criminal responsibility for expression relating to terrorism should be limited to those who incite others to terrorism (see par 67 *infra*).⁵⁷
32. From an international human rights law perspective, requiring criminalization also means that the respective criminal offences must satisfy the requirements of *nullum crimen sine lege*, i.e., shall comply with the principles of legal certainty, foreseeability and specificity of criminal law.⁵⁸ This requires that criminal offences and related penalties be defined clearly and precisely, so that an individual, either by himself/herself or with the assistance of a legal counsel, should know from the wording of the relevant provision which acts and omissions will make him/her criminally liable and what penalty he or she will face as a consequence.⁵⁹

3. DEFINITIONS

33. The general problem of vague and overbroad definitions leading to human rights abuses is widespread and well-known. As has been highlighted by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (hereinafter “UN Special Rapporteur on Counter-Terrorism and Human Rights”), the “*adoption of overly broad definitions of terrorism [...] carries the potential for deliberate misuse of the term [...] as well as unintended human rights abuses*”.⁶⁰ Article 1(2) provides that the definitions provided in Article 1(1) of the Shanghai Convention shall not affect “*any national law of the Parties that contain or may contain a provision regarding broader application of the terms used in this Article*”. This means that the definitions of key terms provided under Article 1(1) of the Convention have no binding or constraining effect on States wishing to ascribe broader meaning to crimes of terrorism, “separatism” or “extremism”. **The lack of comprehensive, binding definitions of such terms and the possibility for State Parties to the Shanghai Convention to adopt their own and potentially broader national definitions of such terms has been considered as particularly problematic.**⁶¹ Furthermore, the obligation to co-operate in the context of extradition, information exchange and in other fields, will in principle remain in force even if the requesting State Party has criminalized respective acts applying broader definitions of terrorism, “separatism” or “extremism”. This concern is well founded in practice, as

⁵⁶ See e.g., ECtHR, [Association Ekin v. France](#) (Application no. 39288/98, judgment of 17 July 2001); and [Belek et Velioglu c. Turquie](#) (Application no. 44227/04, judgment of 6 October 2015).

⁵⁷ See UN Special Rapporteur on freedom of opinion and expression (hereafter “UN Special Rapporteur on freedom of expression”), the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information (hereafter “the International Special Rapporteurs/Representatives on Freedom of Expression”), [2015 Joint Declaration on Freedom of Expression and Responses to Conflict Situations](#), par 3 (b).

⁵⁸ This principle is enshrined in Article 15 (1) of the ICCPR and Article 7 (1) of the ECHR, as well as in the UN General Assembly (1948) Universal Declaration of Human Rights, Resolution 217 A(III) (UDHR), Article 11 (1). See also the Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), Articles 22 (*nullum crimen sine lege*) and 23 (*nulla poena sine lege*). See also, EU [Directive 2017/541](#) on Combating Terrorism, par 35, referring to “*the principles of legality and proportionality of criminal offences and penalties, covering also the requirement of precision, clarity and foreseeability in criminal law*”.

⁵⁹ See e.g., ECtHR, [Rohlena v. the Czech Republic](#) [GC] (Application no. 59552, judgment of 27 January 2015), pars 78-79; and CCPR, [General Comment No. 29 on States of Emergency](#) (Article 4 of the ICCPR), CCPR/C/21/Rev.1/Add. 11 (2001), par 7.

⁶⁰ UN Special Rapporteur on Counter-Terrorism and Human Rights, [Annual Report: Ten areas of best practices in countering terrorism](#), UN Doc. A/HRC/16/51, 22 December 2010, par 26.

⁶¹ Statement of the former UN Special Rapporteur on Counter-Terrorism and Human Rights, Martin Scheinin, [Human Rights in the North Caucasus](#), Hearing before the Tom Lantos Human Rights Commission, US House of representatives, 15 April 2011, page 7.

vague, overly broad and open-ended definitions of terrorism and “extremist activity” in domestic legislation of State Parties to the Shanghai Convention have garnered criticism at the international level, as they have or may be used to facilitate human rights abuse.⁶²

34. In this respect, the most serious human rights ramifications may be that the Convention is an umbrella for coordinating initiatives pursuant to potentially unlawful national laws and policies, rather than in the terms of specific provisions themselves.

3.1. Definition of Terrorism

35. Article 1(1)(1) of the Shanghai Convention defines “terrorism” as “*any act recognized as an offence in one of the treaties listed in the Annex to this Convention*” as well as “[a]ny other act intended to cause death or serious bodily injury to a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict or to cause major damage to any material facility, as well as to organize, plan, aid and abet such act, when the purpose of such act, by its nature or context, is to intimidate population, violate public security or compel public authorities or an international organization to do or to abstain from doing any act, and prosecuted in accordance with the national laws of the Parties”.
36. As stated before there is no agreed upon definition of terrorism in international law.⁶³ The reasons are mainly twofold: firstly, states tend to disagree on whether a definition of terrorism should be extended to include state actions; secondly, states do not agree as to whether a distinction should be drawn between terrorism and groups fighting for self-determination and/or against a government they consider to be committing serious human rights violations. Owing to the difficulty in securing agreement with the whole international community on this issue, it appears easier to secure agreement at the regional level, among a smaller number of states as done with the Shanghai Convention. At the same time, this may result in an overly-complicated and overlapping system of different treaties and international obligations. Due to this complexity, it is imperative that such regional/transnational instruments are drafted as clearly as possible and subjected to transparent oversight and scrutiny so as to enhance their legitimacy.⁶⁴
37. The UN Special Rapporteur on Counter-Terrorism and Human Rights has noted that any definition of terrorism should be confined to conducts that are of a “genuinely terrorist nature”, i.e., it should amount to: (1) an act passing a certain threshold of seriousness, i.e., either (a) amounting to the intentional taking of hostages, or (b) intended to cause death or serious bodily injury to one or more members of the general population or segments of it, or (c) involving lethal or serious physical violence; and (2) done *with the intention* of provoking terror in the general public or a segment of it or compelling a government or international organization to do or abstain from doing something; and (3) corresponding

⁶² See references cited in *op. cit.* footnote 48. See also UN CTED, [Implementation of Security Council Resolution 2178 \(2014\) by States affected by foreign terrorist fighters](#) (2016), especially par 43 on page 55, which noted concerning Central Asian states that “most States have overly broad, vague and open-ended definitions of terrorist offences that go beyond the definitions provided for in the international counter-terrorism instruments [which] raises human rights concerns”; and ODIHR, [Opinion on the Law on Countering Extremist Activity of the Republic of Moldova](#) (30 December 2019); [Comments on the Law on Countering “Extremism” of the Republic of Uzbekistan](#) (22 November 2019); [Preliminary Opinion on the Draft Amendments to the Legal Framework “On Countering Extremism and Terrorism” in the Republic of Kazakhstan](#) (6 October 2016); and OSCE, OSCE Media Freedom Representative concerned by new amendments to Anti-Terrorism Law in Kyrgyzstan, 6 May 2020, <<https://www.osce.org/representative-on-freedom-of-media/451582>>.

⁶³ UN Special Rapporteur on Counter-Terrorism and Human Rights, [2005 Report](#), UN Doc. E/CN.4/2006/98, pars 26-28; *op. cit.* footnote 60, pars 26-28 ([2010 UNSR’s Report](#)); and 2019 [Report to the UN Commission on Human Rights](#), UN Doc. A/HRC/40/52, 1 March 2019, par 19.

⁶⁴ *ibid.*

to an offence under the universal terrorism-related conventions (or, in the alternative, action corresponding to all elements of a serious crime defined by national law).⁶⁵

38. Some of the components of the definition of “terrorism” in Article 1 of the Convention reflect the above-mentioned elements accepted by the international community, and do not themselves pose significant problems. For instance, a terrorist act is defined as an act intended to cause death or serious bodily injury for the purpose of intimidating a population or compelling authorities or an organisation to carry out or abstain from carrying out an act.⁶⁶ However, **other aspects of this definition differ from international recommendations, widening the definition and raising concerns as to respect for the principle of legality and other norms of international law, in particular human rights standards.**
39. **The *actus reus* (required conduct or material element of the offence) and link to violence is rather uncertain.** Unlike the definition of “extremism” (see Sub-Section 3.3 *infra*), the definition of terrorism is not limited – or explicitly linked – to acts of “violence”. It covers “any act” committed with a prescribed “aim”. Particularly where the said behaviour will trigger criminal liability and imply transnational co-operation, it is important that there is a proximate link between the individual and acts of “terrorism” that the criminal law seeks to punish and prevent. Each individual need not engage in the act of violence directly, but intent to contribute to violence, and the creation of at least a real risk of concrete acts of violence unfolding, is required.⁶⁷ **Another key concern relates to the scope of supportive or preparatory acts, in particular the overbroad notion of “assistance to terrorism”;** however, as these arise also in relation to the other definitions of “extremism” and “separatism”, they are dealt with together under Sub-Section 3.4 *infra*.
40. Article 1(1)(1)(b) refers to a violent act against “a civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict”, which borrows language from international humanitarian law (IHL). As emphasized by the International Committee of the Red Cross (ICRC), among others, acts of terrorism occurring during armed conflict are governed by IHL norms.⁶⁸ As such, they should be investigated and prosecuted as war crimes, if they constitute one (e.g., attacks on civilians or civilian property or “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population”),⁶⁹ rather than being prosecuted as domestic terrorist offences. This provision confuses and conflates the two by referencing both civilians and other actors in an armed conflict.
41. The reference to “major damage to any material facility” is overly broad and vague, thus unlikely to comply with the principle of legal certainty, and potentially leading to discretionary application. There is potentially no limit to the types of facilities covered by the wording “any material facility”. It is also unclear whether “material facility” includes digital data on computer systems, etc. The wording “major damage” would suggest that the harm caused is greater than trivial, thus narrowing the definition to an extent. However, as emphasized by the UN Special Rapporteur on Counter-Terrorism and Human Rights,

⁶⁵ See *op. cit.* footnote 60, Practice 7 (2010 UNSR’s Report); and [UN Security Council Resolution 1566 \(2004\)](#), S/RES/1566 (2004), par 3. On the definition of “terrorism” within the OSCE context, see *op. cit.* footnote 31, pages 27-30 (2014 OSCE TNTD-SMPU and ODIHR [Preventing Terrorism and Countering VERTL](#)). See also e.g., ODIHR, [Opinion on the Draft Law of Tunisia Related to the Fight against Terrorism and Prevention of Money Laundering](#), 9 December 2013, pars 18-27. See also, UNODC, [Model Legislative Provisions Against Terrorism](#) (2009), page 12: “It is understood, in line with the International treaties, that the conducts described therein have to be criminalized by States Parties when committed ‘unlawfully’ and ‘intentionally’”.

⁶⁶ See UNSC [Resolution 1566 \(2004\)](#), UN Doc. S/RES/1566 (2004), 8 October 2004, par 3; and *op. cit.* footnote 60, pars 14-15 (2010 UNSR’s Report).

⁶⁷ See e.g., *ibid.* par 28 (2010 UNSR’s Report) for a model offence of “terrorism” requiring intentionality. See also *op. cit.* footnote 31, pages 34-46 (2018 ODIHR “FTFs” [Guidelines](#)).

⁶⁸ ICRC, [International humanitarian law and the challenges of contemporary armed conflicts](#), October 2015, pages 17-18.

⁶⁹ Article 51 (2), “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)”, 8 June 1977; and Article 13 (2), “Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)”, 8 June 1977.

“[d]amage to property, absent other qualifications, must not be construed as terrorism”.⁷⁰ The [UN Security Council Resolution 1566 \(2004\)](#) overall takes the same approach. For example, both Article 3.1(d) of the *EU Directive of 2017 on Combating Terrorism* and Article 2.1(b) of the *Draft Comprehensive Convention on International Terrorism* refer to “*extensive destruction*”, which seems to go further than mere damage as it suggests that the property can no longer be used or no longer exists. Given the seriousness of the criminal offence of terrorism, the stigmatism attached to acts labelled as terrorism, and the severity of penalties that often follow from conviction for terrorist offences, this narrower approach would be preferable.

42. Relatedly, ambiguity surrounds the targets of “terrorist” or other acts and whether it includes acts deemed to constitute an attack on the state’s interests, as opposed to the above-mentioned definition of terrorism proposed by the UN Special Rapporteur, which indicates that acts of terrorism are those directed towards “*members of the general population or segments of it*”.⁷¹
43. Among the undefined terms used in Article 1 is also the wording “public security”, which is overly broad and vague. One of the purposes for which a terrorist act may be committed is the “*viola[tion] [of] public security*”. However, the provision does not specify what would constitute such a violation, and may potentially cover a wide range of behaviours.
44. **Article 1(1)(1) of the Shanghai Convention fails to indicate the nature of the intent of the individual (*mens rea* or mental element of the criminal offence), which is an essential element of individual criminal responsibility.**
45. Finally, the use of the term “*intimidation of the population*” is similar to other comparative definitions of terrorism,⁷² though other legal texts may go further by requiring conduct that is “*seriously intimidating*”,⁷³ or that would “*provoke a state of terror*”.⁷⁴ Again, the general principle should be that as narrow a definition as possible should be followed and a narrower wording should be preferred to avoid unnecessary ambiguity and overbroad application of the norm or potential overlap with other criminal acts.

3.2. Definition of “Separatism”

46. Article 1(1)(2) of the Shanghai Convention defines “separatism” as “*any act intended to violate territorial integrity of a State including by annexation of any part of its territory or disintegration of a State in a violent manner, as well as planning and preparing, aiding and abetting such act, and subject to criminal prosecuting in accordance with the national laws of the Parties*”.
47. **The definition refers to “any act” and as such is vague and overbroad, and may cover a wide range of conducts. Further, the definition is ambiguous as to whether violence is always required for this crime**, in other words whether the qualification committed “*in a violent manner*” qualifies “*any act*” or only the clause beginning “*including by annexation of any part of its territory or disintegration of a State*”. **Moreover, there is no clear and precise definition of the constitutive elements of such an offence, especially nothing is said as to the required criminal intent (*mens rea*).** Overall, as mentioned above, the criminalization of such conduct raises concern in terms of compliance with the principle of legality and specificity of criminal law.

⁷⁰ See *op. cit.* footnote 63, par 75 (c) (2019 Report of the UN Special Rapporteur on Counter-terrorism and Human Rights).

⁷¹ See *op. cit.* footnote 60, par 14 ([2010 UNSR’s Report](#)).

⁷² See e.g., s1.1(b) of the UK’s Terrorism Act 2000.

⁷³ See Article 3.2(a) of the EU [Directive 2017/541](#) on Combating Terrorism.

⁷⁴ Article 5 of the Draft Comprehensive Convention on International Terrorism.

48. The lack of internationally agreed definition and vague and overbroad definition could lead to potential abuse, for instance to target persons or organizations which may simply express opinions, however shocking and unacceptable certain views or words used may appear to the authorities and/or the population. Indeed, such definition could potentially capture writings and speeches advocating “separatism”, or even political movements expressly critical of the incumbent government and constitutional order, even if there is no real foreseeable risk of violent action or of incitement to violence or any other form of rejection of democratic principles. As expressly stated by the ECtHR, “*the fact that a group of persons calls for autonomy or even requests secession of part of the country’s territory – thus demanding fundamental constitutional and territorial changes [...] does not automatically amount to a threat to the country’s territorial integrity and national security*”.⁷⁵
49. As such, this provision potentially conflicts with the right to hold opinions and freedom of expression enshrined in Article 19 of the ICCPR and Article 10 of the ECHR. Of note, the ICCPR permits no exception or restriction to the right to hold opinions.⁷⁶ The right to freedom of expression may be limited for the protection of “*national security or of public order (ordre public), or of public health or morals*” (Article 19.3(b) of the ICCPR) or of “*national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals*” (Article 10.2 of the ECHR). In the case of political expression, any interference must be scrutinised closely.⁷⁷
50. In addition, among the concerns regarding potential interference with particular rights is the risk of impinging upon the right to self-determination enshrined in international law.⁷⁸ Political opinion, support or activism towards the formation of a new state, whether pursuant to the right to self-determination or not, should not be criminalized unless it crosses the line into incitement to violence or to commit established crimes that are compliant with international human rights standards (see Sub-Section 3.4 *infra*).
51. Also, the mere existence of such a criminal offence of “separatism” and related criminal sanctions may have a “chilling effect” on political expression as individuals self-censor but also on journalistic freedom of expression, as expressly recognized in the ECtHR case law.⁷⁹ The ECtHR has expressly stated that “*the nature and severity of the penalties must not be such as to dissuade the press from taking part in the discussion of matters of legitimate public concern*”.⁸⁰
52. Finally, **in terms of practical implementation of the Shanghai Convention, widespread resort to “separatism” laws is being used as a tool in politically tense and controversial contexts across the region to target political opposition or persons**

⁷⁵ See ECtHR, *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (Applications nos. 29221/95 and 29225/95, judgment of 2 October 2001), par 97.

⁷⁶ See e.g., CCPR, *General Comment No. 34 on Article 19: Freedoms of opinion and expression*, 12 September 2011, par 9.

⁷⁷ See CCPR, Communication no. 458/91, *Mukong v. Cameroon*, Views adopted on 21 July 1994, where the UN Human Rights Committee has stressed that “[p]aragraph 3 may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights”; and Communication no. 1180/2003, *Bodrozic v. Serbia and Montenegro*, Views adopted on 31 October 2005, where it is stated that “*the value placed by the Covenant upon uninhibited expression is particularly high in the circumstances of public debate in a democratic society concerning figures in the public and political domain*”.

⁷⁸ See Article 1(2) of the Charter of the United Nations (1945); Article 1 of the ICCPR; Article 1 of the ICESCR; UNSC *Resolution 1513*, UN Doc. S/RES/1513 (2003), 28 October 2003; UNGA Resolution 2625 (XXV), *Friendly Relations Declaration*, 24 October 1970.

⁷⁹ See e.g., ECtHR, *Dammann v. Switzerland* (Application no. 77551/01, judgment of 25 April 2006), par 57; and *Cumpăna and Mazăre v. Romania* (Application no. 33348/96, 17 December 2004), pars 114 and 116, where the ECtHR recognized, as a matter of principle, that the fear of being sentenced to imprisonment for reporting on matters of public interest creates a “chilling effect” on journalistic freedom of expression. While, *Cumpana* referred to the ‘chilling effect’ of a custodial sentence on journalistic activity, the ECtHR has acknowledged the chilling effect in relation to other sanctions too, for example the amount of fines or when assessing the proportionality of damages for defamation; see ECtHR, *Kasabova v. Bulgaria* (Application no. 22385/03, judgment of 19 April 2011), par 71.

⁸⁰ *ibid.* par 69 (2011 ECtHR *Kasabova v. Bulgaria*).

exercising their rights to freedom of religion or belief, expression, peaceful assembly and association.⁸¹

3.3. Definition of “Extremism”

53. Article 1(1)(3) of the Shanghai Convention defines extremism as “*an act aimed at violent seizing or keeping power, and violently changing the constitutional system of a State, as well as a violent encroachment upon public security, including organization, for the above purposes, of illegal armed formations and participation in them*”.
54. The term “*extremism*” is not an agreed upon legal concept and can have multiple meanings.⁸² As mentioned in par 17 *supra*, there is no consensus at the international level on a normative definition of “*extremism*” or “*violent extremism*”.⁸³ **ODIHR and other international bodies have previously raised concerns pertaining to “*extremism*”/“*extremist*” as a legal concept and the vagueness of such a term, particularly in the context of criminal legislation.**⁸⁴ On several occasions, ODIHR also questioned the practice of having specific legislation on countering so-called “*extremism*” at all, given the inherent difficulty of providing a legal definition of the term “*extremism*” and the serious human rights concerns arising from vague and overbroad definitions and provisions.⁸⁵ It is also important to emphasize that in its latest 2020 Report, the UN Special Rapporteur on Counter-Terrorism and Human Rights **specifically called upon States to repeal provisions regulating so-called “*extremism*” in their laws.**⁸⁶
55. As mentioned above, there is no universal international obligation to take measures to counter so-called “*extremism*”. Consequently, the international legal obligation upon State Parties to the Shanghai Convention to criminalize so-called “*extremism*” derives solely from this convention.
56. As noted above, precise legal definitions are fundamentally important to upholding the principle of legality. Although there is no internationally agreed definition of “*extremism*”,

⁸¹ See e.g., OSCE Representative on Freedom of the Media, [Press release](#), 3 February 2020, regarding the suspended sentence of a journalist for “*public calls for actions violating the territorial integrity of the Russian Federation*”, a criminal offence introduced in the Criminal Code (Article 280.1); UN, [Press release - UN experts denounce the criminalization of linguistic and cultural rights advocacy](#) (charges of incitement to separatism in China), 21 February 2018; and [Press release of 26 December 2019](#).

⁸² It may describe ideas that are diametrically opposed to a society’s core values, and/or it can refer to the “*ruthless methods*” by which political ideas are realised, namely by “*show[ing] disregard for the life, liberty, and human rights of others*”; see e.g., OSCE Chairperson in Office’s Special Representative on Countering Radicalisation and Violent Extremism, [Report on Countering Violent Extremism and Radicalisation that Lead to Terrorism: Ideas, Recommendations, and Good Practices from the OSCE Region](#), 29 September 2017, p. 15, referring to Roger Scruton, *The Palgrave Macmillan Dictionary of Political Thought*, 3rd ed. (Basingstoke: Palgrave Macmillan, 2007).

⁸³ See e.g., *op. cit.* footnote 35, pars 11 and 21 (UNSRCT [2015 Thematic Report](#)), noting that “[d]espite the numerous initiatives to prevent or counter violent extremism, there is no generally accepted definition of violent extremism, which remains an ‘elusive concept’”.

⁸⁴ See e.g., UN Special Rapporteur on Counter-Terrorism and Human Rights, [2020 Report on the human rights impact of policies and practices aimed at preventing and countering violent extremism](#), 21 February 2020, A/HRC/43/46, pars 12-14 (hereinafter “UNSRCT 2020 Report on Violent Extremism”); and *ibid.* pars 11 and 21 (UNSRCT [2015 Thematic Report](#)), noting that “[d]espite the numerous initiatives to prevent or counter violent extremism, there is no generally accepted definition of violent extremism, which remains an ‘elusive concept’”. See also *op. cit.* footnote 31, pages 21 and 31; and OSCE, [Preventing Terrorism and Countering Violent extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach](#) (2014), Sub-Section 2.3.1. See also ODIHR, [Opinion on the Law on Countering Extremist Activity of the Republic of Moldova](#) (30 December 2019), pars 13-16; [Comments on the Law on Countering “Extremism” of the Republic of Uzbekistan](#) (22 November 2019), pars 12-16; [Preliminary Opinion on the Draft Amendments to the Legal Framework “On Countering Extremism and Terrorism” in the Republic of Kazakhstan](#) (6 October 2016), pars 21-24; [Comments on the Draft Laws of the Republic of Kazakhstan “On counteractive measures against extremist activities” and “On amendments to several legislative acts with regard to counteractive measures against extremist activities”](#) (11 February 2005), pars 2-3 and 11-15; [Comments on the Draft Laws “On counteractive measures against extremist activities” and “On amendments to several legislative acts with regard to counteractive measures against extremist activities” in Kazakhstan](#) (20 October 2004), pages 5-7; and ODIHR, [Preliminary Comments on the Draft Laws “On counteractive measures against extremist activities” and “On amendments to several legislative acts with regard to counteractive measures against extremist activities” in Kazakhstan](#) (23 June 2004), pars 4.1. to 4.3. See also ODIHR, [Guidelines on the Protection of Human Rights Defenders](#) (2014), pars 100, 205 and 213; Venice Commission, [Opinion on the Federal Law on Combating Extremist Activity of the Russian Federation](#), CDL-AD(2012)016-e, 15-16 June 2012, par 30; see *op. cit.* footnote 76, par 46 (2011 CCPR General Comment no. 34), where the Committee has stressed the need to ensure that offences such as “*extremist activity*” are clearly defined to ensure that they do not lead to disproportionate interference with freedom of expression.

⁸⁵ See e.g., ODIHR, [Opinion on the Law on Countering Extremist Activity of the Republic of Moldova](#) (30 December 2019), pars 10 and 22; and [Comments on the Law on Countering “Extremism” of the Republic of Uzbekistan](#) (22 November 2019), pars 9 and 21.

⁸⁶ See *op. cit.* footnote 84, par 52(b) (2020 UNSRCT [Report](#) on Violent Extremism).

countering VERLT is a strategic focus area for the OSCE in the fight against terrorism.⁸⁷ The United Nations Secretary General’s *Plan of Action to Prevent Violent Extremism* similarly puts emphasis on “*violent extremism*” rather than “*extremism*” *per se*.⁸⁸ The UN High Commissioner for Human Rights (UNHCHR) has stated that if the measures to counter “*extremism*” “*are not limited to ‘violent’ extremism, such measures risk targeting the holding of an opinion or belief rather than actual conduct*”.⁸⁹

57. In that respect, the possibility to peacefully pursue a political, or any other, agenda – even where different from the objectives of the government and considered to be “*extreme*” – must be protected.⁹⁰ Indeed, freedom of expression protects all forms of ideas, information or opinions, including those that “*offend, shock or disturb*” the State or any part of the population,⁹¹ even “*deeply offensive*” speech.⁹² While the right to freedom of expression may in very limited cases be restricted, any such restrictions must strictly conform with the requirements of international human rights standards.⁹³ Simply holding or peacefully expressing views that are considered “*radical*” or “*extreme*” under any definition should never be prohibited or criminalized, unless such views are connected to violence or criminal activity,⁹⁴ such as incitement to hatred, inciting or condoning criminal activity and/or violence, as legally defined in compliance with international human rights law⁹⁵ (see Sub-Section 3.4 *infra*, especially par 65 on incitement). In this context, Article 1(1)(3) of the Shanghai Convention’s emphasis on “*violence*” is in compliance with the above-mentioned focus on “*violent extremism*” followed at the international level, thus theoretically reducing the risk of targeting the mere holding of an opinion or belief.
58. However, **the call for criminalization of “extremism” in the Shanghai Convention is more problematic. “Extremism” is an inherently unclear term and fails to provide sufficiently clear boundaries for criminal law between an act which can be defined as “extremism” and other acts involving violence, as this is required by the *nullum crimen* principle. Serious concerns have been raised by the UN Special Rapporteur on Counter-Terrorism and Human Rights with respect to the criminalization of “extremism” in general, on account of its fundamentally vague and subjective nature, and the broad range of conduct that may be captured by it.**⁹⁶ She noted that “*the term ‘extremism’ has no purchase in binding international legal standards and, when employed as a criminal legal category, is irreconcilable with the principle of legal certainty and is*

⁸⁷ OSCE, Permanent Council Decision No. 1063, [Consolidated Framework for the Fight against Terrorism](#).

⁸⁸ United Nations Secretary General, Plan of Action to Prevent Violent Extremism A/70/674.

⁸⁹ A/HRC/33/29 8

⁹⁰ *Op. cit.* footnote 35, par 38 (UNSRCT [2015 Thematic Report](#)).

⁹¹ See e.g., European Court of Human Rights, [Handyside v. United Kingdom](#) (Application no. 5493/72, judgment of 7 December 1976); and [Bodrožić v. Serbia](#) (Application no. 32550/05, judgment of 23 June 2009), pars 46 and 56. See also *ibid.* par 38 (UNSRCT [2015 Thematic Report](#)).

⁹² See *op. cit.* footnote 76, pars 11 and 38 (2011 CCPR General Comment no. 34).

⁹³ See e.g., Article 19 (3) of the UN International Covenant on Civil and Political Rights (ICCPR), which states that the right to freedom of expression may “be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals”. See also Article 20 of the ICCPR as well as Article 4 of the UN International Convention on the Elimination of All Forms of Racial Discrimination, Article 3(c) of the Convention on the Prevention and Punishment of the Crime of Genocide, and UN [Security Council resolution 1624\(2005\)](#). Under Article 20 of the ICCPR, States are required to have legal prohibitions for certain forms of expression (“any propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”, see below). However, as the UN Human Rights Committee has noted, every case in which the State restricts freedom of expression, including those covered by Article 20, must be in strict conformity with the requirements of Article 19 ICCPR, see *op. cit.* footnote 76, pars 50-52 (2011 CCPR General Comment no. 34).

⁹⁴ *Op. cit.* footnote 35, par 38 (UNSRCT [2015 Thematic Report](#)). See also *op. cit.* footnote 84, par 30 (2020 UNSRCT [Report on Violent Extremism](#)). ODIHR [Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism: A Community-Policing Approach](#) (2014), page 42, which states that “[s]imply holding views or beliefs that are considered radical or extreme, as well as their peaceful expression, should not be considered crimes”.

⁹⁵ *ibid.* par 38 (UNSRCT [2015 Thematic Report](#)). See also *op. cit.* footnote 31, pages 42-43 (2014 ODIHR Guidebook on Preventing Terrorism and Countering Violent Extremism and Radicalization that Lead to Terrorism).

⁹⁶ See *op. cit.* footnote 84, pars 13-15 (2020 UNSRCT [Report on Violent Extremism](#)); [2016 Annual Report](#), UN Doc. A/HRC/37/52, 22 February 2016, par 21; [Report on her visit to Kazakhstan](#), UN Doc. A/HRC/43/46/Add.1, 22 January 2020, par 15; CCPR, [Concluding observations on the Russian Federation](#), UN Doc. CCPR/C/RUS/CO/6, 24 November 2009, par 24. See also *op. cit.* footnote 31, page 21 (2018 ODIHR “FTFs” [Guidelines](#)).

per se incompatible with the exercise of certain fundamental human rights".⁹⁷ While considerable international attention has been dedicated to programming and interventions to prevent or counter "violent extremism",⁹⁸ as noted above the criminal law cannot prosecute ideas or the mere expression of opinions. What can be criminalized is the specific conduct of individuals with intent to cause harm to a value protected by criminal law. Furthermore, it should be underlined that **the mere existence of crimes of so-called "extremism" is likely to have a chilling impact on the exercise of basic rights and fundamental freedoms, such as the rights to freedom of religion or belief, expression, peaceful assembly and association, as well as the right to education and academic freedom.**

59. **In practice, despite the references to violent conduct in the definition of "extremism" in the Shanghai Convention, in practice, State Parties appear to have treated this requirement as discretionary and have criminalized "extremist activity" that do not necessarily have a link to violent conduct.**⁹⁹
60. Finally, it is worth noting that while the Shanghai Convention requires violence as an essential element of the definition, the 2017 [Convention of the SCO on Combating Extremism](#) no longer necessarily requires violent acts but refers more broadly to "violent and other unconstitutional actions" when defining so-called "extremism".¹⁰⁰ Moreover, and although the same Convention defines an "extremist act" by first referring to the definition of "extremism" of the Shanghai Convention, it then supplements such a definition by adding references to a variety of other behaviours that go much beyond the scope of "extremism" as defined in the Shanghai Convention.¹⁰¹

3.4. Inchoate Offences and Assistance

61. Each limb of Article 1 of the Convention proscribes preparatory or supportive acts within the definitions of terrorism, "separatism" and "extremism", including "organization",¹⁰² "planning",¹⁰³ "preparation",¹⁰⁴ "abetting"/incitement¹⁰⁵ or "aiding".¹⁰⁶ **These vastly widen the scope of the respective definitions, while such terms are not being defined by the Shanghai Convention.**
62. This aims at incorporating preparatory or inchoate acts in the definition of such offences, which is not unusual. Indeed, the UN Model legislation on countering terrorism contains provisions on planning and preparation, as well as incitement.¹⁰⁷ The UN Security Council

⁹⁷ UN Special Rapporteur on Counter-Terrorism and Human Rights, [Report on her visit to Kazakhstan](#), UN Doc. A/HRC/43/46/Add.1, 22 January 2020, par 15.

⁹⁸ Which has been emphasised by the UN Security Council as an area to be countered: [UNSC Resolution 2178](#) (2014), UN Doc. S/RES/2178 (2014), 24 September 2014, par 15.

⁹⁹ See e.g., ODIHR, [Comments on the Law on Countering "Extremism" of the Republic of Uzbekistan](#) (22 November 2019); [Preliminary Opinion on the Draft Amendments to the Legal Framework "On Countering Extremism and Terrorism" in the Republic of Kazakhstan](#) (6 October 2016); UN Special Rapporteur on Counter-Terrorism and Human Rights, [Report on her visit to Kazakhstan](#), UN Doc. A/HRC/43/46/Add.1, 22 January 2020, par 15; CCPR, [Concluding observations on the Russian Federation](#), UN Doc. CCPR/C/RUS/CO/6, 24 November 2009, par 24; [Communication of UN Special Rapporteurs on China](#), OL CHN 18/2019, 1 November 2019, page 2.

¹⁰⁰ Shanghai Cooperation Organization, [Convention of the SCO on Combating Extremism](#) (Astana, 9 June 2017); its Article 2 par 1 (2) defines "extremism" as: "ideology and practices aimed at resolving political, social, racial, national and religious conflicts through violent and other unconstitutional actions".

¹⁰¹ Article 2.1(3) of the Convention of the SCO on Combating Extremism defines an "extremist act" as: "acts provided for in Article 1, paragraph 1, subparagraph 3 of the Shanghai Convention on Combating Terrorism, Separatism and Extremism of June 15, 2001; organization of, and participation in an armed rebellion for extremist purposes; creation, governance of an extremist organization, and participation in its activities; instigation of political, social, racial, national and religious enmity or discord; promotion of exclusiveness, superiority or inferiority of a person on the grounds of his or her political, social, racial, national and religious affiliation; public calls to the above-mentioned acts; mass issuance, storage and dissemination of extremist propaganda materials aimed at promoting extremism".

¹⁰² Article 1 (1)(b) (terrorism) and (3) (extremism).

¹⁰³ Article 1(1)(b) (terrorism) and (2) (separatism).

¹⁰⁴ Article 1 (2) (separatism).

¹⁰⁵ Article 1(1)(b) (terrorism) and (2) (separatism).

¹⁰⁶ Article 1(1)(b) (terrorism) and (2) (separatism).

¹⁰⁷ UNODC, Model Legislative Provisions Against Terrorism, arts 20 and 21.

has also called for certain forms of support to be criminalized,¹⁰⁸ and the prohibition of incitement to terrorism is addressed specifically in [Resolution 1624 \(2005\)](#).¹⁰⁹ However, the UNSC resolutions, unlike the Shanghai Convention, do note that they need to be applied consistently with international human rights law. This includes the principle of legality, and specifically the stringent standards of the *nullum crimen sine lege* principle, which require clear identification of the content of these offences in criminal law.¹¹⁰

63. The UN Special Rapporteur on Counter-Terrorism and Human Rights has expressed profound concerns about the shift to criminalizing “*pre-terrorist*” conduct, as this “*criminalizes legitimately protected rights under international and domestic law, destabilizes fundamental tenets of the rule of law, including legal certainty, proportionality and non-discrimination and renders groups and individuals as ‘suspect’ often primarily on the basis of stereotypes*”.¹¹¹
64. In their counter-terrorism efforts, states have increasingly sought to use criminal law preventively – by criminalizing conduct arising before a terrorist crime is committed, which raises questions regarding broader implications for the protection of human rights and effectiveness in terms of terrorism prevention.¹¹² **Preparatory acts, which may include planning or conspiracy with a view to committing or contributing to a terrorist offence, may be prosecuted but only if there is an actual risk that the terrorist act takes place (as opposed to an abstract danger), with a meaningful proximate link between the behaviour and the ultimate wrong, and while demonstrating criminal intent (intent to act and to cause the harm, or at least, to create a serious risk of foreseeable harm).**¹¹³ These requirements, especially the criminal intent (*mens rea*), are not mentioned in the Shanghai Convention, which may lead to discretionary interpretation by the respective State Parties.
65. Regarding abetting/incitement specifically, this term is undefined in international law, as it is under the Shanghai Convention. As mentioned above, the right to freedom of expression is not absolute and prosecution of direct incitement to violence is permissible¹¹⁴ provided the material and mental elements of the offence are clearly defined and limited in law, and any interference is necessary and proportionate.¹¹⁵ Of note, Article 20 par 2 of the ICCPR¹¹⁶ states that “[a]ny advocacy of national, racial or religious hatred that

¹⁰⁸ See e.g., [UN Security Council resolution 1373 \(2001\)](#), UN Doc. S/RES/1373 (2001), 28 September 2001, par 2, which requires Member States to “ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice”; see also [UNSC Resolution 2462 \(2019\)](#), UN Doc. S/Res/2462 (2019), 28 March 2019, par 1, requiring all States to “prevent and suppress the financing of terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists”.

¹⁰⁹ See par 1(a).

¹¹⁰ See references cited in footnote 58.

¹¹¹ See *op. cit.* footnote 84, par 24 (2020 UNSRCT [Report](#) on Violent Extremism).

¹¹² *Op. cit.* footnote 31, page 35 (2018 ODIHR “FTFs” [Guidelines](#)).

¹¹³ *ibid.* pages 37-38 (2018 ODIHR “FTFs” [Guidelines](#)). See also e.g., OSCE/ODIHR, [Comments on the Law on Combatting Terrorism of the Republic of Uzbekistan](#) (20 December 2019), Sub-Section 3.3; and [Comments on the Law on Countering “Extremism” of the Republic of Uzbekistan](#) (22 November 2019), par 52.

¹¹⁴ See e.g., ECtHR, [Incal v. Turkey](#) [GC], Judgment (Application no. 22678/93, judgment of 9 June 1998), par 54, which states that “it remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks”; ECtHR, [Sirek and Özdemir v. Turkey](#) (No. 2) (Application nos. 23927/94 24277/94, judgment of 8 July 1999), par 34, indicating that States enjoy a wider margin of appreciation for curtailing freedom of expression when remarks incite to violence; [Fatullayev v. Azerbaijan](#) (Application no. 40984/07, judgment of 22 April 2010), par 116, finding that unless a publication incites violence on ethnic hatred, the government should not bring criminal law proceedings against the media; [Müdür Duman v. Turkey](#) (Application no. 15450/03, judgment of 6 October 2015), par 33, finding an invalid interference as the relevant materials which the applicant was convicted for possessing did not advocate violence.

¹¹⁵ See *op. cit.* footnote 84, par 27 (2020 UNSRCT [Report](#) on Violent Extremism), where the UN Special Rapporteur noted that “[s]uch offences must be strictly circumscribed in both their wording, to comply with the principle of legal certainty, and their application, to comply with the principles of proportionality and necessity, so as not to unduly restrict the rights to freedom of expression and religion”. See also *op. cit.* footnote 31, page 21 (2018 ODIHR “FTFs” [Guidelines](#)), which puts emphasis on the need to “[c]arefully define and limit the scope of activity covered by [foreign terrorist fighter]-related laws and policies and ensure that responses are framed around the conduct of individuals, and clearly identified in law”.

¹¹⁶ [UN International Covenant on Civil and Political Rights](#) (hereafter “the ICCPR”), adopted by the UN General Assembly by Resolution 2200A (XXI) of 16 December 1966.

constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Moreover, pursuant to Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination¹¹⁷ (CERD), "*all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin*" shall be considered offences punishable by law.

66. At the international level, to avoid undue limitations to freedom of expression, for forms of expression to constitute "*incitement*" that is prohibited, the following three criteria should be met cumulatively: (1) the expression is intended to incite imminent violence; and (2) it is likely to incite such violence; and (3) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.¹¹⁸ Moreover, the severity threshold to amount to incitement is quite high, as emphasized in the [Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence](#), which lists six factors to determine whether the expression is serious enough to warrant restrictive legal measures. These six factors are: context, speaker (including the individual's or organization's standing), intent, content or form, extent of the speech, and likelihood of harm occurring (including imminence).¹¹⁹
67. As regards "*incitement to terrorism*" specifically, [UN Security Council Resolution 1624 \(2005\)](#) expressly called on states to prohibit such behaviour.¹²⁰ However, as mentioned above, banning and prosecuting crimes based only on expression of opinion should be exceptional, and as such, the criminal offence and constitutive elements should be clearly defined and strictly circumscribed, so as to prevent undue restrictions, which have been increasingly frequent in counter-terrorism practice internationally.¹²¹ To be human rights-compliant, the offence of "*incitement to terrorism or acts of terrorism*" must be prescribed by law in a precise language and (a) expressly refer to the intent to communicate a message and intent that this message incite the commission of a terrorist act; and (b) be limited to the incitement to conduct that is truly terrorist in nature; and (c) include an actual (objective) risk that the act incited will be committed; and (d) preserve the application of legal defences or principles leading to the exclusion of criminal liability in certain cases,¹²²

¹¹⁷ *International Convention on the Elimination of All Forms of Racial Discrimination* (hereafter "the CERD"), adopted by the UN General Assembly by Resolution 2106 (XX) of 21 December 1965.

¹¹⁸ See UN Special Rapporteur on freedom of opinion and expression (hereafter "UN Special Rapporteur on freedom of expression"), the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information (hereafter "the International Special Rapporteurs/Representatives on Freedom of Expression"), [2016 Joint Declaration on Freedom of Expression and Countering Violent Extremism](#), 3 May 2016, par 2 (d); and [Principle 6 of the Johannesburg Principles on Freedom of Expression and National Security](#) (1995). See also UN Secretary General, [Report on the protection of human rights and fundamental freedoms while countering terrorism](#), A/63/337, 28 August 2008, par 62. See also UN Special Rapporteur on Counter-Terrorism and Human Rights, [Report on her visit to Kazakhstan](#), UN Doc. A/HRC/43/46/Add.1, 22 January 2020, par 14, where the UN Special Rapporteur noted that there must be "*a direct and immediate connection between the action... and the actual (i.e. objective) risk of terrorist acts being committed*". See also the [Rabat Plan of Action on the Prohibition of Advocacy of National, Racial or Religious Hatred that Constitutes Incitement to Discrimination, Hostility or Violence](#), which provides that to prove inchoate crimes there should be at least a causal link or actual risk of the proscribed result occurring.

¹¹⁹ See the [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#), in the "Report of the United Nations High Commissioner for Human Rights on the prohibition of incitement to national, racial or religious hatred", United Nations General Assembly, 11 January 2013, Appendix, par 29. This six-part threshold test has been endorsed by various independent experts and human rights monitoring bodies, e.g., in the [Report of the United Nations Special Rapporteur on freedom of religion or belief \(Tackling manifestations of collective religious hatred\)](#), United Nations General Assembly, UN Doc. A/HRC/25/58, 26 December 2013, par 58; and in Committee on the Elimination of Racial Discrimination, [General Recommendation 35: Combating Racist Hate Speech](#), UN Doc. CERD/C/GC/35, 12-30 August 2013, par 15.

¹²⁰ See also UN Security Council, [Resolution 1624 \(2005\)](#), 14 September 2005, UN Doc. S/RES/1624 (2005), par 1, which calls on states to prohibit, by law, incitement to commit terrorist acts.

¹²¹ See e.g., CoE Commissioner for Human Rights, [Misuse of anti-terror legislation threatens freedom of expression](#) (4 December 2018).

¹²² See the model offence of incitement to terrorism provided by the UN Special Rapporteur on counter-terrorism in *op. cit.* footnote 63, par 31 (2010 [Report](#) of the UN Special Rapporteur on counter-terrorism). As expressly stated by the International Mandate-Holders on Freedom of Expression "[i]ncitement should be understood as a direct call to engage in terrorism, with the intention that this should promote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act occurring"; see UN Special Rapporteur on freedom of opinion and expression, the OSCE Representative on Freedom of the Media and

for instance when the statements were intended as part of a good faith discussion or public debate on a matter of religion, education, scientific research, politics, arts or some other issue of public interest.¹²³

68. Particularly problematic, and unusual, is the Convention's inclusion of "*aiding*" to the "acts" associated with terrorism, "extremism" or "separatism". The forms this assistance might take or the required mental element are not defined or limited in any way, thus broadening out the scope of criminality and opening up considerable potential for abuse. Serious questions arise as to the exact scope of such behaviours, where "moral support", politically or ideologically supportive views, provision of basic needs by family members, or educating individuals or groups, have at times been deemed to constitute support.
69. In that respect, it is worth emphasizing that the definition of the mental element (*mens rea*) for support or preparatory offences is particularly significant in terms of gender implications and the broader it is defined, the more likely it may affect the rights of child and family life, and potentially affect women disproportionately. Indeed, women in some contexts may have far less access to information and may have no or very limited knowledge about the full scope of behaviour of their spouse or family members or may not be in a position to challenge that behaviour or to refuse to assist.¹²⁴ Moreover, the broader scope of the mental element could favour the prosecution of persons who provide support to a family member engaged in terrorism, even where that support is provided out of a sense of family duty or loyalty, rather than for the purpose of supporting terrorist activities, and this has been shown as disproportionately affecting women.¹²⁵
70. With respect to terrorism financing, Article 6 (5) of the Shanghai Convention, included under the section dealing with co-operation, refers to the identification and suppression of "*any other forms of assistance to any person and/or organization for the purpose of committing acts referred to in Article 1 (1) of this Convention*". Whilst under international law States must suppress the financing of terrorism,¹²⁶ this provision potentially extends far beyond this obligation. In particular, the reference to the provision of "*any other forms of assistance*" of an unspecified nature, and undefined "*assistance*", actually goes much beyond the "*financing*" of terrorism. These broader forms of engagement are uncertain as to their scope and are also not defined internationally. Hence, there is a significant lack of clarity about what forms such assistance may take, which raises concern in terms of compliance with the principle of legality.

3.5. Relationship with National Law and Wide Discretion Given to States

71. As mentioned above, Article 1.2 of the Shanghai Convention gives State Parties to the Shanghai Convention a concerning amount of discretion to broadly define the terms terrorism, "separatism" and "extremism" within their own national frameworks.

the OAS Special Rapporteur on Freedom of Expression, [2005 Joint Declaration](#), Sub-Section on Anti-terrorism measures. See also e.g., International Mandate-Holders on Freedom of Expression, [2011 Joint Declaration on Freedom of Expression and the Internet](#), Section 8 on Security and Freedom of Expression, par 1 (d). See also *op. cit.* footnote 31, page 42 (2014 OSCE TNTD-SMPU and ODIHR [Preventing Terrorism and Countering VERT](#)); and *op. cit.* footnote 31, pages 53 and 55 (2018 ODIHR "FTFs" [Guidelines](#)). See also Principle 6 of the [Johannesburg Principles on Freedom of Expression and National Security](#) (1995), adopted on 1 October 1995 by a group of experts in international law, national security, and human rights and endorsed by the UN Special Rapporteur on freedom of opinion and expression. For reference, see also Article 5 of the [2005 CoE's Convention on the Prevention of Terrorism](#) on the "*public provocation to commit acts of terrorism*", defined as "*the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed*".

¹²³ See e.g., OSCE Representative on Freedom of the Media, [Legal Analysis of the Proposed Bill C-51, the Canadian Anti-terrorism Act, 2015: Potential Impact on Freedom of Expression](#) (May 2015), pages 9-10.

¹²⁴ See *op. cit.* footnote 31, pages 41-42 (2019 UNODC [Handbook on Gender Dimensions of Criminal Justice Responses to Terrorism](#)).

¹²⁵ *ibid.* page 42. See also e.g., Bérénice Boutin, '[Has Countering the Financing of Terrorism Gone Wrong? Prosecuting the Parents of Foreign Terrorist Fighters](#)', International Centre for Counter-Terrorism, 2 October 2017.

¹²⁶ [International Convention for the Suppression of the Financing of Terrorism](#) (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.

72. More generally, several references to national law throughout the Convention¹²⁷ raise doubts as to the relationship between the Convention and the definitions and interpretations of these key terms under national law in the State Parties. It appears that **the Convention provides a framework for co-operation in the enforcement of national laws governing conduct defined as “terrorism, separatism or extremism” in the State Parties, irrespective of whether the said national laws/definitions are human-rights compliant and whether they contain the procedures and safeguards inherent in international human rights law.**

4. INTERNATIONAL CO-OPERATION AND EXTRADITION

4.1. Co-operation and Extradition

73. Article 2 of the Shanghai Convention provides that acts referred to in Article 1(1) constitute extraditable offences and that when implementing the Convention, State Parties “*shall co-operate in conformity with international treaties to which they are parties and national laws of the Parties*”.
74. In principle, efforts to enhance international co-operation between signatories throughout the Shanghai Convention, particularly in Articles 2, 5, 6, 7, 8, 9 and 11, are commendable. The UN Security Council has, for instance, called for international co-operation on matters of counter-terrorism and for States to “*improve international, regional, and sub-regional cooperation, if appropriate through bilateral agreements, to prevent the travel of foreign terrorist fighters from or through their territories*”.¹²⁸ So far as states are co-operating to address crimes defined in accordance with international human rights standards, they advance human rights and meet their “positive obligations” under international human rights law. However, states should not co-operate with states or processes that violate basic human rights norms, in line with their own obligations and responsibility under international law. This principle is all the more important in light of the weak dispute resolution mechanism provided by the Convention (see Sub-Section 6 *infra*).
75. In relation to the recognition of terrorism, “separatism” and “extremism” as extraditable offences under Article 2.2, it is worth noting that one of SCO’s core principles is mutual recognition. Its [2005 Concept of Co-operation](#) requires SCO Member States to give mutual recognition of acts of terrorism, “separatism” and “extremism”, regardless of whether the legislation of the SCO Member States includes the act in the same category of crimes or whether it describes it using the same terminology. Moreover, the [2005 Concept of Co-operation](#) refers not only to those accused of terrorism, “separatism”, or “extremism” but also those merely suspected of committing such acts by one SCO Member State, which must be so recognized by other SCO states. As such, even if the legislation of one State Party is human-rights compliant, that State Party may be compelled to extradite an individual merely suspected of the said offences according to the legislation of another State Party, which may be broader in scope and non-compliant with international human rights standards. In that respect, it must be stressed that State Parties to the ECHR are precluded from extraditing persons to a state where they are at risk of being subjected to the death penalty, or torture and other ill-treatment.¹²⁹
76. Article 2(3) of the Shanghai Convention does indicate that the Parties should co-operate in conformity with obligations arising from international treaties. However, it makes no

¹²⁷ Articles 1 (1), 2 (1) and 2 (3) of the Shanghai Convention.

¹²⁸ [UN Security Council resolution 1373 \(2001\)](#), UN Doc. S/RES/1373 (2001), 28 September 2001; [UNSC Resolution 2178 \(2014\)](#), UN Doc. S/RES/2178 (2014), 24 September 2014, par 11.

¹²⁹ See e.g., ECtHR, [Soering v. United Kingdom](#) (Application no. 14038/88, judgment of 7 July 1989), par 88; and [Chahal v. United Kingdom](#) [GC] (Application no. 22414/93, judgment of 15 November 1996), pars 80-81.

reference to customary international law or to specific international norms or principles. This is important given the uneven ratification of human rights treaties among State Parties to the Shanghai Convention. For instance, China has signed though not ratified the ICCPR, while several State Parties to the Shanghai Convention have not ratified the International Convention for the Protection of All Persons from Enforced Disappearance.

77. Article 2 allows for extradition of individuals without acknowledgement of the need to respect non-refoulement obligations (i.e., that they shall not return or extradite non-nationals to a country where there is a real risk of that person being subjected to torture or other cruel, inhuman or degrading treatment or punishment,¹³⁰ risks of violations to the rights to life¹³¹ or to the integrity or freedom of the person,¹³² flagrant violation with respect to arbitrary imprisonment,¹³³ enforced disappearance,¹³⁴ flagrant denial of justice,¹³⁵ serious forms of sexual and gender-based violence,¹³⁶ prolonged solitary confinement¹³⁷ or other serious human rights violations¹³⁸). It is worth emphasizing that **the Shanghai Cooperation Organization establishes unconditional extradition between its member states, thus departing from the international principle of non-refoulement.** The mutual recognition principle also prevents individuals suspected of involvement in separatist or terrorist activities from seeking asylum in neighbouring SCO states because their alleged involvement will be recognized and will trigger their automatic refoulement to their home State irrespective of the treatment they could face there.
78. The principle of non-refoulement is recognized as being absolute,¹³⁹ i.e., that can never be suspended or restricted under any circumstances. Recognition of the non-refoulement principle has been expressly accepted at the international level in the counter-terrorism context, as reflected for example in the Terrorist Financing Convention.¹⁴⁰ **In that respect, several UN bodies have denounced expulsion and extradition practices of SCO members and State Parties to the Shanghai Convention.**¹⁴¹

¹³⁰ See Convention Relating to the Status of Refugees (opened for signature on 28 July 1951, entered into force on 22 April 1954), 189 UNTS 150, Article 33; Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (adopted on 10 December 1984, entered into force on 26 June 1987), 1465 UNTS 85, Article 3; International Convention for the Protection of All Persons from Enforced Disappearance (adopted on 20 December 2006, entered into force on 23 December 2010), 2716 UNTS 3, Article 16; Articles 2(1) and 7 of the ICCPR (see *CCPR, General Comment no. 20 (1992)*), par 9, which indicates that this obligation is reflected in Article 7 of the ICCPR, whilst *General Comment no. 31 (2004)*, UN Doc. CCPR/C/21/Rev.1/Add.13, par 12, recognises the non-refoulement principle in Article 2 of the ICCPR). See also e.g., par 31 of 2018 CCPR *General Comment no. 36*.

¹³¹ See e.g., *op. cit.* footnote 63, par 38 and Practice 10.5 (2010 *Report* of the UN Special Rapporteur on Counter-Terrorism and Human Rights); and *op. cit.* footnote 118, par 45 (2008 UN Secretary General's Report). See also OHCHR, *Technical Note on the Principle of Non-Refoulement under International Human Rights Law* (2018), page 1; and CCPR, *General Comment no. 31* (2004), par 12.

¹³² *ibid.* par 45 (2008 UN Secretary General's Report); and page 1 (2018 OHCHR Technical Note on Non-Refoulement).

¹³³ See e.g., ECtHR, *Othman (Abu Qatada) v. United Kingdom* (Application no. 8139/09, 17 January 2012), par 233.

¹³⁴ See Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly by Resolution A/RES/61/177 of 20 December 2006 (which entered into force on 23 December 2010).

¹³⁵ *Op. cit.* footnote 118, par 45 (2008 UN Secretary General's Report); and page 1 (2018 OHCHR Technical Note on Non-Refoulement). See also, ECtHR, *Othman (Abu Qatada) v. United Kingdom* (Application no. 8139/09, 17 January 2012), pars 258-262.

¹³⁶ *ibid.* page 1 (2018 OHCHR Technical Note on Non-Refoulement). See also e.g., UN CAT Committee, *Njamba and Balikosa v. Sweden*, Communication no. 322/2007, 3 June 2010, par 9.5; and CEDAW Committee, *General Recommendation no. 32* (2014), par 23.

¹³⁷ *Op. cit.* footnote 118, pars 39 and 42 (2008 UN Secretary General's Report); and page 1 (2018 OHCHR Technical Note on Non-Refoulement). See also e.g., CCPR, *General Comment no. 20* (1994), par 6.

¹³⁸ CCPR, *Kindler v. Canada*, Communication no.470/1991, at par 13.2: "If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant"; and *ARJ v. Australia*, UN Doc. CCPR/C/60/D/692/1996, 11 August 1997, par 6.9 referring to risk of any serious human rights violation triggering non-refoulement obligations.

¹³⁹ See Convention against Torture and Cruel, Inhuman or Degrading Treatment and Punishment (CAT), Article 3, which contains an absolute prohibition of *refoulement* for individuals in danger of being subjected to torture. See also CCPR, *General Comment no. 20 on Art. 7 of the ICCPR*, 10 March 1992, par 9; and ECtHR case-law which incorporates this absolute principle of non-refoulement into Article 3 of the ECHR; see e.g., *Soering v. United Kingdom* (1989), par 88; and *Chahal v. United Kingdom* [GC] (1996), pars 80-81.

¹⁴⁰ *International Convention for the Suppression of the Financing of Terrorism* (adopted 9 December 1999, entered into force 10 April 2002), 2178 UNTS 197, Article 15.

¹⁴¹ See e.g., CCPR, *Concluding observations on the Russian Federation*, UN Doc. CCPR/C/RUS/CO/6, 24 November 2009, par 17, where the UN Human Rights Committee expressed concerns "about reports of extraditions and informal transfers [...] to return foreign nationals to countries in which the practice of torture is alleged while relying on diplomatic assurances, notably within the framework of the 2001 Shanghai Convention on Combating Terrorism, Separatism and Extremism"; more general concerns on extraditions in the Russian Federation were expressed more recently e.g., by the UN Committee Against Torture, *Concluding observations on the sixth periodic report of the Russian Federation*, UN Doc. CAT/C/RUS/CO/6, 28 August 2018, par 42. See also e.g., UN Special Rapporteur on Counter-

4.2. Co-operation, Assistance and Information-sharing

79. The Shanghai Convention provides that the Parties “*cooperate with and assist each other through*” a range of different activities (Article 6), “*shall exchange information of mutual interest*” (Article 7) and that co-operation “*shall be carried out bilaterally or multilaterally on the basis of a request for assistance*” (Article 8). Parties “*shall take all necessary measures to ensure that the request is carried out promptly and as fully as possible*” (Article 9).
80. The UN Security Council has for instance called for States to “*expeditiously exchange information, through bilateral or multilateral mechanisms and in accordance with domestic and international law, concerning... foreign terrorist fighters*”.¹⁴² Exchanging information to prevent and respond to serious criminal offences is appropriate and important. Nevertheless, lawful collection and sharing of data must be compatible with the right to respect for private and family life under international human rights law, which currently has no reference in the Shanghai Convention. There should be more clarity as to the circumstances in which surveillance or other forms of information gathering will be engaged in, as well as the necessity and proportionality of such interference and appropriate independent oversight.
81. This is all the more important given the serious concerns raised about data-sharing amongst intelligence services within the framework of the Shanghai Convention in particular, considering that “[t]his sharing of data and information is not subject to any meaningful form of oversight and there are no human rights safeguards attached to data and information sharing”.¹⁴³ Moreover, there are concerns that the secrecy surrounding this information-sharing mechanism “*provide[s] an insurmountable wall against independent investigations into human rights violations*”.¹⁴⁴ Generally, **co-operation between security services may risk circumventing the existing national mechanisms of control.**¹⁴⁵ **As such, substantive and procedural safeguards, especially in terms of handling and sharing of personal data, and other human rights considerations, should be in place before proceeding with information-sharing.**
82. The UN Special Rapporteur on Counter-Terrorism and Human Rights has developed a [Compilation of Good Practices on Legal and Institutional Frameworks and Measures that Ensure Respect for Human Rights by Intelligence Agencies while Countering Terrorism, including on their Oversight](#) (2010), which provides a number of good practices to enhance compliance with international law and human rights standards in foreign intelligence sharing.¹⁴⁶ Especially, information should not be transferred if likely to be used for

Terrorism and Human Rights, [Report on her visit to Kazakhstan](#), UN Doc. A/HRC/43/46/Add.1, 22 January 2020, par 51; and UN Committee on the Elimination of Racial Discrimination, [Concluding observations on Kyrgyzstan](#), UN Doc. CERD/C/KGZ/CO/4 (2007), par 9, where the Committee raised its “deep concern” about “*forcible return of ethnic Uighurs and Uzbeks to their countries of origin pursuant to multilateral agreements and bilateral agreements*” with neighbouring states.

¹⁴² [UNSC Resolution 2396](#) (2017), UN Doc. S/RES/2396 (2003), 21 December 2017, par 6.

¹⁴³ UN Special Rapporteur on Counter-Terrorism and Human Rights, [2009 Annual Report](#), UN Doc. A/HRC/10/3, 4 February 2009, pars 35 and 49.

¹⁴⁴ *ibid.* par 49.

¹⁴⁵ See e.g., Venice Commission, [Report on the Democratic oversight of Signals Intelligence Agencies](#) (2015), par 74.

¹⁴⁶ UN Special Rapporteur on Counter-Terrorism and Human Rights, [Compilation of Good Practices on Legal and Institutional Frameworks and Measures that Ensure Respect for Human Rights by Intelligence Agencies while Countering Terrorism, including on their Oversight](#) (2010), especially Practice 31 (2010 UN SRCT Compilation). **Practice 32**, states that “*National law outlines the process for authorizing both the agreements upon which intelligence-sharing is based and the ad hoc sharing of intelligence. Executive approval is needed for any intelligence-sharing agreements with foreign entities, as well as for the sharing of intelligence that may have significant implications for human rights*”; **Practice 33**: “*Before entering into an intelligence-sharing agreement or sharing intelligence on an ad hoc basis, intelligence services undertake an assessment of the counterpart’s record on human rights and data protection, as well as the legal safeguards and institutional controls that govern the counterpart. Before handing over information, intelligence services make sure that any shared intelligence is relevant to the recipient’s mandate, will be used in accordance with the conditions attached and will not be used for purposes that violate human rights*”; and **Practice 35**: “*Intelligence services are explicitly prohibited from employing the assistance of foreign intelligence services in any way that results in the circumvention of national legal standards and institutional controls on their own activities. If States request foreign intelligence services to undertake activities on their behalf, they require these services to comply with the same legal standards that would apply if the activities were undertaken by their own intelligence services*”.

purposes that violate human rights, e.g., that would ultimately result in torture or other ill-treatment or would enable a country to repress free speech or human rights defenders or allow further human rights violations.¹⁴⁷ The ECtHR case law also points to the importance of external supervision and remedial measures.¹⁴⁸ The UN Special Rapporteur on Counter-Terrorism and Human Rights has also emphasized that a human rights compliant approach to information-sharing in the context of counter-terrorism operations requires respect for data protection principles, such as accuracy, purpose limitation and access, and data likely to give rise to unlawful or arbitrary discrimination should not be collected or shared.¹⁴⁹

83. Broad unqualified references in Article 6 of the Shanghai Convention to information exchange, requesting “operational search actions”, and coordinated efforts of detection do not reflect the above-mentioned principles, standards and safeguards in any way. Article 6(3) also requires the implementation of measures “to prevent, detect and suppress” acts defined in Article 1(1) of the Convention. These obligations are extremely broad and open-ended and particular measures to be adopted are not specified.
84. Similarly, **the breadth, ambiguity and susceptibility to abuse of Article 7 as regards the grounds for exchange of information, and the open-ended nature of that information, is noteworthy.** For example, Article 7(3) provides for “the exchange of information of mutual interest” in relation to “organizations, groups and individuals preparing and/or committing acts referred to in Article 1(1) of this Convention or otherwise participating in those acts, including their purposes, objectives, ties and other information”. Those who would be deemed “participating” is unclear and undefined, thus potentially giving enforcement authorities broad latitude in determining which organizations, individuals, and activities are covered by the Shanghai Convention.¹⁵⁰ Moreover, gathering information on others “tied” to such groups or individuals, without further reason broadens the net and potentially jeopardises freedom of association. In turn, “other information” is open-ended in terms of the type of information covered. This provision is cause for particular concern in a global context of shrinking civil society space, excessive oversight of their operations, and widespread curtailing of privacy in the name of national security.
85. Of note however, Article 9(6) of the Shanghai Convention does indicate that a request for assistance may be deferred or denied in full if, *inter alia*, it contravenes existing international law obligations. Although this should in principle include relevant

¹⁴⁷ See e.g., Venice Commission’s [Report on the Democratic oversight of Signals Intelligence Agencies \(2015\)](#), par 75. See also *ibid.* Practice 33 (2010 UN SRCT Compilation); and *op. cit.* footnote 31, page 43 (2018 ODIHR “FTFs” [Guidelines](#)).

¹⁴⁸ In [Szabo and Vissy v. Hungary](#), the ECtHR stated that “[t]he governments’ more and more widespread practice of transferring and sharing among themselves intelligence retrieved by virtue of secret surveillance – a practice, whose usefulness in combating international terrorism is, once again, not open to question and which concerns both exchanges between Member States of the Council of Europe and with other jurisdictions – is yet another factor in requiring particular attention when it comes to external supervision and remedial measures”; ECtHR, [Szabo and Vissy v. Hungary](#) (Application no. 37138/14, judgment of 12 January 2016), par 78.

¹⁴⁹ UN Special Rapporteur on Counter-Terrorism and Human Rights, [2009 Annual Report](#), UN Doc. A/HRC/10/3, 4 February 2009, par 35, citing UNGA Resolution 45/95 (1990), Guidelines concerning computerized personal data files.

¹⁵⁰ See e.g., ODIHR, [Preliminary Opinion on the Draft Amendments to the Legal Framework “On Countering Extremism and Terrorism” in the Republic of Kazakhstan](#) (6 October 2016), par 34; and *op. cit.* footnote 65, par 26 (2013 [ODIHR Opinion on the Draft Law of Tunisia Related to the Fight against Terrorism](#)). See also UNODC, [Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments](#) (2006), pars 212-233. For definitions of “participation” in the Criminal Codes of OSCE participating States, see e.g., Article 421-2-1 of the Criminal Code of France, which states: “The participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles shall in addition be an act of terrorism”; and Article 83.18 of the Criminal Code of Canada which provides a definition as well as a list of precise criteria and factors to be taken into account to assess whether such participation exists, <<http://www.legislationline.org/documents/section/criminal-codes>>. See also the definition of “Participating in an association or group for the purpose of terrorism” in the [Additional Protocol to the CoE’s Convention on the Prevention of Terrorism](#), 22 October 2015, which requires that it be committed unlawfully and intentionally (see also pars 31-37 of the Explanatory Report <<https://rm.coe.int/168047c5ec>>); and Article 4 of the EU [Directive 2017/541](#) on Combating Terrorism, which requires that the participation in the activities of a terrorist group, when committed intentionally, be punishable as a criminal offence, specifying that participating in the activities of a terrorist group, includes “supplying information or material resources, or funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group”. See, although in the context of a criminal offence for “membership in an armed organisation”, Venice Commission, [Opinion on articles 216, 299, 301 and 314 of the Penal Code of Turkey](#), CDL-AD(2016)002-e , 11-12 March 2016, pars 95-121 and 128.

international human rights obligations that bind the State Parties, the Shanghai Convention fails to specify the significant role that human rights should play in that respect. As discussed above, respect for human rights and the rule of law are one of the pillars of the UN Global Counter-Terrorism Strategy.¹⁵¹ Accordingly, not co-operating with states carrying out or risking carrying out serious violations of international human rights law should be an obligation, not simply an option, for states.

86. International human rights law is also relevant to other forms of co-operation referred to under rendering “legal assistance” (Article 2(3)). Co-operation should be withheld where states would be aiding and assisting serious human rights violations by other states.¹⁵² This would arise where the obligations are binding on both states, and where the state was making a direct and concrete contribution to the wrong in knowledge of its nature. If states co-operate – through extradition but also through mutual legal assistance – for instance with “extremism” or “separatism” prosecutions that are politically motivated and that use criminal law as a form of persecution or discrimination, or that otherwise violate basic human rights norms, they may be responsible for aiding and assisting such human rights violations.
87. Article 13 of the Shanghai Convention provides that each State Party “*shall assure the confidential nature of the information and documents received if they are sensitive or if the providing Party considers their disclosure undesirable*” while “[t]he degree of sensitiveness of such information and documents shall be determined by the providing Party”. States sharing sensitive information with partner states will often wish to ensure that it remains under their control (the control principle). However, the UN Special Rapporteur on Counter-Terrorism and Human Rights has raised concerns about the adoption of policies of secrecy by States to shield serious violations of human rights.¹⁵³ International human rights law may require that certain information is made available to individuals, in accordance with the right to truth and transparency, and that a meaningful opportunity to challenge and to seek a remedy or reparation in international law be in place.¹⁵⁴

5. PROSECUTION AND PENALTIES

88. Article 3 of the Shanghai Convention provides that the State Parties “*shall take such measures as may prove necessary, including, as appropriate, in the field of their domestic legislation, in order to ensure that in no circumstances acts referred to in Article 1(1) of this Convention should be subject to acquittal based upon exclusively political, philosophical, ideological, racial, ethnic, religious or any other similar considerations and that they should entail punishment proportionate to their gravity*”. Such a wording is unclear in terms of its intent and implications. Criminal law judges must convict or acquit, and punish proportionately, based on available evidence as to the individual’s culpability. If the reference to ensuring that there can be no acquittal on these grounds suggests leaving no discretion to the judge/court and accordingly interference with independent judicial function, this would be impermissible as impinging upon international standards on judicial independence. However, if such a provision simply requires that State Parties take

¹⁵¹ *Op. cit.* footnote 60, par 12 (2010 UNSR’s Report).

¹⁵² See e.g., UN, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)*, Report on the work of its fifty-third session (23 April-1 June and 2 July-10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), Article 16.

¹⁵³ UN Special Rapporteur on Counter-Terrorism and Human Rights, *2009 Annual Report*, UN Doc. A/HRC/10/3, 4 February 2009, par 49.

¹⁵⁴ Office of the United Nations High Commissioner for Human Rights, *The right to privacy in the digital age*, UN Doc. A/HRC/27/37, 30 June 2014, paras 39-41 on the right to challenge and seek a remedy, par 46 on the need for tele-communications companies to ensure users have “meaningful transparency” on how their data is used, and par 48 highlight concern about lack of governmental transparency with respect to surveillance policies.

measures necessary to ensure that such factors or motivations do not constitute a *defence* under criminal law, this is not inherently problematic.

89. Article 3 includes a reference to proportionate punishment, which is a principle reflected in international human rights law. The proportionality should be assessed on a case by case basis by the judge, based on the contribution of the particular individual and all the circumstances. It should not be assumed that the offences in the Shanghai Convention are inherently serious, as they may cover much more and less serious forms of contribution or assistance. As noted above, **criminal prosecution of “extremism” itself is problematic from a human rights perspective so the question of punishment should not arise at all.**

6. DISPUTE RESOLUTION MECHANISM

90. Article 17 states that “[a]ny disputes, concerning interpretation or application of this Convention shall be settled through consultation and negotiation between the interested Parties”. This provision raises rule of law concerns regarding the interpretation of the treaty. Specifically, by relying upon consultations and negotiations rather than, for example, interpretation or adjudication by an independent body or tribunal established by the Convention or some other form of independent arbitration, **the Convention risks entrenching an inequality of negotiation power. Article 17 may *de facto* favour the more politically powerful states that are a party to the Convention.** Further, it also risks external factors independent of the text of the treaty impacting upon the interpretation or application of the Convention.

[END OF TEXT]
