

**DRAFT ADDITIONAL
PROTOCOL TO THE COUNCIL
OF EUROPE CONVENTION ON
THE PREVENTION OF
TERRORISM**

JOINT SUBMISSION BY AMNESTY
INTERNATIONAL AND THE
INTERNATIONAL COMMISSION OF
JURISTS TO THE COMMITTEE ON
FOREIGN FIGHTERS AND RELATED
ISSUES (COD-CTE)

**AMNESTY
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Submission of Amnesty International and the International Commission of Jurists to the Committee on Foreign Fighters and Related Issues (COD-CTE)

Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism

19 March 2015

I. Introduction

Amnesty International and the International Commission of Jurists (ICJ) welcome this opportunity to comment on the draft Additional Protocol (the draft Protocol) to the Council of Europe Convention on the Prevention of Terrorism (the Convention), in advance of the third meeting of the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE; the Committee). The comments made in the present submission, which supplement those made in our previous preliminary public observations¹ are not meant to be exhaustive, but set out a short overview of some of the main concerns raised by the proposed text.

While we appreciate the Committee's efforts to improve transparency in the drafting process for the Protocol, we remain concerned that the speed of the process, and the very short period during which the draft will have been publicly available prior to its finalization and agreement, do not allow for an appropriate degree of consultation and debate on this complex topic. Given that this is also an instrument that is likely to have significant consequences for the protection of human rights, due consideration should be given to extending the timeframe for finalization of the draft by COD-CTE.

II. Scope of application of the draft Additional Protocol

At the outset, and having studied the text of the draft Protocol as of 12 March, the ICJ and Amnesty International wish to reiterate our concern that the scope of application of the draft Protocol is excessively broad, as a result of the wide and uncertain definition of "terrorist offence" in Article 1.1 of the Convention.² Article 1.1 defines "terrorist offence" with reference to a list of treaties in an appendix to

¹ Amnesty International and the International Commission of Jurists, Preliminary public observations on the terms of reference to draft an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism, <https://www.amnesty.org/en/documents/ior60/1172/2015/en/>, <http://www.icj.org/council-of-europe-icj-and-ai-observations-on-draft-foreign-fighters-protocol-negotiations/>

² Article 1.1 states: "For the purposes of this Convention, 'terrorist offence' means any of the offences within the scope of and as defined in one of the treaties listed in the Appendix." The appendix lists 11 international conventions and protocols for the suppression of specific acts related to terrorism.

the Convention, some of which themselves define offences by referring to other treaties or define offences broadly.³

This problem is compounded by the fact that offences ancillary to the principal offence (“terrorist offence”), such as those which are the focus of the draft Protocol, criminalize conduct which to varying extents is distant from the principal offence, and is therefore more difficult to identify with certainty. This raises serious concerns as to compliance with the principle of legality, a core general principle of law, enshrined, *inter alia*, in Article 7 ECHR and Article 15 ICCPR, which requires laws to be clear and accessible and for their application in practice to be sufficiently foreseeable. The principle has been affirmed by the European Court of Human Rights as an essential element of the rule of law and an important protection against arbitrariness.⁴

As Amnesty International and the ICJ noted in our previous observations, and following in particular the reference to UN Security Council resolution 2178 in paragraph 6 of the draft Preamble, the potential scope of application of the Protocol is of particular concern. UN Security Council resolution 2178 itself is highly problematic in its use of ill-defined notions of “terrorism”, “terrorist act” and “foreign terrorist fighters” which appear to conflate different legal regimes.⁵ International humanitarian law (IHL) already prohibits certain conduct that would be characterized as acts of terrorism if committed outside of armed conflict. Under IHL, such conduct is generally prohibited as war crimes in the context of armed conflict, which require prosecution under national or international jurisdictions.⁶ On the other hand, the commission of an act of terrorism by a person trained by an armed group, including an armed group involved in an armed conflict, with the intent to carry out this act outside a situation of armed conflict, typically does not engage IHL, but rather criminal law. It is notable that, within the Council of Europe legal framework, Article 26.5 of the Convention on the Prevention of Terrorism excludes the application of the Convention to the activities of armed forces during an armed conflict which are governed by IHL. Furthermore, a number of the treaties on which the definition of “terrorist offence” in Article 1.1 of the Convention relies either specifically exclude application in situations of armed conflict, or are likely to be irrelevant to such situations.⁷

³ See in this regard, Amnesty International, *Council of Europe: Preliminary Observations on the December 2004 Draft European Convention on the Prevention of Terrorism* (Index: IOR 61/002/2005) <https://www.amnesty.org/en/documents/ior61/002/2005/en/>; *Amnesty International's representations on the February 2005 draft Council of Europe Convention on the Prevention of Terrorism* (Index: IOR 61/005/2005). <https://www.amnesty.org/en/documents/ior61/005/2005/en/>

⁴ *Del Rio Prada v. Spain*, application no. 42750/09, Grand Chamber, 21 October 2013, para. 77.

⁵ Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, UN Doc. A/HRC/28/28 of 19 December 2014, paras. 46/47.

⁶ See Rome Statute of the International Criminal Court, Articles 17, 54, 59, 86-89; Convention against Torture, Articles 6, 7; International Convention for the Protection of All Persons from Enforced Disappearances, Articles 3, 6, 11; International Court of Justice, *Questions Concerning the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment of 20 July 2012, paras 92-95. For example, the Commission of Inquiry on Syria of the UN Human Rights Council has affirmed that the armed group calling itself Islamic State (IS, or ISIS) has committed war crimes and crimes against humanity, and that its commanders are individually criminally responsible for these crimes; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic - *Rule of Terror: Living under ISIS in Syria*, 14 November 2014, paras. 74 and 78.

⁷ Martin Scheinin, *Council of Europe Draft Protocol on Foreign Terrorist Fighters is Fundamentally Flawed*, Just Security, <http://justsecurity.org/21207/council-europe-draft-protocol-foreign-terrorist-fighters-fundamentally-flawed/>

While it is appropriate that the draft Protocol does not expressly foresee the application of its provisions to situations of armed conflict, the consequences arising from the present draft are uncertain. Amnesty International and ICJ stress that it would be highly problematic from a legal standpoint to apply the measures in the draft Protocol to situations of armed conflict. We therefore urge states, in the negotiation of this draft, and in its implementation in their national law, to ensure the Protocol is not regarded as an instrument for the criminalization of conduct in situations of armed conflict. In regard to such situations, we call on states to give priority to the fulfilment of their existing obligations to investigate and prosecute war crimes, crimes against humanity and other crimes under international law, including through co-operative measures.

Where individuals in any situation are responsible for crimes under international law, criminalization and co-operation in the prosecution of those crimes should include, where necessary, asserting universal jurisdiction, and bringing those responsible to justice, in fair proceedings. The obligation to do so is part of existing international law. While there are clear evidential challenges in investigating and prosecuting crimes under international law such as war crimes and crimes against humanity perpetrated in other countries, the responsibility of states to ensure that those who engage in such crimes are held accountable for them needs to remain at the forefront of states' agenda.

Below we make specific observations on provisions of the draft Protocol, on the understanding that it applies to conduct outside of situations of armed conflict. Furthermore, throughout our comments, we emphasize the need for a sufficiently direct connection with the principal criminal act and for a clear and unequivocal intent to commit all elements of the crime. While criminalizing preparatory acts is not necessarily inconsistent with international human rights law, to do so for conduct which is not proximate to any specific principal criminal act, and in the absence of intent to engage in the principal criminal conduct, may raise serious legal problems, including in terms of undue restrictions on the legitimate exercise of certain human rights.

III. Commentary on the text of the Draft Additional Protocol as of 12 March

Preamble

In light of the importance, highlighted in our preliminary observations of 6 March 2015, of action by states to fulfil their existing international law obligations to bring to justice those who have committed crimes under international law, including abroad, Amnesty International and the ICJ propose insertion of a new paragraph in the preamble that recalls states' obligations to take measures to co-operate in the investigation and prosecution of crimes under international law.

As to the application in situations of armed conflict of the treaties annexed to the Convention, see for example, International Convention for the Suppression of Terrorist Bombings, Article 19: "The activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention..." and the International Convention against the Taking of Hostages, Article 12: "the present Convention shall not apply to an act of hostage taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto."

Furthermore, while welcoming the reference to human rights in the fourth preambular paragraph, we note that the scope of this paragraph is very limited in that it refers only to two treaties, the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). While it is entirely appropriate to highlight these instruments for mention as particularly relevant to the draft Protocol, the clause should first refer in general terms to all obligations of Contracting Parties⁸ under international law, including international human rights and refugee law, and then specifically to the ECHR and ICCPR; this would mirror the reference in Article 7.1 of the draft Protocol to “and other obligations under international law”.

Article 1: Purpose

While the purpose of the Protocol as described in Article 1 refers to the “negative effects [of terrorism] on ... human rights”, Amnesty International and the ICJ consider it important that this provision explicitly recall the international human rights law obligations of the Contracting Parties in this context.⁹

We therefore suggest that, at the end of Article 1, the reference to “applicable multilateral or bilateral treaties or agreements between the Parties”, there be added a specific reference to the duty to comply with all obligations of the Contracting Parties under international human rights law, as in the current draft of Article 7.1. Reference to these obligations should be understood as encompassing all international legal obligations, including those that are treaty-based and those that arise from customary international law.

Article 2: Participation in an association or group for the purpose of terrorism

Amnesty International and the ICJ are concerned at the very general terms in which the provision on “participation in an association or group for the purpose of terrorism” is drafted, which would make it difficult for individuals to ascertain with sufficient certainty which conduct could constitute a criminal offence. Taken together with the lack of clarity and precision of the definition of “terrorist offence” (see above) to which it is attached, it therefore raises concerns as to the principle of legality, and risks arbitrary application in practice. In Article 2, as currently drafted, it is not clear what level of involvement in a group would be required to establish “participation in its activities” or what intent and level of awareness would be required for an individual’s conduct to be deemed criminal. Furthermore, it does not specify what level of “contribution” is required for criminal liability to arise, allowing for overbroad application of this offence. For instance, indirect “contribution”, which might be interpreted as including the provision of services like catering or cleaning to members of the organization, might potentially be considered as falling under this offence.

⁸ In accordance with Article 23 of the Convention on the Prevention of Terrorism, and Articles 10 and 11 of the draft Protocol, Contracting Parties may include the EU, as well as states who are not Member States of the Council of Europe.

⁹ UNSC Resolution 1456, UN Doc. S/RES/1456 (2003), 20 January 2003, OP 6; UNGA Resolution 60/288, UN Doc. A/RES/60/288 of 20 September 2006, part IV. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Ten areas of best practice in countering terrorism, UN Doc. A/HRC/16/5 of 22 December 2010, para. 12; Committee of Ministers of the Council of Europe, *Guidelines on human rights and the fight against terrorism*, Guideline II.

In this regard, we note that Article 9.1.c of the Convention on the Prevention of Terrorism, which requires states to criminalize “contributing to the commission” of specified offences of terrorism under that Convention “by a group of persons with a common purpose”, sets out with greater specificity the nature of the intent required to ground such an offence. It appears as if Article 2 of the draft Protocol, read in conjunction with Article 9 of the draft Protocol, is aimed at replacing, or at least diluting, more specific formulations of “ancillary offences” as prescribed in Article 9 of the Convention. We urge all delegations, including when considering the current text of Article 9 of the draft Protocol, to ensure that the Protocol reinforces rather than further loosen requirements of intent and knowledge.

Article 2 must, at a minimum, ensure that any offence of “participation in an association or group for the purpose of terrorism” is confined to participation that is voluntary and with knowledge that the action will significantly contribute to the commission of the principal offence. Article 2 should also make such offences subject to specific intent, not only to participate in the activities of a group, but also to thereby commit or contribute to the commission of a principal criminal offence.

Article 3: Receiving training for terrorism

Amnesty International and the ICJ are concerned that this provision is not drafted with sufficient clarity and precision so as to prevent arbitrary application of the criminal law. In particular, Article 3.1 does not envisage “receiving training for terrorism” as confined to receiving such training wilfully. Also, in contrast with the offence of *providing* “training for terrorism” as prescribed in Article 7 of the Convention, Article 3 of the draft Protocol does not require that the individual has knowledge that the training and the skills provided are intended to be used for the purpose of committing the principal offence.

Finally, it is essential that offences of “receiving training for terrorism” must be subject to the establishment of specific intent of carrying out, or contributing to the commission of the principal offence as a result of the training. In the absence of such intent, conduct risks being criminalized without a sufficient proximate causal link with the principal criminal offence.

Article 4: Travelling abroad for the purpose of terrorism

This measure engages the right to freedom of movement, which includes the freedom to leave any country, including one’s own. Under Article 2 of Protocol 4 ECHR, and Article 12 ICCPR, the right to leave one’s country may be limited only where strictly necessary and proportionate.

In light of its impact on the right to freedom of movement, and so as to comply with the principle of legality and to avoid arbitrary and discriminatory application in practice, Amnesty International and the ICJ consider that Article 4 must be formulated with greater precision. In particular, Article 4.1 should be reformulated so as to clarify that the offence of “travelling abroad for the purpose of terrorism” requires a clearly demonstrated intent to commit or otherwise participate in the commission of a criminal act.

Furthermore, the defendant should not in any circumstances bear the burden of proof in establishing that his or her travel to or presence in a specific area would be for a legitimate purpose, in keeping with the principle of presumption of innocence. The burden of proof in criminal proceedings lies solely with the prosecution.

Moreover, concerns raised by Article 4.1, which covers conduct that is several stages removed, and therefore lacks a proximate causal link, to any principal offence which may take place, are further exacerbated by Article 4.3 criminalizing attempt. Any preparatory offence to be criminalized must have a close connection to the commission of the principal criminal offence, with a real and foreseeable risk that such principal criminal conduct would in fact take place. Moreover, criminal prosecution solely based on expressions of motivation by the individual, and without more concrete manifestation of any intent to actually carry out a principal criminal act, would appear to criminalize expression and manifestations rather than objective criminal conduct. This risk is heightened where the conduct to be criminalized is the attempt to carry out an act. The draft Protocol should lay down a prerequisite of a sufficiently direct connection with a principal criminal act and stipulate that a clear and unequivocal intent has to be established.

Article 5: Funding travelling abroad for the purpose of terrorism

Amnesty International and the ICJ are concerned that the requirement to criminalize “funding for travel abroad for the purpose of terrorism” in Article 5 is formulated in broad terms that would pave the way for criminalization of conduct with no, or only very distant, causal connection to a principal offence. For instance, criminalising “collection” of funds, even “indirectly”, which may be used to “partially enable” a person to travel for the purpose of committing, participating in or contributing to a principal criminal offence, makes the scope of the offence overbroad. The language of Article 5 should at a minimum make clear that funding must not only “enable” in theory, but must in practice lead to travel sufficiently connected to the commission of, participation in, or significant contribution to, a principal criminal offence.

Furthermore, it should be clarified in the text that the offence requires specific intent to facilitate the commission of the principal offence, through the provision or collection of funds. In no circumstances should the burden of proof be reversed to require the defendant to show that funds were provided or collected for purposes other than commission of, participation in, or significant contribution to, a principal criminal offence, in keeping with the principle of presumption of innocence and that the burden of proof in criminal proceedings lies with the prosecution.

Article 6: Organizing or otherwise facilitating travelling abroad for the purpose of terrorism

This provision raises concerns due to its potentially overbroad scope of application. In particular, the current wording does not explicitly require that the act of organization or facilitation concerned at least carry a real risk of having any actual impact or real influence on, or sufficient causal or proximate link with, the

principal offence. Amnesty International and the ICJ are concerned that this provision does not seem to require specific intent to facilitate the commission of the principal offence, in addition to the intent to facilitate travel.

Article 7: Conditions and safeguards

Amnesty International and the ICJ welcome the insertion of a human rights safeguard clause. We are concerned however that this provision is positioned after, and refers only to, Articles 2 to 6 of the draft Protocol. Article 7.bis and Article 8 of the draft Protocol both have considerable potential to affect human rights, including the right to liberty, right to freedom of movement and to leave one's country, rights to respect for private and family life, the right to seek asylum, the right to freedom from torture and other cruel, inhuman or degrading treatment or punishment and the principle of *non-refoulement*. We consider it essential that, if Article 7.bis and Article 8 are retained, they also are made expressly subject to human rights safeguards. We therefore recommend a wording prescribing that the implementation of the whole draft Protocol, not just its present Articles 2-6, are subject to the safeguards in Article 7. Furthermore and as a consequence of this recommendation, we suggest moving the present Article 7 to a position following the present Articles 7.bis and 8 (if retained).

Amnesty International and the ICJ recommend that Article 7.1 also refer to the obligations of states under international refugee law, which may be relevant to freedom of movement, and in particular to measures of prevention under Article 7.bis. Furthermore, given the likelihood that people under the age of 18 will be affected by measures taken under the Protocol, we consider that it would be appropriate also to make specific reference to the Convention on the Rights of the Child. Thirdly, we suggest that any reference to the rights set out in the ECHR should also include reference to the rights set out in its relevant protocols, as applicable to specific Contracting Parties.

As has been noted repeatedly throughout these submissions, the principle of legality in respect of criminal offences, and the right to a fair trial, are of particular importance for this Protocol. This should be recognized in an additional subparagraph of Article 7, which would require Contracting Parties, in their establishment, implementation and application of the Protocol, to respect the rule of law, including the principle of legality, and respect for the right to a fair trial, including the presumption of innocence. Also, given the fact that this Protocol will be open to ratification and accession by states outside the Council of Europe, Article 7 should explicitly rule out any measure, including co-operation, exchange of information, or criminal prosecution, which could entail a risk of the use of the death penalty.

Article 7.bis: Prevention and international co-operation

As noted above, it is essential that, if Article 7.bis is retained, it is made subject to the human rights safeguard clause.

Amnesty International and the ICJ consider that the scope and meaning of this provision are excessively vague. In particular, it is not clear what preventive measures are envisaged, and no procedures or safeguards are established for co-

operative preventive measures. Such measures may raise serious human rights concerns, for example, if they involve detention; exchange of intelligence information, potentially or actually obtained in violation of human rights; communications surveillance, including interception of communications; interferences with the right to nationality and the prohibition of rendering a person stateless, or with the right to enter one's own country, which under Article 3.2 of Protocol 4 ECHR does not admit any restriction. Such a general obligation to co-operate, without provision of safeguards and procedures to ensure protection of human rights, is therefore of serious concern, and should be revised accordingly.