



Submission of Amnesty International and the International Commission of Jurists to the Council of Europe Committee of Experts on Terrorism (CODEXTER)

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

7 April 2015

Amnesty International and the International Commission of Jurists (ICJ) submit these comments on the revised (26 March) draft Additional Protocol (the draft Protocol) to the Council of Europe Convention on the Prevention of Terrorism (the Convention) to the Committee of Experts on Terrorism (CODEXTER), in advance of its 28th plenary meeting 8-10 April. These comments highlight key points which our two organizations set out in more detail in a previous submission to the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE) on a previous (12 March) draft of the Additional Protocol,¹ as well as in earlier preliminary observations,² and which are not reflected in the text of the draft Protocol as it presently stands. This submission also includes comments on the new Article 7 of the draft Protocol. We take this opportunity to urge CODEXTER to consider these concerns and recommendations and to make further amendments to the text of the draft Protocol accordingly before it is submitted for adoption by the Committee of Ministers of the Council of Europe.

The ICJ and Amnesty International reiterate our general concern that the potential scope of application of the Protocol is excessively broad due to the wide and uncertain definition of “terrorist offence” in Article 1.1 of the Convention,³ which defines “terrorist offence” with reference to a list of treaties, some of which themselves define offences broadly or by referring to other

¹ *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, <https://www.amnesty.org/en/documents/ior60/1281/2015/en>, <http://www.icj.org/council-of-europe-icj-and-ai-submission-on-draft-foreign-fighters-protocol>.

² 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*, 6 March 2015, <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>.

³ 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.

treaties.⁴ Moreover, and compounding this, the draft Protocol focuses on criminalizing ancillary offences arising from conduct which to varying extents is distant from the principal offence (“terrorist 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, which requires that laws are clear and accessible and that their application in practice is sufficiently foreseeable,⁵ and which 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.⁶

The potential scope of application of the Protocol is of additional concern in view of the reference in paragraph 6 of the draft Preamble to UN Security Council resolution 2178, which itself is highly problematic in its use of ill-defined, or indeed not defined at all, notions of “terrorism”, “terrorist act”, and “foreign terrorist fighters”, and which appear to conflate different legal regimes.⁷ International humanitarian law (IHL) already prohibits certain conduct that would be characterized as acts of terrorism if committed outside of armed conflict. Under IHL, in the context of armed conflict such conduct is generally prohibited as war crimes, which require prosecution under national or international jurisdictions.⁸ On the other hand, the commission of an act of terrorism outside a situation of armed conflict by a person trained by an armed group, including such a group involved in an armed conflict, is typically a matter for criminal law and not IHL. In this regard, it is notable that 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

⁴ 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>.

⁵ See, for example, Article 7 of the European Convention on Human Rights (ECHR) and Article 15 of the International Covenant on Civil and Political Rights (ICCPR).

⁶ *Del Rio Prada v. Spain*, application no. 42750/09, Grand Chamber, 21 October 2013, para. 77.

⁷ 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.

⁸ 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.

exclude application in situations of armed conflict, or are likely to be irrelevant to such situations.⁹

While the draft Protocol, appropriately, does not expressly foresee the application of its provisions to situations of armed conflict, the consequences arising from the draft as it presently stands are uncertain, particularly given the nature of the offences on which it focuses, especially those related to travel to other countries. It would be highly problematic from a legal standpoint to use the Protocol as an instrument for the criminalization of conduct in situations of armed conflict. In regard to such situations, states should give priority to fulfilling their existing international legal obligations to investigate and prosecute war crimes, crimes against humanity and other crimes under international law, including through co-operative measures and through asserting universal jurisdiction to bring those responsible to justice in fair proceedings.

Accordingly we urge that the draft Protocol be amended to make explicit that it is not applicable to conduct relating to offences committed in situations of armed conflict.

Comments on specific provisions of the text of the draft Protocol as of 26 March

The comments below briefly reiterate observations from our previous submission¹⁰ which in our view it is essential to reflect in the text of the Protocol, so as to mitigate the risk of provisions of it providing a basis for domestic legislation leading to arbitrary application of the criminal law. Throughout these comments, we emphasize the need for the draft Protocol to expressly and clearly require the establishment of a sufficiently direct connection with the principal criminal act and for a clear and unequivocal intent to commit all elements of the crime. With regard to the latter, the precise scope of the requirement of intent contained in Articles 2.2, 3.2, 4.2, 5.2 and 6.2 must be expressed more clearly so as to ensure that the binding provisions of the Protocol will guard against the adoption of overbroad domestic legislation.

⁹ 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>. 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."

¹⁰ For a more detailed explanation of Amnesty International and the ICJ's concerns on specific provisions of the text of the draft Protocol, which for the most part have not been addressed in the revised draft as of 26 March, please see Section III of *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, note 1 above.

Preamble

In light of the importance, noted above, 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 the insertion of a new paragraph in the preamble that recalls Contracting parties' obligations to take measures to co-operate in the investigation and prosecution of crimes 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 also explicitly recall the international human rights law obligations of the Contracting Parties in this context.¹¹

We therefore suggest that, at the end of Article 1, in the “due regard” clause referring to “applicable multilateral or bilateral treaties or agreements between the Parties”, there be added an explicit reference to the duty to comply with all obligations of the Contracting Parties under international law, including international human rights and refugee law, including those that are treaty-based or arising from customary international law.

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

In Article 2, it is not clear what level of involvement in a group would be required to establish “participation in its activities”, or what level of “contribution” to the commission of an offence, or what intent and level of awareness, would be required for an individual's conduct to be deemed criminal. This would make it difficult for individuals to ascertain with sufficient certainty what conduct could constitute a criminal offence and, taken together with the lack of clarity and precision of the definition of “terrorist offence” (see above) raises concerns as to the principle of legality, and risks arbitrary application in practice.

Article 2 must, at a minimum, make clear 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. It should also make clear that such offences are 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

This provision is not drafted with sufficient clarity and precision to prevent arbitrary application of the criminal law. For instance, Article 3.1 does not

¹¹ 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.

ensure that “receiving training for terrorism” is confined to receiving such training wilfully. Moreover, it is essential that offences of “receiving training for terrorism” be subject to establishing 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, there is a risk of criminalizing conduct which lacks a sufficient proximate causal link with the principal criminal offence.

Article 4: Travelling abroad for the purpose of terrorism

Article 4 impacts on the right to freedom of movement, including the freedom to leave any country, including one’s own, which under international human rights law is subject only to limitations which are strictly necessary and proportionate.¹² Accordingly, and in order to comply with the principle of legality and to avoid arbitrary and discriminatory application in practice, Article 4 must be formulated with greater precision so as to ensure that any preparatory act which is to be criminalized must have a sufficiently close connection to the commission of the principal offence, with a real and foreseeable risk that such principal criminal conduct would in fact take place.

In particular, Article 4.1, which covers conduct several stages removed from, and therefore lacking a proximate causal link to, any principal offence which may take place, should expressly 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. It should also clarify that, in keeping with the principle of presumption of innocence, the burden of proof lies solely with the prosecution. The defendant should not in any circumstances bear the burden of proof in establishing that his or her travel would be for a legitimate purpose.

The same concerns apply to an even greater degree with regard to Article 4.3, which criminalizes the attempt to carry out such acts.

In summary, the draft Protocol should establish a requirement that the offences envisaged in Article 4 have sufficiently direct connection with a principal criminal act, and should stipulate the need to establish a clear and unequivocal intent not only to travel, or attempt to travel, but to commit or otherwise participate in the principal offence.

Article 5: Funding travelling abroad for the purpose of terrorism

The concerns noted above with regard to Article 4 are exacerbated in regard to the requirement to criminalize “funding for travel abroad for the purpose of terrorism” in Article 5, which 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, criminalizing “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.

¹² Article 2 Protocol 4 ECHR; Article 12 ICCPR.

Article 5 should at a minimum make clear in the text that funding must not only “enable” in theory, but must in practice lead to, travel which is sufficiently connected to the commission of, participation in, or significant contribution to, a principal criminal offence. The text should also make clear that the offence requires specific intent to facilitate the commission of the principal offence, through the provision or collection of funds. It should also clarify that, in keeping with the principle of presumption of innocence, the burden of proof lies solely with the prosecution. The defendant should not in any circumstances bear the burden of proof in establishing that funds were provided or collected for purposes other than commission of, participation in, or significant contribution to, a principal criminal offence.

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

Like the previous provisions, the scope of application of Article 6 is potentially overbroad. In particular, this provision lacks any explicit requirement that the act of organization or facilitation concerned at least carries a real risk of having an actual impact or real influence on, or sufficient causal or proximate link with, the principal offence. It lacks also a clear requirement of intent not only to facilitate the travel but also the commission or contribution to the principal offence. The text should be amended accordingly.

Article 7: Exchange of information

While noting that Article 7 in the revised draft is subject to the amended safeguard clause now in Article 8, and that Article 7 itself contains a general reference to states’ existing international law obligations, Amnesty International and the ICJ would stress that the requirement on Contracting Parties to strengthen timely exchange of “any available relevant information concerning persons travelling abroad for the purpose of terrorism” must be subject to strict compliance with their obligations under international human rights law. This includes the obligation not to share intelligence or other information where there is a real risk that it may directly or indirectly lead to or has or may have been directly or indirectly obtained in violation of international human rights law, including the absolute prohibition on torture and other ill-treatment¹³ and the right to privacy.

Amnesty International and the ICJ recommend that, notwithstanding the general safeguard provision in Article 8, such an explicit reference should be added in Article 7.

Article 8: Conditions and safeguards

Amnesty International and the ICJ are pleased to note that the human rights safeguard clause has now been amended to apply to the whole Protocol, rather than, as in the previous draft, only to Articles 2 to 6.

¹³ See Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/HRC/25/60 of 10 April 2014. See also *El Haski v. Belgium*, application no. 649/08, 25 September 2012, in which the European Court of Human Rights held that the use of evidence obtained in breach of Article 3 ECHR renders the proceedings as a whole automatically unfair, including the use of real evidence obtained as a direct result of such a breach, and of evidence extracted from a person other than the defendant (at para. 85).

However, as noted above and in our previous submissions, the principle of legality in respect of criminal offences, and the right to a fair trial, are of particular importance for this Protocol. We therefore urge that this be recognized in an additional sub-paragraph of Article 8, which would expressly 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 Additional Protocol will be open to ratification and accession by states outside the Council of Europe, Article 8 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.

Moreover, we would reiterate our earlier recommendations that, in view of the focus of the draft Protocol, the reference to Contracting Parties' obligations under international law include express reference to their obligations under international refugee law, and that, in view of the likelihood that people under the age of 18 will be affected by measures taken under the Protocol, include specific reference to the Convention on the Rights of the Child.