



**European Commission's proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism**

**Joint submission by Amnesty International, the International Commission of Jurists, and the Open Society Justice Initiative and the Open Society European Policy Institute**

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**INTRODUCTION**

In this submission, Amnesty International, the International Commission of Jurists (ICJ), and the Open Society Justice Initiative (OSJI) and the Open Society European Policy Institute (OSEPI) analyse and offer recommendations on the European Commission's December 2015 proposal for a Directive on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism ("the proposed Directive") in light of Member States' obligations under international law, in particular international human rights law. Rather than submitting observations on every challenge raised by this proposal, the present document focuses on some of the organisations' main issues of concern and makes specific recommendations to address them (both in general - Part I- and in regard to specific articles - Part II). Therefore, the absence of comment on a specific recital or draft article should not be read as an endorsement of that text.

This submission seeks to specifically address:

- The failure to provide sufficient guarantees of human rights protection in the implementation of the Directive by Member States;
- The overbroad scope and vague delineation of many of the offences to be established under the Directive, with consequences for the principle of legality and the prohibitions on arbitrary, disproportionate and discriminatory interference with human rights;
- The designation of ancillary and inchoate offences with a low degree of proximity to the principal offence of commission of a terrorism-related act;
- The imprecise definition of the specific intent required to incur responsibility for a number of offences and lack of requirements for wilful or voluntary conduct;

- The potential of the Directive to undermine states' obligations under international humanitarian law and international criminal law, where those regimes are applicable.

## I. GENERAL PRINCIPLES

### Background to the Directive

This proposed Directive develops and extends the criminalisation of terrorism-related acts in EU law, building on Framework Decision 2002/475/JHA on Combating Terrorism as amended by Framework Decision 2008/919/JHA. The impetus for the new offences included in the proposed Directive is said to be UN Security Council Resolution 2178 (2014) which seeks to address what is often characterized as the “foreign terrorist fighters” phenomenon and provides that:

“Member States shall ... prevent and suppress the recruiting, organizing, transporting or equipping of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, and the financing of their travel and of their activities”.<sup>1</sup>

The proposed Directive further draws on the Additional Protocol to the Council of Europe's Convention on the Prevention of Terrorism adopted in May 2015 (“the Additional Protocol”), which was aimed at implementing Security Council Resolution 2178 within the Council of Europe legal framework. Amnesty International, the ICJ and OSJI made a series of submissions on the draft Protocol, and retain significant concerns regarding its content and potential to result in violations of human rights.<sup>2</sup>

Although both Security Council Resolution 2178 and the Additional Protocol affirm that the measures they establish must be implemented in accordance with States' international human rights obligations, both contain flaws that give rise to the potential to result in arbitrary, disproportionate, and discriminatory interference with human rights, and to conflict with international humanitarian

<sup>1</sup> UNSC resolution 2178, UN Doc. S/RES/2178 (2014), 24 September 2014, OP 5.

<sup>2</sup> 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 <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/CouncilofEurope-Letter-ForeignFighters-Advocacy-Legal-Submission-2015-ENG.pdf>; Amnesty International and the International Commission of Jurists, Submission to the Committee on Foreign Fighters and Related Issues (COT-CTE) on the Draft Additional Protocol to the Convention on the Prevention of Terrorism, 19 March 2015, <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/03/CouncilofEurope-Submission-ForeignFighters-Advocacy-Legal-Submission-2015-ENG.pdf>; Amnesty International and the International Commission of Jurists, Submission to the Council of Europe Committee of Experts on Terrorism (DODEXTER) on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, 7 April 2015. <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/04/CouncilofEurope-CODEXTER-DraftProtocolTerrorismConvention-ICJ-AISubmission-2015-ENG.pdf>; [Open Society Justice Initiative, Comments on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, 24 March 2015, https://www.opensocietyfoundations.org/publications/comments-draft-additional-protocol-council-europe-convention-prevention-terrorism.](https://www.opensocietyfoundations.org/publications/comments-draft-additional-protocol-council-europe-convention-prevention-terrorism)

law and international criminal law where applicable.<sup>3</sup> These problems are also reflected, and in some cases exacerbated, in the text of the proposed Directive.

### **International human rights law: general principles**

Amnesty International, the ICJ, and OSJI and OSEPI consider that the proposed Directive as currently drafted would not accord with the principle of legality of criminal offences enshrined in article 49 of the EU Charter, Article 7 of the European Convention on Human Rights (ECHR) and Article 15 of the Covenant on Civil and Political Rights (ICCPR). The human rights obligations engaged by the measures in the proposed Directive include, among others, the right to liberty; the right to freedom of movement, including the right to leave and enter one's own country; the right to privacy; the rights to freedom of expression and association; and the principle of non-discrimination. Under the Charter of Fundamental Rights of the EU (Article 52.1), as well as the ECHR and the ICCPR, both of which are binding on all EU Member States, any restrictions of these rights must be prescribed by law which is clear and accessible, in pursuit of a legitimate purpose, and must be necessary and proportionate to achieve that purpose. The burden is on the state to demonstrate that these conditions are met, including the necessity and proportionality of the restriction. Restrictions must be consistent with all other human rights recognized in international law; may not impair the essence of the right affected; and may not be applied in a discriminatory or arbitrary manner.

The requirement that, where limitations on certain human rights are permissible, they must be "prescribed by law" reflects the well-established principle of legality, a principle that similarly applies to defining all criminal offences. Thus, laws must be clear and accessible and their application in practice must be sufficiently foreseeable. In particular, they must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly. They must not confer unfettered discretion on authorities, but rather provide sufficient guidance to those charged with their application to enable them to ascertain the sort of conduct that falls within their scope.<sup>4</sup> This 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.<sup>5</sup> With regard to criminalization, the principle of legality requires that the law must classify and describe offences in precise and unambiguous

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<sup>3</sup> 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.

<sup>4</sup> 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, para. 28; UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, UN Doc. E/CN.4/2006/98 of 28 December 2005, para.46. See, for example, Article 49 of the EU Charter, Article 7 of the European Convention on Human Rights (ECHR) and Article 15 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>5</sup> *Del Rio Prada v. Spain*, application no. 42750/09, Grand Chamber, 21 October 2013, para. 77.

language that narrowly defines the punishable behaviour. **The offences in the proposed directive are insufficiently precise and conduct which would trigger criminal responsibility under them insufficiently foreseeable to satisfy the principle of legality, and should be amended accordingly. (See further below specific recommendations with regard to Articles 2, 4, 5, 8, 9 and 10.)**

Furthermore, the criminalization of earlier stages of certain preparatory acts that are several stages removed from any principal offence, including when related to terrorism and without a direct intent to commit the principal offence, leads to a very weak, if any, causal or proximate link with the principal offence. These ancillary offences are therefore difficult to justify as necessary and proportionate to legitimate aims such as combatting serious crime and protecting national security. Any preparatory offence to be criminalized must have a genuinely 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. **The relevant provisions in the proposed Directive should be amended in light of these requirements, to clarify that there must be genuinely close proximity to the principal offence and specific intent to commit or to actually<sup>6</sup> contribute to a terrorism-related act.**

#### **Crimes under international law and related states' obligations**

Where individuals are accused of 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 take these steps is binding on all EU Member States under existing international law.<sup>7</sup> 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 all EU Member States' agenda.

**We therefore urge EU Member States and MEPs, in the negotiation of this Directive, and Member States in its implementation in national law, 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.**

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<sup>6</sup> The term 'actual contribution' means the offense would not have occurred, but for the contribution: Cornell University Law School, Legal Information Institute, Wex, [https://www.law.cornell.edu/wex/actual\\_cause](https://www.law.cornell.edu/wex/actual_cause)

<sup>7</sup> 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.

### **The role of non-punitive approaches**

While the proposed Directive focuses on punitive measures to combat terrorism, **it would be beneficial for the recitals to recognize the importance of using a non-punitive approach to address many of the factors surrounding the resort to criminal conduct, including terrorism related conduct.** This is warranted, *inter alia*, in light of the role that duress and coercion can play, in particular with regard to children. **At the same time, it should be made clear that such references to non-punitive measures are not regarded as including or encouraging administrative measures, such as restrictions on freedom of movement, which may be tantamount to detention without charge or trial or measures, which interfere with rights including freedom of expression beyond what is demonstrably necessary and proportionate for the stated lawful purpose, or which are applied in a discriminatory manner, and that all such measures must be subject to effective appeal in the courts.**

### **The legislative process and the lack of an impact assessment**

Amnesty International, the ICJ, and OSJI and OSEPI are concerned that the expedited process for the adoption of this Directive will further increase the risk of its provisions leading to violations of human rights, when implemented in national law. In particular, the explanatory memorandum accompanying the Directive states that “given the urgent need...in light of recent terrorist attacks... this proposal is *exceptionally presented without an impact assessment.*” Given the impact that this Directive may have on a wide array of human rights, in addition to the resources of Member States, it is crucial that this Directive undergoes proper scrutiny and debate, including through an impact assessment, and through proper consultation with civil society as to the potential impact of the Directive in practice. **Amnesty International, the ICJ, and OSJI and OSEPI recommend that the timetable for consideration of the proposed Directive be modified, with a view to ensuring thorough scrutiny and a proper participatory debate.**

We also note that the explanatory memorandum outlines “implementation plans and monitoring, evaluation and reporting arrangements” which include “consultations with Member States and stakeholders, notably Europol, Eurojust and the Fundamental Rights Agency.” **Amnesty International, the ICJ, and OSJI and OSEPI recommend that provision be made for civil society to also participate in these activities.**

## **II. COMMENTARY ON ARTICLES**

### **New Article: Inclusion of human rights safeguards**

We are concerned that the proposed Directive provides insufficient recognition of the responsibility of States to comply with their human rights obligations and the rule of law while resorting to any counterterrorism measure. Although reference is made in Recital 19 to obligations under the Treaty on the EU as well as the Charter of Fundamental Rights for the European Union, it is a serious omission that the operative part of the Directive contains no guarantees of human rights protection. This is in contrast to Article 1(2) of the Council

Framework Decision of 13 June 2002 on Combating Terrorism, which states that “[t]his Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.”<sup>8</sup> A human rights safeguard clause is also included in Article 2 of the 2008 Framework Decision. It is difficult to understand why these or similar safeguard clauses have not been included.

Furthermore it should be noted that the Council of Europe’s Additional Protocol to the Convention on the Prevention of Terrorism, a source document for this Directive (as asserted by the European Commission), contains an explicit provision stipulating that State Parties must ensure the implementation of the Protocol is in line with their human rights obligations.<sup>9</sup>

**We therefore recommend that a new Article be included in the operative section of the proposed Directive stipulating that the Directive does not have the effect of altering in any way the Member States’ obligations concerning human rights and fundamental legal principles as enshrined, *inter alia*, in Articles 2 and 6 of the Treaty on European Union, in the Charter of Fundamental Rights of the European Union, in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and in the International Covenant on Civil and Political Rights (ICCPR).**

#### ***Procedural rights and the right to an effective remedy***

Given the potential of the offences to impact on the enjoyment of human rights, as well as the tendency for national legal systems to apply special procedures or lesser procedural safeguards in cases involving offences related to terrorism, it is important that the Directive emphasises and re-enforces the rights of suspects and accused persons in criminal proceedings related to the offences within its scope. Moreover, the Directive should make express reference to the rights individuals have to effective remedies for human rights violations.

Such language would re-enforce obligations under Articles 6, 47 and Article 48(2) of the Charter of Fundamental Rights of the European Union, Articles 5, 6 and 13 of the ECHR and Articles 2(3), 9 and 14 of the ICCPR, which enshrine the rights to liberty, to a fair trial and an effective remedy. In addition, it is highly relevant to the Directive that in recent years, the EU has affirmed the protection of defence rights by adopting a series of Directives aiming to ensure that minimum standards are applied throughout the EU and that all suspects and accused persons are guaranteed certain fundamental rights. These include the *Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings*<sup>10</sup>; *Directive 2012/13/EU of the European Parliament and of the Council of 22 May*

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<sup>8</sup> Council Framework Decision of 13 June 2002 on combating terrorism, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002F0475..>

<sup>9</sup> Additional Protocol, Article 8

<sup>10</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1453219086697&uri=CELEX:32010L0064>

2012 on the right to information in criminal proceedings<sup>11</sup>; and Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty”.<sup>12</sup>

**Amnesty International, the ICJ, and OSJI and OSEPI therefore recommend the further inclusion in the proposed Directive of an additional Article on human rights safeguards, including a clause stating that nothing in the Directive affects the obligations on all Member States to guarantee procedural rights for people suspected or accused of the offences listed in the Directive, as well as the right to an effective remedy for violations of human rights. The article should refer to rights set out in Articles 6 and 47 of the Charter of Fundamental Rights of the European Union, Articles 5, 6 and 13 of the ECHR, Article, 9 14 and 2(3) of the ICCPR, including where reflected in the Directives adopted pursuant to the *Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*,<sup>13</sup> such as the Directives mentioned above.**

### ***Freedom of Expression***

Article 3(2)(i) of the proposed Directive, which prohibits a person from *threatening* to commit any of the other acts listed in Article 3(2), poses (*per se* as well as when taken together with other provisions of the Directive) in many respects particularly serious consequences for the right to freedom of expression. This is in particular due to the broad nature of the Directive’s offenses and since the Directive does not sufficiently define the qualities that the threat must contain, such as its precision, nature, and its level of impact. These consequences are exacerbated by Article 16, which makes it a crime to aid, abet, or incite someone to threaten to commit a terrorism related offense. Article 5, which provides for the offence of “public provocation to commit a terrorist offence”, also has a significant impact on freedom of expression.

The criminalisation of such threats and provocation, which as pointed out is particularly remote from any actual principal offence, may be extremely difficult to justify and the Directive should be amended accordingly. It is essential that the Directive expressly reaffirm and effectively guarantee the right to freedom of expression, which may only be limited where the authorities can affirmatively justify restrictions as prescribed by law and as absolutely necessary and proportionate to a legitimate purpose as noted above. Such a provision was included in the 2008 Framework Decision on Combating Terrorism, which first introduced the offence of “public provocation to commit a terrorist offence” in

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<sup>11</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1453219057037&uri=CELEX:32012L0013>

<sup>12</sup> <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0048>

<sup>13</sup> [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2009.295.01.0001.01.ENG&toc=OJ:C:2009:295:TOC](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2009.295.01.0001.01.ENG&toc=OJ:C:2009:295:TOC)

EU law.<sup>14</sup> It is not clear what justification there could be for omitting a similar clause from the Directive. In the view of Amnesty International, the ICJ, and OSJI and OSEPI, the particular impact of the Directive on freedom of expression warrants a specific clause re-enforcing Member States obligations to protect that freedom under the Charter of Fundamental Rights and in international human rights law. **We therefore recommend that a new Article, or a specific clause of the broader human rights safeguard provision mentioned above, be inserted stipulating that the Directive shall not have the effect of requiring Member States to take measures in contravention of their obligations to respect and protect freedom of expression.**

### **Article 2: Definitions of a “terrorist group” and a “structured group”**

It is significant for several of the offences in the proposed Directive, notably for offences related to travel under Article 9 and ancillary offences, that the definition of “terrorist group” and of “structured group” under Article 2 are overbroad and indeterminate. For instance, under Article 2 a “structured group” is defined with particular lack of clarity, and in the negative, as a “group...that does not need to have...a developed structure.” Also, a “terrorist group” is a group established “over a period of time”, without further specification of this temporal scope. The uncertainty of such definitions fails to ensure that their application in practice is reasonably foreseeable, contrary to the principle of legality. **Amnesty international, the ICJ, and OSJI and OSEPI therefore recommend that the definitions in Article 2, such as that of “terrorist group” and of “structured group”, be revised, including to comply with the principle of legality.**

### **Article 3: Definition of “terrorist offences”**

The definition of “terrorist offences” under Article 3<sup>15</sup> has significant implications for the scope of all offences in the Directive, including the new

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<sup>14</sup> Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0919>

<sup>15</sup> Article 3 states that: “Each Member State shall take the necessary measures to ensure that the intentional acts referred to in paragraph 2, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation are defined as terrorist offences where committed with the aim of one or more of the following:

(a) seriously intimidating a population;  
(b) unduly compelling a Government or international organisation to perform or abstain from performing any act,  
(c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

2. Intentional acts referred to in paragraph 1 are

(a) Attacks upon a persons' life which may cause death;  
(b) attacks upon the physical integrity of a person;  
(c) kidnapping or hostage taking;  
(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;  
(e) seizure of aircraft, ships or other means of public or goods transport;  
(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;



offences of “receiving training for terrorism” and “travel abroad for terrorism”. The Directive’s definition is formulated in highly general terms and its scope is unclear in a number of respects. For instance, it is difficult to foresee how the satisfaction of criteria such as “may seriously damage a country or an international organisation”, “seriously destabilise or destroy the fundamental political, constitutional economic or social structures of a country” or “result in major economic loss” may be determined in practice. As regards Article 3(2)(d), it is also unclear whether the requirement for the conduct to be “likely to endanger human life” applies in all the circumstances foreseen by this provision. Moreover, the use of the term “likely” introduces further uncertainty to this already imprecise provision. Moreover, the definition does not require that an act must be wilful for it to be an offence.

In addition, as the Directive is unclear about its application to conduct taking place as part of an armed conflict, as mentioned above, this provision could potentially undermine international humanitarian law (IHL) by criminalising acts of violence that are governed by IHL, including for example, acts falling within Articles 3.1(a) or 3.1(c) read with Article 3.2. (a) (b) or (d). It is important that the Directive should not affect other rights, obligations, and responsibilities of a States and individuals under international law, including IHL.

IHL already prohibits certain conduct that would be characterised as terrorism if committed outside of a situation of armed conflict, including acts or threats of violence the primary purpose of which is to spread terror amongst civilian populations.<sup>16</sup> Under IHL, in the context of armed conflict such conduct is generally prohibited as war crimes. These crimes are already clearly defined in international criminal law,<sup>17</sup> and, as noted above, there is a well-established international legal framework for their prosecution, which already applies and imposes obligations of investigation, prosecution and mutual assistance on all EU Member States.<sup>18</sup>

The Council of Europe Convention on the Prevention of Terrorism contains rules excluding its application in armed conflict in its Article 26(4) and 26(5),<sup>19</sup> and it

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(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in points (a) to (h).

<sup>16</sup> Protocol I, Art 51(2); Protocol II, Article 13(2).

<sup>17</sup> See Rome Statute of the International Criminal Court, Articles 7 and 8; Convention against Torture, Article 1; International Convention for the Protection of All Persons from Enforced Disappearances, Article 2.

<sup>18</sup> 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.

<sup>19</sup> Article 26(4) states, “Nothing in this Directive shall affect other rights, obligations and responsibilities of a Party and individuals under international law, including international humanitarian law.” Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16.V.2005, Article 26(4). Article 26(5) states, “The activities of armed

would well serve the EU Directive to adopt a similar approach and exclude its application to conduct governed by international humanitarian law and/or international criminal law. 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.

**Amnesty International, the ICJ, and OSJI and OSEPI therefore recommend that a new clause be included in Article 3 clarifying that nothing in the Directive should be construed to affect in any way other rights, obligations and responsibilities Member States and individuals have under international law, including international humanitarian law and international criminal law.**

**Article 4: “Offences relating to a terrorist group”**

Article 4(b) sanctions participation in “activities of a terrorist group” with the knowledge of the fact that such participation “will contribute to the criminal activities of the terrorist group.” It is not clear from the text of Article 4 what level of involvement in a group would be required to establish participation or what intent and level of awareness would be required for an individual’s conduct to be deemed criminal. Without defining the word “contribute” or identifying and circumscribing, except by way of example, the types of contributions that are to be sanctioned, it is difficult for individuals to ascertain with sufficient certainty which conduct could constitute a criminal offence. Including when taken together with the lack of clarity and precision of the definition of “terrorist offence” in Article 3, it therefore raises significant concerns as to the principle of legality, and risks arbitrary application in practice.

**Article 4 (b) must, at a minimum, ensure that any offence of participating in the “activities of a terrorist group” is confined to contributions that have an actual effect on, and close proximity to, the commission of a principal criminal offence. It must also ensure that such participation is voluntary and with knowledge that the action will actually contribute to the commission of the principal offence.**

It is also problematic that Article 4(b) applies to contributions made to “*criminal activities* of a terrorist group” without specifying that the criminal activities are related to terrorism. Not all such groups’ activity that might have a criminal

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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 activities undertaken by military forces of a Party in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.” Council of Europe Convention on the Prevention of Terrorism, Warsaw, 16.V.2005, Article 26(5). Similarly, preambular paragraph 11 to the Council Framework Decision of 13 June 2002 on combating terrorism, states, “Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.” Council Framework Decision of 13 June 2002 on combating terrorism, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32002F0475>.

character is necessarily terrorism related, and therefore appropriate for criminalisation as a terrorism-related offence. **Article 4(b) should therefore be amended to clarify that it applies only to participation in the activities of a group to commit or to actually contribute to terrorism related offences committed by members of that group.**

#### **Article 5: “Public provocation to commit a terrorist offence”**

Amnesty International, the ICJ, and OSJI and OSEPI are concerned at the overbroad and uncertain scope of this article and the significant degree of interference which would result with respect to freedom of expression. The article criminalises conduct “*whether or not* (it is) directly advocating terrorist offences”, provided that it merely “*causes a danger* such offences *may* be committed”. This establishes a very low threshold for the proximity of the criminalised conduct to any principal offence. The vagueness of the provision makes it difficult to foresee how it will be applied in practice, contrary to the principle of legality. Furthermore, the potential breadth and the uncertainty of its scope carry risks of arbitrary or discriminatory interference with freedom of expression. We note that, although the 2008 Framework Decision contained an equivalent offence,<sup>20</sup> this was accompanied by a clause safeguarding freedom of expression,<sup>21</sup> a clause which has not been included in the present proposal. **As already noted above, it is essential, including in order to maintain the level of protection for freedom of expression that applies under the Framework Decision, that such a safeguard clause be included in the Directive.**

#### **Articles 5, 6, 7, 8 and 14: terrorism related nature of the criminal offences**

Articles 5 to 8 and Article 14 state that those provisions shall apply to acts listed in Article 3(2) (a) to (h). However, since they omit any reference to Article 3(1), it is not clear that the acts in Article 3(2) (a) to (h) must be committed in relation to terrorism as characterised by Article 3(1). In the absence of such a reference, these provisions would criminalize acts that are wholly lacking the central element forming the basis for this Directive. **Amnesty International, the ICJ, and OSJI and OSEPI therefore propose that in Articles 5, 6, 7, 8 and 14 the reference to Article 3(2)(a) to (h) should be replaced with a reference to the offenses listed in Article 3 with the exception of that in Article 3(2)(i). Also, as mentioned above, Articles 9 to 13’s reference to Article 3(2)(i) creates problematic consequences that should be redressed accordingly through amendment.**

#### **Article 8: “Receiving training for terrorism”**

We are concerned that the offence of ‘receiving training for terrorism’ in Article 8 is not drafted with sufficient clarity and precision to prevent arbitrary application of the criminal law, and therefore risks violation of freedom of association as well as of, *inter alia*, the freedom to receive information. Although Article 8 provides that receiving instruction must be committed “intentionally”,

<sup>20</sup> Article 1 2008/919/JHA, Article 3.1 (a) and Article 3.2(a) 2002/919/JHA as amended

<sup>21</sup> Article 2 2008/919/JHA

it is not clear from the text that the offence of “receiving training for terrorism” must be committed wilfully and that it is 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. **Amnesty International, the ICJ, and OSJI and OSEPI therefore recommend that Article 8 be amended to clarify that, for the offence to apply, a person must receive the training wilfully, and with the specific intent of carrying out or significantly contributing to the commission of the principal offence.**

There is a particular risk that Article 8 may be inappropriately applied where someone inadvertently accesses websites providing such training. We note that the European Commission’s explanatory memorandum to the proposed Directive states that “the mere fact of visiting websites containing information or receiving communications, which could be used for training for terrorism, is not enough to commit the crime of receiving training for terrorism. The perpetrator must normally take an active part in the training.”<sup>22</sup> **Amnesty International, the ICJ, and OSJI and OSEPI propose that, in order to guard against arbitrary application of the offence, a similar clause be included in the proposed Directive.**

#### **Article 9: “Travelling abroad for terrorism”**

The offence of “travelling abroad for terrorism” in Article 9 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 may be limited only where strictly necessary and proportionate to a legitimate purpose.<sup>23</sup> Accordingly, and in order to comply with the principle of legality and to avoid arbitrary and discriminatory application in practice, Article 9 must be formulated with greater precision so as to ensure that any preparatory act which is to be criminalized must have a sufficiently close (proximate) connection to the commission of the principal offence, with intent, and a real and foreseeable risk that such principal criminal conduct would in fact take place.

In particular, it should be clarified that intention under Article 9 requires not only intention to travel, but also a clearly demonstrated intent to do so for the purposes of committing or actually contributing to the principal offence. 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 is for a legitimate purpose.

It is notable that Article 9 criminalises a wider range of conduct than the equivalent offence under the Additional Protocol to the Council of Europe

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<sup>22</sup> Explanatory memorandum, page 17

<sup>23</sup> Article 2 Protocol 4 ECHR; Article 12 ICCPR.

Convention on the Prevention of Terrorism (Article 4). While the Protocol requires criminalisation of travel for the purposes of “the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism”, the Directive would also criminalise travel for the purposes of “participation in the activities of a terrorist group referred to in Article 4”.

This element of the offence has a particularly unclear scope, given the uncertainty of the meaning of “participation in a terrorist group activities” under Article 4 (see above). What is clear is that Article 4 envisages that relatively minor involvement, such as supplying information or resources, involves participation, and that it does not require that such participation be wilful or voluntary. Taken together with the wide definition of terrorism, this is likely to mean, amongst other things, that anyone travelling to a zone controlled by a party to an armed conflict – where provision of some information, funds, or services to the group may be unavoidable - would be at high risk of incurring criminal responsibility.

**Amnesty International, the ICJ, and OSJI and OSEPI therefore recommend that the reference to Article 4 be omitted from Article 9. Recital 8 of the Directive should also be amended accordingly.**

**Furthermore, the text should clarify that the offences envisaged in Article 9 have a sufficiently direct connection with the principal offence, must be done with intent (including to commit or otherwise participate in a meaningful manner in the principal offence), have a real and foreseeable risk that such principal criminal conduct would in fact take place, and that the criminalised behaviour must be wilful or voluntary.**

**Article 10: “Organising or otherwise facilitating travelling abroad for terrorism”**

The provision for offences of organisation or facilitation of travelling abroad under Article 10 raises concerns due to its overbroad scope of application. In particular, the current wording does not explicitly require that the act of organization or facilitation concerned must at least carry a real risk of having an actual impact or real influence on, or sufficient causal or proximate link with, the principal offence. We are furthermore 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. **Amnesty International, the ICJ, and OSJI and OSEPI therefore recommend that the scope of the offence under Article 10 be confined to cases which at least carry a real risk of having an actual impact or real influence on, or sufficient causal or proximate link with, the principal offence, and where there is a wilful and specific intent to facilitate the commission of the principal offence.**

### **Article 15: “Relationship to terrorist offences”**

Article 15 stipulates that for offences under the Directive (with the exception of offences under Article 3) to be committed, it is not only unnecessary that “a terrorist offence be committed”, but it is also unnecessary “to establish any link with a specific terrorist offence, or, insofar as Articles 9 to 11 are concerned, with any specific offences related to terrorist activities”. In particular, this second aspect creates the risk that conduct will be criminalised in the absence of any proximity to a principal terrorism-related principal offence. Furthermore, the provision creates confusion in regard to the specific provisions in each of the substantive articles it refers to, each of which make provision for the linkages required to a terrorism-related principal offence. **Amnesty International, the ICJ, and OSJI and OSEPI therefore recommend that, at minimum, the phrase “nor shall it be necessary to establish a link to a specific terrorist offence or, insofar as the offences in Articles 9 to 11 are concerned, to specific offenses related to terrorist activities” be deleted from Article 15.**

### **Article 16: “Aiding or abetting, inciting and attempting”**

Concerns as to the lack of legal certainty and potential for arbitrary application of offences under the Directive are exacerbated by Article 16 criminalizing aiding or abetting, incitement or attempt of offences under the Directive. In order to meet standards of foreseeability under the principle of legality, any preparatory offence, such as the offence of attempt under Article 16.3, 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. Article 16 should require a sufficiently direct connection with a principal criminal act and stipulate that a clear and unequivocal intent to commit or actually contribute to such an act has to be established.**

### **Article 18: “Mitigating circumstances” and grounds for exclusion of responsibility**

Article 18 provides that States may allow for the reduction of penalties for offences under the Directive in cases where the offender “renounces terrorist activity” or provides certain types of useful information to the authorities. Although the Article is entitled “mitigating circumstances”, this description could be misconstrued, as mitigating circumstances in sentencing are generally understood to refer to circumstances linked to the contested criminal act, that may decrease sentences but do not exclude criminal responsibility. By contrast, article 18(b) refers to assistance in the investigation of other criminal offences. Indeed, the Framework Decision correctly titles this very same provision as “particular circumstances”.

The Directive should include language that ensures domestic courts take fully into account any mitigating circumstances provided for by criminal law during

sentencing, and any other ground for exclusion of criminal responsibility. This is particularly important given the role that duress and coercion can play in forcing individuals to carry out criminal acts, including related to terrorism, and due to the fact that juveniles and individuals with diminished mental capacities will at times find themselves wrapped up in the type of behaviour that the Directive addresses.<sup>24</sup> **We therefore recommend that the Directive include provisions relating to mitigating circumstances and grounds for exclusion of responsibility traditionally available under national criminal law, besides the current provision listing grounds affecting penalties. If Article 18 retains its current scope, it should be re-titled “particular circumstances” and any reference to mitigating circumstances should be made in a separate article.**

#### **Article 22: Protection of and assistance to victims of terrorism**

Amnesty International, the ICJ, and OSJI and OSEPI welcome the assistance and support services included in this Article and **suggest making it clear that all assistance to the victims of terrorism should be provided in the best interest of the victims and under the principle of “do no harm”.**

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<sup>24</sup> The International Criminal Court’s Rules of Procedure and Evidence, under Rule 145, list as mitigating circumstances, *inter alia*, “[t]he circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress.”