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To the members of the
Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE)
of the Council of Europe

6 March 2015

Re: Preliminary public observations on the terms of reference to draft an Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism

Dear members of the COD-CTE,

On behalf of Amnesty International and the International Commission of Jurists (ICJ), we are submitting the following public observations regarding the mandate provided to you by the Committee of Ministers on 21 January 2015 to “prepare a draft Additional Protocol supplementing the Council of Europe Convention on the Prevention of Terrorism”,¹ in advance of your second meeting on 9-12 March 2015.

As no draft protocol or other working document of your Committee has yet been made public, we would like to reiterate our concerns about the need for greater transparency in the drafting process, as communicated to you by our letter of 20 January 2015. The current expedited process is severely limiting the possibility for public scrutiny and debate of a treaty which has significant implications for the protection of human rights, and potentially excludes important input from civil society on the human rights dimension of this issue. The drafting of an international treaty of this kind, introducing new criminal offences, requires thorough consultation and analysis, not only by states but with independent experts and others, including representatives of civil society, so as to give full consideration not only to how to achieve the aims of the treaty but also to identifying the consequences of proposals under consideration. In order to enable contributions by civil society to the fullest extent, we request that you make public any draft at the earliest opportunity for comments and input from relevant sectors of civil society, in particular those whose work focuses on the protection of human rights, to be properly considered by the Committee.

States have the duty under international human rights law, including the European Convention of Human Rights, to protect the rights to life and security of person. This is also recognized by the Guidelines of the Committee of Ministers of the Council of Europe on

¹ CM/Del/Dec(2015)1217, 23 January 2015, Item 1.7.

human rights and the fight against terrorism (Council of Europe Guidelines).² However, while states have the obligation to protect any persons under their jurisdiction, any counter-terrorism measures adopted by states must always strictly comply with their obligations under international law including international human rights, humanitarian and refugee law.³

Respect and protection of human rights and the rule of law are essential to any counter-terrorism strategy, and, as underlined by the UN Global Counter-Terrorism Strategy, are the “fundamental basis of the fight against terrorism”.⁴ The undersigned organizations note that the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has recommended that:

“Compliance with all human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensable part of a successful medium- and long-term strategy to combat terrorism.”⁵

The Council of Europe Guidelines state that “[a]ll measures taken by states to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.”⁶ Furthermore, “[a]ll measures taken by States to combat terrorism must be lawful. ... When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aim pursued.”⁷

Moreover, the undersigned organizations wish to emphasize that the need for states to ensure there is no impunity for crimes under international law, such as war crimes, should remain the primary focus of any strategy aimed at dealing with actions conducted as part of an armed conflict, including by members of armed groups.

As no working document is available for text-specific analysis, the following comments are based on the terms of reference of your mandate.⁸ They are not meant to be exhaustive, but set out a short overview of some of the main issues raised by the proposed measures. For this submission, we are limiting ourselves to general observations. Part 1 below sets out general principles, while in Part 2 we make short comments on specific acts the criminalization of which was explicitly mandated by the Committee of Ministers. We would welcome having the opportunity to provide additional comments once the text of the draft protocol is available.

1. General observations: definition, terminology and general principles of human rights and criminal law

1.1 The proposal for the draft Additional Protocol is directly based on UN Security Council resolution 2178, in which the UN Security Council decided that:

² *Guidelines on human rights and the fight against terrorism*, adopted by the Council of Minister on 11 July 2002; Guideline I: “States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies states’ fight against terrorism in accordance with the present guidelines.”

³ UNSC Resolution 1456, UN Doc. S/RES/1456 (2003), 20 January 2003, OP 6.

⁴ UNGA Resolution 60/288, UN Doc. A/RES/60/288 of 20 September 2006, part IV.

⁵ 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.

⁶ *Guidelines on human rights and the fight against terrorism*, Guideline II.

⁷ *Guidelines on human rights and the fight against terrorism*, Guideline III. See also the [ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism](#) (the ‘Berlin Declaration’), 28 August 2004, Principle 3: “States ... may not criminalize the lawful exercise of fundamental rights and freedoms. Criminal responsibility for acts of terrorism must be individual, not collective. In combating terrorism, States should apply and, where necessary, adapt existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty.”

⁸ CM(2015)19 final.

*"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."*⁹

UNSC resolution 2178 contains provisions which are overbroad and vague, and has been strongly criticized in this regard.¹⁰ Terms such as "terrorist act" and "terrorist training" in UNSC resolution 2178 are not linked to any specific definition or description of prohibited conduct, such as that outlined in earlier UNSC resolutions,¹¹ but are used in the context of the opening preambular paragraph which refers to "terrorism in all forms and manifestations." While the resolution refers explicitly at some points to "foreign terrorist fighters [who] are being recruited by and are joining entities such as the Islamic State in Iraq and the Levant (ISIL), the Al-Nusrah Front (ANF) and other cells, affiliates, splinter groups or derivatives of Al-Qaida", it is not limited to those groups and could be applied now or in the future to people associated with other groups. The absence of any such specific definitions raise the concern that, in implementing the resolution, states may create broadly-defined criminal offences that fail to satisfy the principle of legality, and that they may apply wide or vague or politicized definitions, including of terrorism, with a risk of abusive, arbitrary or discriminatory application.

Indeed, there is no internationally agreed definition of the concept of "terrorism". This lack of circumscription in UNSC resolution 2178 is exacerbated by the varying definitions or lack of definitions of terms such as "foreign terrorist fighters", or "foreign fighters", applied by different international organizations, governments, or other institutions.¹²

Adopting the approach of UNSC resolution 2178 would only repeat the limitations of that resolution, and result in a lack of sufficient clarity and foreseeability, in breach of the principle of legality. Also, a similar approach to the one adopted at Article 1.1 of the Council of Europe Convention on the Prevention of Terrorism¹³ would raise significant concerns, including in view of the fact that some of the treaties in the appendix to the Convention on the Prevention of Terrorism themselves define offences by referring to other treaties or define offences broadly.¹⁴

The undersigned organizations therefore urge your Committee to carefully consider the underlying premises of the proposed Additional Protocol, and refrain from adopting any terminology that would risk breaches by states of their obligations under international human rights law by failing to satisfy the necessary requirements of clarity, accessibility and foreseeability as prescribed by the principle of legality and member states' obligations under Article 7 of the ECHR and Article 15 of the ICCPR. In addition, the new offences prescribed in the Additional Protocol should be strictly limited to acts which are closely connected to the perpetration of acts of terrorism as sufficiently delimited.

⁹ UNSC resolution 2178, UN Doc. S/RES/2178 (2014), 24 September 2014, OP 5.

¹⁰ 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.

¹¹ See, for example, UNSC resolution 1566, UN Doc. S/RES/1566 of 8 October 2004, OP 3.

¹² See, for example, 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. 47 and paras. 31-53 generally.

¹³ "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.

¹⁴ 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); *Amnesty International's representations on the February 2005 draft Council of Europe Convention on the Prevention of Terrorism* (Index: IOR 61/005/2005).

1.2 In its attempt to define the term “foreign terrorist fighters”, UNSC resolution 2178 gives the following elements:

“[I]ndividuals 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, including in connection with armed conflict ...” (PP8)

The undersigned organizations are concerned at the serious risk that different legal regimes are conflated in this context, namely those applying to acts committed *outside* a situation of armed conflict and those applying to acts perpetrated *as part of* an armed conflict. This risk is compounded by the reference to “armed conflict” in UNSC resolution 2178. International humanitarian law (IHL) 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 requires prosecution under national or international jurisdictions. 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 concern IHL but ordinary criminal law.

Referring to acts of terrorism in the context of an armed conflict, without distinguishing between the different applicable legal regimes, risks conflating the rules governed by different legal regimes and their application to particular forms of conduct. The undersigned organizations therefore recommend that the Additional Protocol should avoid any reference to armed conflict.

1.3 Where fighters in the context of an armed conflict, or individuals in any situation are responsible for crimes under international law, including war crimes and crimes against humanity, the undersigned organizations submit that the focus of international efforts should be on ensuring criminalization and co-operation in the prosecution of those crimes, including by asserting universal jurisdiction or jurisdiction on the basis of the active personality principle, and in bringing those responsible to justice, in fair proceedings. The obligation to do so is part of existing international law, including under the Rome Statute and other international treaties covering crimes under 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, resorting to the prosecution of other offences, the evidence of which may be easier to establish, should not be used in a way that circumvents the responsibility of states to ensure that those who engage in such crimes are held accountable for them.

Furthermore, crimes under international law, including war crimes, crimes against humanity, torture and enforced disappearance, are already clearly defined in international law.¹⁵ States are already under a duty to cooperate, prosecute or extradite those responsible or alleged to be responsible for such crimes and there is ample international jurisprudence to define their ancillary offences.¹⁶

¹⁵ 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.

¹⁶ 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. In this regard, 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.

1.4 All counter-terrorism laws must be consistent with international human rights law and standards. One element of this is that they must comply with the principle of legality. They must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly, as recalled in this Committee's terms of reference, and must be made accessible to the public. Laws 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.¹⁷ The European Court of Human Rights has affirmed that the principle of legality is an essential element of the rule of law and an important protection against arbitrariness.¹⁸ With regard to criminalization, the principle of legality requires that the law must classify and describe offences in precise and unambiguous language that narrowly defines the punishable behaviour.

1.5 Human rights potentially engaged by the measures envisaged in this Committee's terms of reference, which contains a list of acts to be criminalized as well as an open-ended reference to other aspects of UNSC 2178, 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; and the rights to freedom of expression and association. Any restrictions of these rights, whether imposed by criminal, administrative, or other measures, 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. These requirements are set out in legal instruments binding on Council of Europe Member States under the European Convention on Human Rights and its Additional Protocols as well as to all States Parties to the ICCPR. Any restriction must not only be adequate to the pursuit of the legitimate purpose, but must also be the least intrusive measure among those available. The burden is on the state to demonstrate 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.

1.6 In some cases, your mandate extends criminalization to earlier stages of preparatory acts which do not appear to require a direct intent to commit the principal offence (labelled as acts of terrorism), and are several stages removed from any such principal offence which may take place. In regard to such new offences, there is likely to be a very weak, if any, causal or proximate link with the principal offence. These new offences are therefore difficult to justify in the interests of the protection of the life or security of persons. While criminalizing preparatory acts is not necessarily inconsistent with international human rights law, to do so for acts which are several stages removed from specific acts of terrorism, or lacking a direct intent to commit the principal criminal conduct or an actual danger that such conduct will be committed, may raise serious legal problems, including in terms of undue restrictions on the legitimate exercise of certain human rights. Any preparatory offence to be criminalized must have a close connection to the commission of the principal criminal offence, with a real risk that such a principal criminal conduct would in fact take place. The relevant provisions in the Additional Protocol should clarify these requirements.

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 criminal act, would appear to criminalize expressions and manifestations rather than objective criminal conduct. This risk is especially manifest where the act to be criminalized is the attempt to carry out an act (such as being recruited, receiving training, or travel). The Additional Protocol should lay down a prerequisite of a sufficiently direct connection with an actual criminal act and that a clear and unequivocal intent has to be established.

¹⁷ 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. See also, inter alia, 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.

¹⁸ *Del Rio Prada v. Spain*, application no. 42750/09, Grand Chamber, 21 October 2013, paras 77 and 125.

In this regard, the undersigned organizations recall that the Consultative Council of European Judges has stressed that, in "view of the gravity of the offences which are regarded as terrorist as well as of procedural consequences stemming from them, it is important that the basic principles of criminal law be applicable to terrorist offences as to any other criminal offence, and that the elements of such offence be clearly and precisely defined."¹⁹

1.7 It is *never* permissible for states to take measures which breach the absolute prohibitions of torture and other cruel, inhuman or degrading treatment or punishment, or of arbitrary detention or *refoulement*.

Specifically with regard to the prohibition of torture and other ill-treatment, we would like to draw your attention to the recent report of the UN Special Rapporteur on Torture, in which he sets out the scope of the rule excluding the use of information obtained by torture or other ill-treatment in judicial proceedings, and its application also to the collecting, sharing and receiving of information by executive actors.²⁰

The situation addressed by the proposed Additional Protocol by definition includes transnational contexts and may involve the sharing of information with states where there is a real risk that torture or other forms of ill-treatment are used as a way of obtaining information. International cooperation and information-sharing with a view to preventing, investigating or prosecution of the acts which are the focus of the proposed Additional Protocol must at no stage, at any level, involve any implicit acceptance, acquiescence, encouragement or condoning of torture or other ill-treatment. Information obtained as a result of torture and other cruel, inhuman or degrading treatment or punishment, wherever that has occurred, may therefore never be used.²¹

Moreover, the measures suggested in the terms of reference also raise general questions concerning accompanying procedural safeguards to ensure fairness. In the counter-terrorism context, measures circumventing the ordinary criminal justice system are sometimes taken. States must ensure that, where sufficient admissible evidence exists, persons suspected of what amounts to criminal conduct will be prosecuted in ordinary criminal courts and in conformity with international fair trial standards.

To ensure that any measure undertaken as part of the implementation of the Additional Protocol fully respects these and other obligations under international human rights law, the undersigned organizations urge your Committee to introduce a robust human rights safeguard provision in the Additional Protocol.²²

2. Observations on the criminalization of specific acts

2.1 "*being recruited, or attempting to be recruited, for terrorism*"

The undersigned organizations have serious concerns about the compliance of an offence of "being recruited for terrorism" with the human rights obligations of Council of Europe Member

¹⁹ Opinion no. 8 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on "the role of judges in the protection of the rule of law and human rights in the context of terrorism", 10 November 2006, para. 37.

²⁰ 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).

²¹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2010), paras. 37/38 ("Practice 10"); 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.

²² See UNSC Resolution 1456, UN Doc. S/RES/1456 (2003), 20 January 2003, OP 6; reaffirmed, inter alia, in UNSC resolution 2178, UN Doc. S/RES/2178 (2014), 24 September 2014, PP 7.

States. The very concept of "being recruited" implies the criminalization of passive conduct, or of the consequences of someone else's action. The elements of such an offence would be very difficult to define in a way that would protect against arbitrariness and be sufficiently precise and foreseeable so as to respect the principle of legality. As with other offences under consideration by this Committee, the problem is compounded by the uncertainty of the definition of terrorism on which any such offence should be based.

Under the Council of Europe Convention on the Prevention of Terrorism, States are already required to criminalize under domestic law the offence of "recruitment for terrorism", which is defined as "to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group" (Article 6.1). This therefore addresses the "active" side of recruitment, namely acts by the person doing the recruitment.

In contrast, an offence of "being recruited for terrorism", not based on a specific and active intent to commit or participate in a specific criminal conduct, would be likely to severely limit rights protected under the ECHR simply on the ground that an individual had been a target for the crime of recruitment. Furthermore, being solicited to join an association or group is very distant from the perpetration of any actual criminal conduct. While it may be justifiable to criminalise the attempt to commit a criminal offence, the mere fact of being the object of solicitation should not trigger criminal responsibility without any clear expression of the intent to participate in a criminal act.

The undersigned organizations note that UNSC resolution 2178 does not require a criminal offence of being recruited for terrorism. We recommend that the Additional Protocol should not require the criminalization of such conduct.

2.2. "receiving training, or attempting to receive training, for terrorism"

We recall that the Council of Europe Convention on the Prevention of Terrorism in its Article 7.1 states that:

*"training for terrorism" means to **provide** instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills **provided** are intended to be used for this purpose.* (emphasis added)

We note that the scope of this offence lacks certainty in particular due to the vagueness of the definition of terrorism to which it is attached. This concern would also need to be addressed in any requirement under the Additional Protocol to criminalize receiving or attempting to receive training. Furthermore, in order to protect against arbitrariness, any such offence would require at the very least the intent to be trained for the purposes of, or the specific intent of carrying out or contributing to the commission of, a criminal offence, as a result of the training, and the knowledge that the skills provided are intended to be used for this purpose.

2.3 "travelling, or attempting to travel, to a State other than the State 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", "providing or collecting funds for such travels" and "organising and facilitating (other than 'recruitment for terrorism') such travels"

This measure would impact on the right to freedom of movement, which includes the freedom to leave any country, including one's own.²³ The ICCPR provides that only in exceptional circumstances are restrictions on the right to leave a country permissible, and require general requirements for limitations are met, including adherence to the principles of necessity and proportionality and consistency with other Covenant rights. The application of restrictions in any individual case must be based on clear legal grounds. These requirements are mirrored by Article 2 of Protocol 4 to the European Convention on Human Rights.

Relevant provisions in the Additional Protocol should clarify that any offence of travelling, attempting to travel, or financing, organizing or facilitating travel, for the purpose of committing a criminal act must require a clearly demonstrated intention to commit, participate in or facilitate such criminal act. Furthermore, any such new offence should be subject to a defence that the travel or relevant ancillary action was for legitimate purposes. There should be no burden of proof on the defendant to show that their travel to or presence in a specific area was solely for a legitimate purpose, in keeping with the general principle of presumption of innocence and that the burden of proof in criminal proceedings lies with the prosecution.

Amnesty International and the ICJ would welcome the opportunity to expand on these points in the near future. We appreciate you taking the time to consider our concerns, and look forward to your response.

Yours sincerely,

Gauri van Gulik

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cc:

Mr Nicola Piacente
Chair of the Committee of Experts on Terrorism (CODEXTER)

Mr Dirk Van Eeckhout,
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Chair of the Committee of Ministers of the Council of Europe

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²³ Article 12 ICCPR; see Human Rights Committee, General Comment 27: Article 12 (Freedom of Movement), UN Doc. CCPR/C/21/Rev.1/Add.9, 2 November 1999, and Article 2 of Protocol 4 to the European Convention on Human Rights.