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

24 March 2015

Introduction

1. The Justice Initiative welcomes the opportunity to provide comments to the 12 March 2015 version of the draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism ("draft Additional Protocol"). This submission provides comments and recommended amendments to the draft Additional Protocol to ensure that is in compliance with the human rights obligations of the Protocol's parties. The Justice Initiative provides these comments in light of its years of expertise working on human rights, terrorism, and counter-terrorism.

Drafting Process

2. With regard to the drafting process, the 20 February 2015 joint letter from the Justice Initiative, International Commission of Jurists, and Amnesty International (attached) raised concerns about the Additional Protocol's expedited drafting process, which was, initially, not open to public discussion and input from civil society. It is, therefore, a positive step for the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE) to have provided a draft version for comment, although the Justice Initiative remains concerned about the limited time provided for input.

Protecting Human Rights

3. It is imperative that the draft Additional Protocol does not undermine the human rights obligations of its Parties. While draft Article 7 on "Conditions and safeguards" rightly seeks to prevent Parties from ignoring their human rights obligations, the COD-CTE should add a broader range of applicable law and also expand the list of specific rights mentioned therein. The range of applicable law should include all applicable international human rights law, refugee law, and customary international law. The specific rights should include, at a minimum and in addition to what is already listed: fair trial and due process guarantees; the right to private and family life; the right to seek asylum; the prohibition against arbitrary and unlawful detention, torture, and other ill-treatment; the prohibition against the use of statements obtained by torture or other ill-treatment; and the principle of *non-refoulement*. The draft Additional Protocol should also clearly recognize the extraterritorial application of human rights law and prohibit any measures that could entail a risk of the use of the death penalty. The inclusion of these specific rights and obligations is warranted given the draft

Additional Protocol's focus on criminalizing specific behavior; that States will use surveillance techniques, share their intelligence, and transfer detainees to other States as means to implement the Additional Protocol; and the transnational issues the draft Additional Protocol seeks to address. Moreover, the draft Article 7 safeguards should apply to draft Article 7bis ("Prevention and international co-operation") and draft Article 8 ("24/7 points of contact"), and not only to draft Articles 2 through 6. (For additional comment on draft Article 7bis, see paragraph 13 below.) Such a broad recognition of human rights in the draft Additional Protocol should also be reflected in the Preamble.

4. The COD-CTE should also include language to draft Article 7(2) that ensures any punishment be proportionate to the seriousness of the crime and individual criminal responsibility, and that domestic courts be afforded the opportunity to take fully into account mitigating circumstances and to accept plea bargains. This is particularly important given the role that duress and coercion can play in forcing individuals to carry out acts of terrorism. (See paragraph 11 below.)

Principle of Legality and a Close Nexus to the Harm Committed

5. Laws criminalizing terrorism must meet the principle of legality, e.g., the law must be sufficiently precise and there must be a close nexus between the criminalized behavior and the principle act of terrorist harm committed or intended.[1] To this end, the COD-CTE should ensure that the language of the draft Additional Protocol guards against States being permitted or required to criminalize acts that are unclear or far removed from the principle act of terrorism. Such an approach can result in, for example, making it illegal to assist groups or individuals to access their human rights, humanitarian assistance, or other forms of assistance that should never be denied from an individual by virtue of their status as a human being.

6. The Additional Protocol must therefore protect against the application of such rationale articulated in the U.S. Supreme Court's decision in *Holder v. Humanitarian Law Project*.[2] In that decision the Court ruled that the provision of "material support" to designated terrorist groups, including training in the use of international law or advice on petitioning the United Nations, can be a federal crime. The Court reasoned, *inter alia*, that "material support" meant to "promot[e] peaceful, lawful conduct…frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitates more terrorist attacks."[3]

[1] *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin, E/CN.4/2006/98, 28 December 2005, at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement, paras. 37 and 38. (The Special Rapporteur states that one of the three components of an act of terrorism that ensures "that it is only conduct of a terrorist nature that is identified as terrorist conduct" is that there exists "the intention of causing death or serious bodily injury (or the taking of hostages).)"

[2] U.S. Supreme Court, *Holder v. Humanitarian Law Project*, 2009.

[3] U.S. Supreme Court, *Holder v. Humanitarian Law Project*, 2009, p. 25.

7. With this erred approach in mind, we have concerns that draft Article 2's criminalization of participating in an association or group for the purpose of committing or contributing to the commission of a terrorism offense is an overly vague and broad prohibition. This is due to a lack of clarity over what constitutes "participation" and "contributing." We have similar concerns over the broad and vague use of terms such as "receive instruction" in draft Article 3 and providing or collecting funds "by any means, directly or indirectly" that "fully or partially" enables a person to travel abroad for the purpose of terrorism under draft Article 5.

8. Additionally, draft Articles 2(1), 3(1), and 4(1) make it a crime to participate in an association or group, receive training, and travelling abroad "for the purpose of" committing, contributing, carrying out, or participating in a terrorist offense. The Justice Initiative is concerned that States may assert that the "purpose" element of these crime relates to the criminalized act itself (i.e., that the purpose of the act was to commit a terrorist act). Instead, the "purpose" element of the crime should be determined by the individual's intent to commit an act of terrorism. Draft Articles 2(1), 3(1), and 4(1) should, therefore, be redrafted such that a situation cannot arise where an individual could be criminalized for purposefully or intentionally undertaking an act while not knowing or intending that the act was related to terrorism. The structure of draft Articles 2(1), 3(1), and 4(1) is in contrast to that of draft Articles 5(1) and 6(1), which state that acts of funding, organizing, and facilitating travel abroad are criminal only when the individual undertaking those acts *knew* that the assistance rendered was for the purpose of terrorism. This element of knowledge should be introduced into draft Articles 2 through 4. Additionally, the draft Additional Protocol should include "willfulness" as an element of the listed crimes due to the role that coercion and duress can play in acts of terrorism. (See paragraph 11 below.)

9. Draft Article 4, in particular, criminalizes behavior that does not have a strong nexus to the principle act of terrorist harm committed or intended, and undermines the common approach of democratic States to inchoate criminal offences. National criminal law normally addresses not only acts which cause harm, but inchoate offences related to those acts, in particular, attempting to commit such acts. Thus, the Council of Europe Convention on the Prevention of Terrorism ("Convention") not only requires States to criminalize certain harmful acts, but Article 9(2) of the Convention requires States to criminalize attempts to commit such acts. Criminal law sets minimum standards for acts which amount to an attempt to commit a harmful act, excluding from penalty acts which are insufficiently advanced. Traveling to commit an act of terrorism can form part of the acts which constitute the existing crime of attempting to commit an act of terrorism. Draft Article 4 goes far beyond Article 9(2) of the Convention however. It would require criminalization of an act which does no harm and which is not even an attempt to do harm. While it has the appearance of a substantive crime, it is in reality an inchoate offence related to terrorism, but one which is so incomplete that it does not fall within the normal approach to criminal acts. It is wrong in principle.

Additional Concerns Regarding the Criminalization of Travel

10. Draft Articles 4 and 7bis of the draft Additional Protocol address traveling to commit acts of terrorism, but only where this travel includes (or would, if completed, include) crossing the national border of the State Party. This approach fails to recognize the existing international

obligations of Council of Europe Member States. Twenty-eight of these States are members of the Schengen Area. This is not merely an area of rights to cross international borders. These States are required, by Article 67(2) of the Treaty on the Functioning of the European Union (or, in the case of Member States of the European Economic Area, by the Agreement establishing that Area, and in the case of Switzerland, by its Agreement with the European Union) to "ensure the absence of internal border controls for persons" within the Schengen Area. European Union Council Regulation 562/2006 (the Schengen Border Code), Article 21(a) establishes that the abolition of internal borders shall not affect the exercise of police powers by the competent authorities, but this must nevertheless not have border control as an objective. It seems likely that these international law provisions preclude States within the Schengen Area from adopting laws which treat travel to cross a national border within the Schengen Area differently from travel within the territory of that State. Adoption of the Additional Protocol by these States is likely therefore to produce the unconsidered consequence of requiring criminalization of travel within the national territory in the cases to which Article 4 applies.

Non-Punitive Measures

11. The draft Additional Protocol's focus on punitive measures to combat terrorism should be supplemented by language that reflects the importance that non-punitive measures play in addressing issues of terrorism, and, in particular, that the arrest, detention, or imprisonment of children must be in conformity with the rights of the child and shall be used only as a measure of last resort and for the shortest appropriate period of time.[4] This is warranted given that the criminalization of acts of terrorism is a blunt instrument that provides, at best, only short-term solutions; it does not address root causes. In fact, over-focus on punitive measures may exacerbate the root causes of terrorism, especially if those measures are implemented in an arbitrary or discriminatory manner. Recognition of a non-punitive approach to combatting terrorism is also warranted given that the draft Additional Protocol criminalizes many acts of a non-violent nature. Non-punitive measures to combat terrorism are also warranted in light of the role that duress, coercion, and juvenile participation in terrorism (however so defined) can play in the foreign fighter context. This may be particularly true when it relates to the illegal trafficking of children or women, and the forced conscription of individuals.[5]

[4] UN Convention on the Rights of the Child, Article 37.

[5] See, for example, UN Secretary-General, "Ban reiterates condemnation of Boko Haram attacks, urges efforts to combat terrorist threat," *New Release*, 27 February 2015 ("United Nations Secretary-General Ban Ki-moon today reiterated his strong condemnation of the continuing indiscriminate and horrific attacks by Boko Haram against civilian populations in Cameroon, Chad, Niger and Nigeria. 'The abduction and use of children, including as 'suicide bombers,' is particularly abhorrent,' the Secretary-General stated today in a statement issued by his spokesperson"); United Nations**, "**Women, Peace and Security" (2002), available at http://www.un.org/womenwatch/daw/public/eWPS.pdf, p. 3 (noting that women and girls can be "active agents and participants in conflict," the report also notes that "women and girls may also be manipulated into taking up military or violent roles (such as girl soldiers and female suicide bombers) through propaganda, abduction, intimidation and forced recruitment"); Padmini Murthy and Clyde Landford Smith, *Women's Global Health and Human Rights*, (Jones and Bartlett Publishers, LLC: 2010), pp. 27-28 ("Such terrorist handlers . . . resort to blackmail and other tactics to get a woman to perform terrorists acts against her will…" and "The lengths that terrorists will go in order to use the tactical advantage associated with female suicide bombers is not limited to simple manipulation or coercion. . . There is new evidence that terrorist groups may be recruiting or using women who are mentally ill, or

12. Draft Articles 4 and 7bis may be counter-productive in practice in other ways. There is good evidence that European attempts to control the movement of persons by law enforcement techniques is counter-productive because of the widespread availability of irregular means of international travel. For example, despite a budget of 9 million Euros devoted to physical prevention of irregular border crossing, the European Union agency Frontex's 2013-14 operations in South-Eastern Europe merely diverted irregular migration from land border crossing to sea border crossing. These measures push would-be border crossers into the hands of smugglers, providing additional resources to international criminal networks which enable them to professionalize and diversify their operations, and increase corruption of Government officials. In the case of persons determined to travel internationally to commit terrorist offences, the creation of criminal offences and harsh measures focused on the border will encourage them to plan to be smuggled to their destination. In summation, it is a mistake to assume that criminalization and use of law enforcement techniques directed at non-harmful acts are the best tools to counter the possibility of consequent harmful acts. The COD-CTE should pause and consider the effects these measures would have in practice.

Preventative Measures

13. Draft Article 7bis also requires greater clarity to explain what it means for States to "adopt such measures as may be necessary to co-operate in efforts *to prevent* persons travelling abroad for the purpose of terrorism…from crossing its borders" and to "endeavor to take measures *to prevent* the criminal offense set forth in article 4" (emphasis added). It may be helpful to provide an illustrative list of what these preventative measures would include and it should be made clear that any preventive measure must comply with human rights law and be accompanied by necessary safeguards and procedures. We do not believe that this article or an illustrative list should encourage States to undertake preventive detention, revocation of citizenship, mass surveillance, or other such measures that seriously impact human rights.

Non-applicability to Armed Conflict

14. Finally, the Additional Protocol must not affect other rights, obligations, and responsibilities of a Party and individuals under international law, including international humanitarian law (IHL). The Convention contains this rule in Article 26, and it would serve the COD-CTE well to re-state this rule to make certain that an international anti-terrorism legal instrument such as the draft Additional Protocol does not punish acts that the international law of armed conflict permits or protects. In additional to this rule, the Convention contains an exclusion

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have developmental disorders…to conduct terrorist attacks"); and Mia Bloom, "Analysis: Women and Children Constitute the New Faces of Terror," *CNN* (6 October 2012), available at http://security.blogs.cnn.com/2012/08/06/analysis-women-and-children-constitute-the-new-faces-of-terror/ ("In 2007, the Taliban is alleged to have tricked a 6-year-old Afghan boy to carry out a suicide attack against the National Army. The Taliban denied it was involved. The attack failed, and the boy survived. Other children were not so fortunate. Coercion, drugs and even alcohol are used to manipulate young operatives and stiffen resolve, much like the abuse of child soldiers in Africa" and "Ansar al Sunna, an al Qaeda in Iraq affiliate, is alleged to have ordered the rape of dozens of women to drive them toward being suicide bombers.")

clause for armed conflict.[6] The COD-CTE should do the same, but the exclusion clause should extend to all State agents and organs, and not only "activities of armed forces."[7] While IHL prohibits acts or threats of violence the primary purpose of which is to spread terror amongst civilian populations,[8] the Justice Initiative is concerned that the broad scope of acts that the draft Additional Protocol criminalizes may result in the sanctioning of behaviors that international law either permits, protects, or is agnostic towards in times of armed conflict. International legal instruments that favor States and punish non-state armed groups would also have the likely corollary effect of hampering non-state armed group compliance with IHL. This is because non-state armed groups have less incentive to follow IHL when the laws applying to them are not the same as the law applying to States.

[6] Article 26(5) states, "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 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 5.

[7] For further discuss on this issue, see 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-fundamentallyflawed/, 20 March 2015.

[8] Protocol I, Art 51(2); Protocol II, Article 13(2).