Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Opinion 289 (2015)[1]

Draft additional protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196)

Parliamentary Assembly

1. The Parliamentary Assembly is concerned about the impact that terrorism has on democracy, the rule of law and human rights. It has always attached utmost importance to respect for human rights in combating terrorism, as reiterated in Resolution 1840 (2011) on human rights and the fight against terrorism. States must be in a position to take appropriate measures to fight terrorism; but "[t]here is no need for a 'trade-off' between human rights and effective counter-terrorist action" (see paragraph 2 of the resolution). Sufficient safeguards exist in international human rights law, including the European Convention on Human Rights (ETS No. 5) and its protocols, which allows for flexible responses to emergencies threatening the very existence of societies, and more generally for the protection of public order or national security interests or other legitimate reasons.

2. The draft additional protocol[2] to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) is a response to the United Nations Security Council Resolution 2178 (2014) on threats to international peace and security caused by terrorist acts. It obliges States to criminalise certain conduct which might be related to the commission of terrorist offences and is particularly aimed at preventing and curbing the flow of "foreign terrorist fighters".

3. The Assembly notes, in this connection, that the draft additional protocol to the Council of Europe Convention on the Prevention of Terrorism was drafted very speedily, shortly after the terrorist attacks in Paris on 7, 8 and 9 January 2015. Some prominent international non-governmental organisations (INGOs), such as Amnesty International, the International Commission of Jurists and the Open Society Justice Initiative, have criticised this rush and expressed concern about the potential negative impact of this text on human rights, such as the freedom of movement, the presumption of innocence or legal certainty, as well as about the unclear separation between its application in times of peace and war, and the applicability of international humanitarian law. Doubts have also been raised about the criminalisation of preparatory acts which do not appear to require a direct intent to commit the principal offence (an act of terrorism), and which are several stages removed from the main principal (terrorist) offence which may take place.

4. The Assembly is fully aware of the above-mentioned concerns and considers that they have not been sufficiently reflected in the draft explanatory report to the draft additional protocol. In particular, the introduction of the offence of "travelling abroad for the purpose of terrorism" might be problematic from the point of view of freedom of movement and the right to nationality. The Assembly recalls that there is no commonly agreed definition of terrorism and that terrorists are criminals, not soldiers, and that their crimes do not amount to acts of war. As stressed in Resolution 1840 (2011), "terrorism should be dealt with primarily by the criminal justice system, with its inbuilt and well-tested fair trial safeguards to protect the presumption of innocence and the right to liberty" (paragraph 6) and "[m]easures limiting human rights must be phrased clearly and interpreted narrowly, in particular when criminal liability is involved, and must be accompanied by adequate judicial and political review" (paragraph 5.3).

1. *Assembly debate* on 23 April 2015 (16th Sitting) (see Doc. 13763, report of the Committee on Legal Affairs and Human Rights, rapporteur: Lord John E. Tomlinson). *Text adopted by the Assembly* on 23 April 2015 (16th Sitting).
2. Doc. 13753.

5. The Assembly does not see a particular need to expand the current legal framework on combating terrorism. But in light of the draft explanatory report, it considers that sufficient safeguards exist in the Convention on the Prevention of Terrorism, which shall apply to States Parties, if the draft additional protocol is adopted and enters into force. In particular, this convention clearly stipulates that it does not apply to situations of armed conflict. The Assembly nevertheless considers that the human rights safeguards in the text of the draft additional protocol itself should be further strengthened, as recommended below. Moreover, the implementation of the draft additional protocol would depend on the States Parties transposing it into their national criminal law, if need be.

6. The Assembly recommends that the Committee of Ministers make the following amendments to the draft additional protocol to the Council of Europe Convention on the Prevention of Terrorism*:*

6.1. in the Preamble, add a new eighth paragraph that would read: “Having regard to Opinion 289 (2015), adopted by the Parliamentary Assembly of the Council of Europe on 23 April 2015”;

6.2. at the end of Article 1, add the following: “and their obligations under international human rights law”;

6.3. in Article 8, paragraph 1, after the words “in particular”, add “the right to a fair trial, the principle of legal certainty,”; after the words “the Convention for the Protection of Human Rights and Fundamental Freedoms”, add “and its protocols”; and after the words “the International Covenant on Civil and Political Rights”, add “, the Convention on the Rights of the Child”;

6.4. in Article 9, change the second sentence to read as follows: “As between the Parties, all the provisions of the Protocol shall be regarded as additional articles to the Convention and shall apply accordingly, with the exception of Article 9 of the Convention.”