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# Draft protocol amending the Council of Europe Convention on the Prevention of Terrorism

**Report**[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Titus CORLĂŢEAN, Romania, Socialists, Democrats and Greens Group

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1. Reference to committee: Doc. 16143, Reference 4867 of 7 April 2025.

## A. Draft opinion[2]

1. Reiterating in the strongest terms its condemnation of terrorism in all its forms, the Parliamentary Assembly welcomes the finalisation of the draft protocol amending the Council of Europe Convention on the Prevention of Terrorism as a way to further strengthen the fight against this scourge by taking into account its recent evolution.

2. For many years, the Council of Europe has been developing key legal standards to combat terrorism. Its main legal instrument in the field of counter-terrorism, the Convention on the Prevention of Terrorism (CETS No. 196, hereinafter "the Warsaw Convention"), was adopted in 2005 with the aim of improving counter-terrorism policies and strategies at the domestic level while facilitating international co-operation. In 2015, with the adoption of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217), the Council of Europe became the first international organisation to set up a regional legal instrument to implement the obligations imposed by the United Nations Security Council Resolution 2178 (2014) regarding the fight against foreign terrorist fighters.

3. Once adopted, the draft protocol amending the Council of Europe Convention on the Prevention of Terrorism (hereinafter "the draft protocol") will introduce the first internationally binding and comprehensive definition of terrorism expanding the current wording of Article 1 of the Warsaw Convention to encompass all forms of terrorism currently prevalent. In particular, acts such as cyberterrorism affecting critical infrastructure or environmental terrorism were not fully anticipated in 2005, when the Warsaw Convention was adopted. The introduction of a common pan-European legal definition of a terrorist offence, reflecting contemporary challenges, is therefore a welcome and desirable step.

4. The draft protocol modifies the definition of a terrorist offence for the purposes of the Warsaw Convention through the addition of a list of criminal acts which, when intentionally committed with a terrorist aim and given their nature or context, may seriously damage a country or an international organisation. The proposed definition closely resembles that contained in Article 3 of the Directive (EU) 2017/541 on combating terrorism and departs from it only in so far as necessary to apply to the framework of the Warsaw Convention and its Additional Protocol.

5. While being supportive of the need to strengthen the tools to prevent and combat terrorism, the Assembly takes note of the concerns expressed by some Council of Europe member States and international institutions, relating to the scope of the proposed definition of terrorism, which in their view could potentially lead to legal uncertainty and arbitrary, overbroad and abusive application, as well as the lack of an exception clause, which would protect legitimate activities, such as those of humanitarian organisations.

6. The Assembly recalls that the guarantee enshrined in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, hereinafter "the Convention") is an essential element of the rule of law. It embodies, among others, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that criminal law must not be extensively construed to the detriment of an accused. At the same time, according to the European Court of Human Rights, Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen. These principles cannot be applied less stringently when it comes to the prosecution and punishment of terrorist offences, even in the most difficult of circumstances.

7. The Assembly welcomes the fact that the draft protocol's preamble explicitly reaffirms that all measures taken to prevent or suppress terrorist offences shall be in accordance with relevant human rights and fundamental freedoms, particularly those enshrined in the Convention, as well as other obligations under international law, including, where applicable, international humanitarian law. Nonetheless, it regrets that this notion was not reflected in substantive provisions of the draft protocol.

8. Recalling that combating terrorism and protecting Council of Europe standards and values should be complementary objectives, the Assembly reaffirms that for rights which are subject to restrictions under the Convention, any limitation must be necessary in a democratic society and be proportionate to the legitimate aim pursued, in line with the case law of the European Court of Human Rights. It further underlines that the right to freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population.

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2. Draft opinion adopted unanimously by the committee on 13 May 2025.

9. Referring to its Resolution 2509 (2023) "Transnational repression as a growing threat to the rule of law and human rights", the Assembly is mindful of the risk that anti-terror legislation may be misused in some member States for political reasons. It further notes that the European Union Agency for Fundamental Rights, in its 2021 report on the human rights impact of the Directive (EU) 2017/541, observed that the use of counter-terrorism legislation and measures may be expanded in some European Union member States to activities that include non-violent movements, public protests and non-governmental organisations – clearly not intended to be considered terrorist in nature. As such, the Assembly believes that the legal definition of terrorism should be as precise as possible to limit the possibility of diverging implementation at the national level and preventing arbitrary application.

10. In this context, the Assembly notes the concerns expressed about the proposed wording of Article 1, paragraph 2(c), which includes "seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation" as one of the three possible terrorist aims defining a terrorist offence. However, it takes note of the clarification provided in the draft explanatory report (paragraph 36), that "legitimate activities that are protected by human rights laws, such as freedom of religion and conscience, freedom of expression or publication, should not be the subject to criminalisation" by virtue of the new provisions. The Assembly considers that this explanation could be further strengthened by adding the following sentence in paragraph 36 of the draft explanatory report: "For example, the public expression of radical, polemic, shocking or controversial views on sensitive political questions does not fall within the scope of this amending protocol".

11. The Assembly further considers that the inclusion of threats to commit any of the acts listed in points (a) to (i) of Article 1, paragraph 1 increases the risk of overbroad criminalisation and, in consequence, criminalisation of the exercise of the right to freedom of expression. It therefore recommends that the scope of Article 1, paragraph 1(j), be limited only to threats that are both "serious" and "credible".

12. Finally, the Assembly supports the proposal for the Warsaw Convention to be supplemented with an explicit humanitarian exemption, in line with the United Nations Security Council Resolution 2664 (2022). Considering the limited scope of the draft protocol, it invites the Committee of Ministers to ask the Committee on Counter-Terrorism (CDCT) to take this proposal into account in its future work, in the context of a more comprehensive review of the Warsaw Convention, including its Article 12 and other provisions.

13. The Assembly therefore recommends that the Committee of Ministers make the following amendment to the draft protocol amending the Council of Europe Convention on the Prevention of Terrorism:

13.1. in Article 1, paragraph 1(j), of the amended Convention, replace the word "threatening" with the words "a credible and serious threat"

## B. Explanatory memorandum by Mr Titus Corlăţean, rapporteur

### 1. Introduction

1. Since the adoption of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196, hereinafter "the Warsaw Convention") in 2005, the world, and in particular the European continent, has witnessed a number of devastating terrorist attacks, many of which have resulted in significant loss of life and widespread trauma. Their scale and brutality have left lasting marks on national consciousness, security strategies and international co-operation to combat and prevent terrorism. It is therefore a welcome step that the Council of Europe Committee on Counter-Terrorism (CDCT) prepared a draft protocol amending the Warsaw Convention (hereinafter "the draft protocol") aimed at introducing a comprehensive legal definition of a terrorist offence for the purposes of the Warsaw Convention. Currently, the Warsaw Convention relies on key international anti-terrorism treaties to define such offence, resulting in a situation in which some offences which could be considered terrorist by nature and context, do not fall within the scope of this instrument.

2. The CDCT, though its Sub-group for the Purpose of Examining the Feasibility of Elaborating a Definition of Terrorism, started to deliberate on this matter in May 2018. Its proposal, as contained in the draft protocol, will introduce a list of criminal acts which, when committed intentionally with a terrorist aim and which, given their nature or context, may seriously damage a country or an international organisation, should be considered as terrorist offences in addition to those contained within the treaties listed in the Appendix to the Warsaw Convention. The proposed definition closely resembles that included in the Directive (EU) 2017/541 of the European Parliament and of the Council of the European Union of 15 March 2017 on combating terrorism.[3] The draft text of the definition was approved during the 11th plenary meeting of the CDCT held in Helsinki in December 2023. At its subsequent 12th plenary meeting held in May 2024, the CDCT decided to incorporate the definition by means of an amending protocol.

3. On 2 April 2025, at their 1524th meeting, the Ministers' Deputies agreed to transmit the draft protocol to the Parliamentary Assembly for opinion as soon as possible. Following reference by the Assembly to the Committee on Legal Affairs and Human Rights, this committee appointed me rapporteur at its meeting in Strasbourg on 7 April 2025.

4. On 8 April 2025, the committee held an exchange of views with Mr Nicola Piacente, Chair of the CDCT. I am grateful for his meaningful contribution to my work on this matter.

5. In my explanatory memorandum, I will start by discussing the main features of the draft protocol (chapter 2). I will then summarise opinions on this draft instrument presented by various stakeholders (chapter 3). Finally, I will give my own assessment of the draft text (chapter 4).

### 2. Main features of the draft protocol

6. The preamble presents the main principles and aims of the draft protocol. It rightly recalls the importance of international co-operation in combating terrorism and the need to strengthen these efforts. It also reaffirms the obligation of implementing the draft protocol in line with relevant human rights and rule of law standards and principles, as well as maintaining the integrity and coherence of related international legal frameworks, particularly international humanitarian law.

7. The main substantive provision of the draft protocol is Article 1, which will replace Article 1 of the Warsaw Convention, thus giving a new meaning to the term "terrorist offence" throughout the Warsaw Convention. The proposed definition of "terrorist offence" encompasses two categories of conduct. First, it includes any offence falling within the scope of, and as defined in, one of the international treaties enumerated in the Appendix to the Warsaw Convention (which will remain unaffected by the draft protocol). Second, it extends to a specified range of acts which, under national law, constitute criminal offences and which, by their nature or context, are capable of causing serious damage to a State or an international organisation. Such acts must be committed intentionally and with one or more of the following purposes: to seriously intimidate a population, to unduly compel a government or an international organisation to act or refrain from acting, or to seriously destabilise or destroy the fundamental political, constitutional, economic, or social structures of a country or an international organisation. The acts covered include, *inter alia*, attacks which may cause death, attacks upon the physical integrity of persons, kidnapping, large-scale destruction of infrastructure or property likely to endanger life or result in major economic loss, unlawful seizure of means of public or goods transport

3. Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

(excluding aircraft and ships), dealing in weapons of mass destruction (including their development or use), the release of hazardous substances or causing fires or floods endangering human life, interference with essential services such as water and energy, substantial disruption to information systems, and threats to commit any of the aforementioned acts.

8. The draft explanatory report further clarifies that the chapeau contained in the second limb of Article 1, paragraph 1, establishes a threshold of gravity by requiring that the "nature or context" of an act must be such that it "may seriously damage a country or an international organisation," thereby distinguishing ordinary criminal offences from those of a terrorist nature. This condition ensures that only serious offences fall within the scope of the Warsaw Convention's definition and that there is a genuine risk of harm resulting from the act. It also allows Parties to exercise discretion in classifying acts as terrorism, depending on the specific circumstances of each case. Moreover, for acts under the second limb of the definition, the draft explanatory report clarifies that the requirement that they be committed intentionally reinforces the seriousness of the crime. The inclusion of intent serves as a safeguard against an overly broad interpretation of the offence. Such intention may be deduced from objective and factual circumstances. The intent must encompass each act listed in Article 1, paragraph 1, including their specified consequences, such as endangering human life through the release of hazardous substances. This requirement aligns with the definitions found in most of the relevant treaties included in the Appendix. It also corresponds with the provisions criminalising terrorist-related offences in the Warsaw Convention, particularly Articles 5 to 7. Additionally, the intentional element is consistent with the provisions of the Additional Protocol, specifically its Articles 2 to 6.

9. As regards the aims contained in Article 1, paragraph 2, the draft explanatory report states that terrorism is distinguished from other criminal conduct by three defining aims, each of which reflects the perpetrator's specific intent and the broader impact sought beyond immediate victims. It emphasises that terrorist acts are motivated by political, ideological, racial, ethnic, religious, or similarly significant causes. The use of qualifiers such as "seriously" and "unduly" is essential to delineate the gravity and special intent of terrorist offences, preventing overcriminalisation and arbitrary application. A terrorist offence exists only when the act, intent, aim, and severity threshold are all satisfied. It is not necessary for the act to realistically achieve its intended effect, only that the perpetrator aimed to bring about such an outcome. The determination of intent relies on the nature, context, and factual circumstances of the act. Moreover, the interpretation and application of the aims listed must comply with international law and human rights standards, particularly those established by the European Court of Human Rights. The legitimate exercise of freedom of religion or freedom of expression is not to be criminalised under these provisions. Although the language allows for flexibility in domestic implementation, the scope is limited to authentic terrorist conduct. This ensures that the legal framework remains proportionate and respects fundamental rights while addressing serious threats.

10. The remaining articles of the draft protocol contain final clauses, which resemble those found in other Council of Europe conventions, including a prohibition of reservations with respect to the provisions of the draft protocol.

### 3. Opinions of the stakeholders about the proposed definition

11. In his communication of 4 October 2024, the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Ben Saul, presented comments and suggestions on the proposed definition of terrorism.[4] While noting certain positive aspects of the proposal, in particular, the raising of the threshold of liability with regard to the first two specific intent elements (by adding the qualifiers "seriously" and "unduly") and the introduction of an objective contextual requirement that the listed acts, "given their nature or context may seriously damage a country or an international organisation", he expressed a number of concerns. Professor Saul pointed out a risk of overcriminalisation and abuse by regimes that intend to use counter-terrorism legislation to target political dissent. He noted, as regards the third specific intent element, the lack of clarity as to what may constitute "fundamental structures", which – coupled with the notion of merely "destabilising" them (in contrast to "destroying") – involves further vagueness and increases the risk of lowering the threshold of harm. In his view, draft Article 1, paragraph 2(c), is rendered repetitive and redundant, given the overriding requirement that an act "may seriously damage a country or an international organisation", and should be omitted altogether. He further criticised the proposed criminalisation of threatening to commit a terrorist offence, which – in his view – sets the threshold of liability too low, since it potentially covers any threats, even trivial ones. Professor Saul recommended that there should be a binding exclusion clause for humanitarian and medical activities protected by international humanitarian law, as well as for legitimate activities of human rights

4. https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=29418.

organisations. He also called for the introduction of a "democratic protest" exception, which would exclude acts of advocacy, protest, dissent or industrial action, which are not intended to cause death, serious bodily harm, or serious risk to public health or safety. Professor Saul also regretted that civil society consultation and participation appear to have been limited, without any public call for submissions, nor hosting any dedicated consultations on the matter.

12. In 2023, the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) released its note on the proposed revision of the definition of terrorist offences in Article 1 of the Warsaw Convention. It contained a positive evaluation of an attempt to clarify the material element of terrorist offences, coupled with a requirement of intent to commit the reprehensible acts and elaboration of the necessary aim pursued. However, the ODIHR also noted that the proposal could potentially result in an expansive notion of terrorism, leaving wide discretion to the implementing authorities, with a potential for arbitrary or overbroad interpretation. It also called for the inclusion of "threats" to be reconsidered entirely or narrowly defined with appropriate qualifiers, connecting it to a real and immediate danger, when a perpetrator would have the capacity to commit such an offence or making a target reasonably believe in it. The ODIHR also criticised the vagueness of the language describing the aim contained in draft Article 1, paragraph 2(c), and stressed the need for exceptions or exclusion clauses to safeguard legitimate activities, especially the defence or exercise of human rights.[5]

13. During the negotiation process, Switzerland made a number of comments regarding the proposed definition. In particular, it was sceptical about the inclusion of threats as a terrorist act, due to the risk of criminalising activities that may be protected under human rights law, and considered the third possible aim, contained in draft Article 1, paragraph 2(c), overly vague, with the risk of overcriminalisation, arbitrary application and possibly abuse inherent in the use of overly broad language. It also supported the proposal of the ODIHR concerning the addition of an exception clause. Due to a general consensus to strictly follow the draft proposed by the European Union, Switzerland accepted to withdraw its proposals and proposed that certain elements of its position be explained and developed further in the explanatory report.[6] In its declaration made during the plenary meeting of the CDCT on 13-14 November 2024 in Strasbourg, Switzerland complained that it was not given the opportunity to integrate in the draft explanatory report some of the points taken up by Professor Ben Saul in his communication of 4 October 2024, notably concerning the principle of legal certainty and the humanitarian exemption.[7]

## 4. Assessment, conclusions and proposals

14. The attempt to introduce an autonomous definition of a terrorist offence is a desirable development, which – if successful – would foster international co-operation and strengthen the fight against terrorism, in all its forms. Nevertheless, defining a terrorist offence in more general terms will necessarily expand the basis for criminal liability and can thus have a significant impact on human rights. In its Resolution 2090 (2016) "Combating international terrorism while protecting Council of Europe standards and values" (rapporteur: Mr Tiny Kox, Netherlands, UEL), the Assembly held that combating terrorism and protecting Council of Europe standards and values are not contradictory but complementary. Guided by this spirit, I will thus make several comments and proposals with a view to improve the proposed definition.

15. I welcome the fact that the preamble to the draft protocol explicitly reaffirms that all measures taken to prevent or suppress terrorist offences shall be in accordance with relevant human rights and fundamental freedoms, particularly those enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, hereinafter "the Convention"), as well as other obligations under international law, including, where applicable, international humanitarian law. Coupled with Article 12 of the Warsaw Convention, which provides that criminalisation of specific offences shall be carried out while respecting human rights obligations, in particular the right to freedom of expression, freedom of association and freedom of religion, as set forth in, where applicable to that Party, the Convention, the International Covenant on Civil and Political Rights, and other obligations under international law, it introduces a safeguard against abuse and overcriminalisation.

16. Nevertheless, I note that the proposed definition is essentially the same as the one included in the Directive (EU) 2017/541 on combating terrorism. In its 2021 report on the impact of this Directive on fundamental rights and freedoms, the European Union's Fundamental Rights Agency stated that "in some

5. Note on the Proposed Revision of the Definition of Terrorist Offences in Article 1 of the Council of Europe Convention on the Prevention of Terrorism (28 September 2023), ODIHR.
6. https://rm.coe.int/cdct-2023-14-final-lod-helsinki-2784-5920-1033-v-1/1680ae0a2e, Annex II.
7. CDCT(2024)12, Appendix I.

Member States, there are concerns that the notion of terrorism, and consequently the use of counter-terrorism legislation and measures, is expanded to activities that are not of such a strictly defined terrorist nature. This includes their use against ideologies, groups and individuals that the state perceives as undesirable, which can encompass non-violent anarchist or separatist movements, public protests of various types, and non-governmental organisations or non-EU nationals. Defence lawyers, academic specialists on counter-terrorism and related criminal law matters, and NGO experts in particular, but also some judges, state that this can, among other effects, lead to disproportionate use of investigative tools and sentences".[8] Despite these concerns, related particularly to the so-called "third aim" contained in draft Article 1, paragraph 2(c), the provision remains exactly the same as in the Directive 2017/541.

17. The aim of "seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation" was already included in the Preamble to the Warsaw Convention. The draft explanatory report (paragraph 36) clarifies in this context that "legitimate activities that are protected by human rights laws, such as freedom of religion and conscience, freedom of expression or publication, should not be the subject to criminalisation" by virtue of the new provisions. I believe that this explanation could be further strengthened by adding the following sentence in paragraph 36 of the draft explanatory report: "For example, the public expression of radical, polemic, shocking or controversial views on sensitive political questions does not fall within the scope of this Amending Protocol", along the lines of one of the recitals of Directive (EU) 2017/541. These explanations, together with the general human rights clause in the Preamble to the draft protocol, are sufficient to allay the concerns expressed by some that the language used in draft Article 1, paragraph 2(c), is too vague and could lead to disproportionate application of the new definition.

18. It is worth recalling that the European Court of Human Rights held that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and the interpretation and application of such enactments depend on practice.[9] Nevertheless, given the contemporary tendency of misusing criminal law, and anti-terror measures in particular, to punish political opponents,[10] I believe that an utmost caution will be required when applying the new provisions. The misuse of anti-terror measures, whether to impose a "chilling effect" or to repress opponents, may have far-reaching consequences for the individuals targeted including asset freezing, financial exclusion and violation of property rights.[11] National authorities, including courts, of States Parties to the Protocol will have to apply the new definition with due regard to the Convention and/or international human rights law standards.

19. An element of the draft protocol that I consider to be flawed is Article 1, paragraph 1(j), which concerns threats to commit a terrorist offence. Although I am in favour, in principle, of criminalising such behaviour, I consider it imperative to set the threshold of liability at an appropriate level. The proposal presented by the CDCT risks criminalising trivial threats, whereas the general consensus is that only threats which are serious, credible, and likely to cause real harm to individuals or property should be criminalised. This ensures that criminal law targets genuinely dangerous conduct while avoiding the prosecution of trivial, vague, or non-credible threats. The European Union itself recommended, in general, to avoid criminalising a conduct at an unwarrantably early stage. Conduct which only implies an abstract danger to the protected right or interest should be criminalised only if appropriate, considering the particular importance of the right or interest which is the object of protection.[12] In this context, I agree with statements made by Liechtenstein[13] and Switzerland[14] in the CDCT, expressing concern that this draft provision could be used too widely. In my view, reference in the draft explanatory report to the fact that this provision does not aim at criminalising a "conduct which only has a theoretical connection to actual terrorist offences" is insufficient to mitigate the risk of overcriminalisation. I believe that this provision should be limited to threats that are both "serious" and "credible", that is attaining a certain degree of severity and making the target justifiably believe that the offender would be capable of following up on the threat.

20. Finally, I note that the Directive (EU) 2017/541, in its recitals, contains several so-called "exclusion clauses", excluding from the scope of its application, for instance, provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law,

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8. EU Fundamental Rights Agency, Directive (EU) 2017/541 on Combating Terrorism – Impact on Fundamental Rights and Freedoms, 18 November 2021.
9. *Kokkinakis v. Greece*, Application No. 14307/88, § 40, 25 May 1993.
10. Resolution 2509 (2023) "Transnational repression as a growing threat to the rule of law and human rights"
11. See, for example, *Shorazova v. Malta*, Application No. 51853/19, 3 March 2022.
12. Council conclusions of 30 November 2009 on model provisions, guiding the Council's criminal law deliberations, No 5.
13. https://rm.coe.int/cdct-2023-14-final-lod-helsinki-2784-5920-1033-v-1/1680ae0a2e, Annex I.
14. https://rm.coe.int/cdct-2023-14-final-lod-helsinki-2784-5920-1033-v-1/1680ae0a2e, Annex II.

and the expression of radical, polemic or controversial views in the public debate on sensitive political questions. I agree with the ODIHR and the UN Special Rapporteur (supported, to an extent, by Switzerland), that the Warsaw Convention could benefit from an explicit humanitarian exemption, similar to the one included in the UN Security Council Resolution 2664 (2022),[15] which states that the provision, processing or payment of funds, other financial assets or economic resources or the provision of goods and services necessary to ensure the timely delivery of humanitarian assistance or to support other activities that support basic human needs are permitted and are not a violation of the asset freezes imposed by that organ or its sanctions committees. Given the limited scope of the draft protocol, I propose to invite the CDCT to take this proposal into account in its future work when reviewing the Convention in a more comprehensive manner, including the safeguard clauses contained in Article 12 and other provisions.

15. S/RES/2664(2022).