

Parliamentary Assembly
Assemblée parlementaire

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Draft Convention on the prevention of terrorism¹

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Jaume Bartumeu Cassany, Andorra, Socialist Group

Summary

The Committee warmly welcomes and strongly encourages the work of the Committee of Experts on Terrorism towards the Draft Convention on the prevention of terrorism. Whilst recognising that the current draft represents "work in progress", the Committee provisionally concludes that this draft suggests an important and valuable addition to national and international efforts to combat international terrorism.

As the Assembly has stated in the past, the protection of human rights plays a key role in the fight against terrorism. This statement is fully applicable to the draft Convention on the prevention of terrorism. It is essential, therefore, that the draft Convention reflect fully the minimum standards contained in the Committee of Ministers' Guidelines on human rights and the fight against terrorism, as adopted on 11 July 2002, along with all other relevant obligations by which member states are bound under international law. The Committee accordingly proposes a series of recommendations to the Committee of Ministers intended to reinforce the content and application of the provisions of the draft Convention.

¹ See Doc 10396.

I. Draft opinion

1. The Parliamentary Assembly, having on several occasions called for further Council of Europe action against terrorism, cannot but warmly welcome and strongly encourage work towards the draft Convention on the prevention of terrorism, which received its first reading in the Committee of Experts on Terrorism (CODEXTER) on 13-15 December 2004. Whilst recognising that the current draft represents "work in progress", with further meetings of the CODEXTER planned for February and March 2005, the Assembly is constrained to give its opinion on the text before it. Nevertheless, the Assembly can provisionally conclude that this draft suggests an important and valuable addition to national and international efforts to combat international terrorism, whilst repeating its calls for further work on a comprehensive convention.
2. In its Resolution 1400 (2004), the Assembly stated that "The protection of human rights plays a key role in the fight against terrorism. These rights are central to our credibility. Any violation of these rights weakens the international coalition in the fight against terrorism and drives new supporters into the hands of the terrorists." This statement is fully applicable to the draft Convention on the prevention of terrorism. If the Assembly is to give its unqualified support to the eventual Convention, therefore, it is essential that the draft Convention reflect fully the minimum standards contained in the Committee of Ministers' Guidelines on human rights and the fight against terrorism, as adopted on 11 July 2002, along with all other relevant obligations by which member states are bound under international law. The Assembly also invites the Committee of Ministers to make future drafts of the Convention available on the Council of Europe website, in such a way as to allow civil society an effective opportunity of submitting comments.
3. The Assembly therefore makes the following recommendations to the Committee of Ministers:
 - i. in the title, before the word "Convention", add the words "Council of Europe";
 - ii. in the Preamble, alinea 5 ("Recalling the need..."), replace the current wording with the following: "Reaffirming that it is absolutely necessary for all measures taken in the fight against terrorism to respect human rights, the rule of law and, where applicable, international humanitarian law";
 - iii. in the Preamble, add a new alinea as follows: "Reaffirming that acts of terrorism are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and recalling the obligation of all States Parties to prevent such acts and, if not prevented, to prosecute and ensure the punishment of offenders by penalties which take into account their grave nature;";
 - iv. in Article 1 ("Terminology"), paragraph 1, delete the words "within the scope of and as defined in one of the treaties" and, at the end, add the words " , when the purpose of the act which constitutes the principal offence, by its nature or context, is to intimidate a population or to compel a government or an international organisation to do or to abstain from doing any act";
 - v. in Article 2 ("Purpose"), at the end, add the following words: "and full respect for human rights and the rule of law";
 - vi. in Article 3 ("National prevention policies"), paragraph 1, at the end, add the following words: "and international humanitarian law";
 - vii. in Article 4 ("Public provocation to commit an act of terrorism"), paragraph 1, delete the words from "including where the message" to the end;
 - viii. in Article 4, paragraph 2, after the words "provided that the provocation", add the words "incites violence and" and after the words "imminent danger" delete the words "or likelihood";
 - ix. in the eventual Explanatory Report's comments on Articles 4-7, stress that all measures taken in relation to the offences must comply with the conditions and safeguards contained in Article 9 and in particular to respect fully Article 10 or 11 of the ECHR, as appropriate;
 - x. delete Article 6*bis* ("Non-reporting");
 - xi. if amendment x. above is not adopted, in Article 6*bis*, delete paragraphs 1 and 2;
 - xii. in Article 7 ("Ancillary offences"), paragraph 1, add the word "knowingly" at the beginning of sub-paragraphs a. and b.;

against terrorism and drives new supporters into the hands of the terrorists." Similarly, the Preamble of the Committee of Ministers' Guidelines states that "it is not only possible, but also absolutely necessary, to fight terrorism whilst respecting human rights, the rule of law and, where applicable, international humanitarian law".

Article 3 – National prevention policies

7. To ensure reference to legal provisions guaranteeing human rights protection in all circumstances and so as to be consistent with the Preamble, paragraph 1 of this article should refer to international humanitarian law in addition to human rights instruments. (In the English, the final phrase should conclude "... human rights to which it is a party." This applies also to Article 9 paragraph 1.)

Articles 4-7 (the offences)

8. As a general point, the Rapporteur suggests that the eventual Explanatory Report's comments on each of these provisions stress that they are subject to the conditions and safeguards contained in Article 9 (as amended according to the Rapporteur's proposals below). Furthermore, since all of these provisions touch on the exercise of fundamental freedoms – of expression, in relation to Article 4, and of assembly and association, in relation to Articles 5 and 6 – they must satisfy the drafting requirements of clarity and certainty and therefore should remain subject to the most careful scrutiny. Given the need for such provisions to be tailored narrowly, therefore, the Rapporteur welcomes the respective second paragraphs in defining the circumstances in which relevant conduct may be criminalised.

Article 4 – Public provocation to commit an act of terrorism

9. This Article contains the first of the offences created by the Draft Convention. In criminalising the distribution of messages, issues arise under Article 10 ECHR (freedom of expression). The Rapporteur is mindful of the statement of the European Court of Human Rights that "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment".⁵ Nevertheless, he would support in principle the criminalisation of an offence of public provocation to commit an act of terrorism, if properly drafted and applied consistently with the principle expressed in *Gerger v. Turkey*: even in the context of the struggle against terrorism, the essential factor to take into consideration for determining the propriety of limitations on the freedom of expression – including in relation to political statements which are very negative and even hostile towards the State – is whether such statements incite violence, armed resistance or an uprising.⁶

10. All of the offences contained in the treaties listed in the Annex, therefore, must satisfy the test in *Gerger*: whilst in most cases this is clearly so, there is still a need for further consideration (e.g. with respect to the offence of inciting the collection of funds intending that they be used for the offence of communicating information knowing it to be false, thereby endangering the safe navigation of a ship⁷). This problem could be avoided by adding a further criterion to paragraph 2, so that only messages which incite violence shall be considered as constituting an offence under this article.

Article 5 – Recruitment for terrorism

11. Again, whilst proposing criminalisation of patently abusive behaviour, this article raises human rights issues, in this case under Article 11 ECHR (the freedom of assembly and association). Convention jurisprudence describes Article 11 ECHR as protecting "a fundamental right in a democratic society and one of the foundations of such a society."⁸ A careful balance must therefore be struck when providing for restrictions on the right, even in the name of the fight against terrorism. The present draft, in focussing on the direct connection between recruitment and the commission of an act of terrorism, would appear properly to limit the scope of the offence to the relevant circumstances.

⁵ See e.g. *Öztürk v. Turkey*, para 64, which continues as follows: "Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or ideas' which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb... This freedom is subject to restrictions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly."

⁶ Grand Chamber judgment, para 50. See also *Sener v. Turkey*: "[I]t certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess ... [W]here such remarks incite people to violence, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression." (para. 40)

⁷ See Article 2.1(a), International Convention for the suppression of the financing of terrorism, and Article 3.1(f), Convention for the suppression of unlawful acts against the safety of maritime navigation.

⁸ *Rassemblement jurassien v. Switzerland*.

Article 6 – Training for terrorism

12. Similar considerations apply here, again in relation to Article 11 ECHR. Inclusion of the element of *mens rea* – the requirement of knowledge that the skills provided are intended to be used for the purpose of carrying out an act of terrorism – would appear properly to limit the scope of the offence to the relevant circumstances.

Article 6bis – Non-reporting

13. The Rapporteur cannot support the current drafting of this article, as contained in footnote 27 of the Draft Convention. It lacks certainty on various levels, in particular in relation to the definition of the conduct in question: to criminalise non-reporting by any person of “any” facts concerning acts of terrorism would create an impermissibly, indeed impossibly wide offence, contrary to the principle of legal certainty and that of legality, as contained in Article 7 ECHR. A narrower provision, imposing a duty on public officials enforced by administrative sanctions, however, might be acceptable; judgment on this issue must be withheld until a draft text is available. As to protection of those who report facts relating to terrorism and terrorist offences, on the other hand, this would seem to be a positive and sensible proposal, if carefully drafted along lines analogous to those of Article 33 of the UN Convention against corruption.

Article 7 – Ancillary offences

14. To ensure that only those who deliberately commit ancillary offences (i.e. being aware of the purposes and intentions of the principal offenders) are criminalised, the word “knowingly” should be added to sub-paragraphs a. and b. of paragraph 1. (For paragraph c., this concern is already met by the current wording.)

Article 7bis – Non-application of the Convention

15. The Rapporteur cannot agree with the current wording of this article, which would have the effect of excluding measures against purely national offences from the safeguards of Article 9. For that reason, he would strongly prefer a formulation based on that contained in footnote 29 of the Draft Convention.

Article 8 – Sanctions and measures

16. The Rapporteur welcomes the reference in Article 8 to proportionality of sentences, especially given that this is one of the essential elements determining the lawfulness of restrictions to the human rights and fundamental freedoms at stake.

Article 8bis - Confiscation

17. The Rapporteur notes with interest the proposal of measures for confiscation of property, equipment or other instrumentalities used in connection with the offences set forth in Articles 4 to 6. As implied by Article 8, such measures must comply with the standards of Article 1 of Protocol No. 1 ECHR (protection of property), and in particular the judgment of the Court in *Phillips v. UK*, which emphasised the importance of procedural safeguards in confiscation proceedings. *Phillips* also addressed the issue of proportionality between the public interest in confiscating property and the individual interest in the right to peaceful enjoyment of possessions. (These considerations are implicit in Committee of Ministers' Guideline XIV on the right to property.)

18. From the point of view of legislative technique, and given the comment in footnote 33 of the Draft Convention, it would be better to establish confiscation measures by adding the present Convention to the list contained in the Annex of the Draft Convention on laundering, the financing of terrorism, search, seizure and confiscation of the proceeds from crime, subject to the recommendations contained in the report of the Committee on Legal Affairs and Human Rights.⁹ This would have the advantage of ensuring that confiscation of property related to the offences contained in the present Convention would also be subject to the procedural safeguards that should be contained in the Draft Convention on laundering etc., and could be done without difficulty or delay by means of the latter's expedited amendment procedure.

Article 9 – Conditions and safeguards

⁹ See Assembly Doc. 10392.

19. The Rapporteur of course welcomes the reference in this article to consistency with the rule of law, human rights and fundamental freedoms, the principle of proportionality and the prohibition on discriminatory or racist treatment. To reflect the fact that these are general considerations, therefore, Article 9 should be made to apply to all measures taken further to the Convention. In addition, given the nature of the offence contained in Article 4, Article 9 should make specific reference to freedom of political speech and, given the power to arrest and detain implied by Article 13, to Article 5 ECHR (right to liberty and security). In addition, the text beginning with the words "as set forth in international law and practice" should be preceded by a comma, in order to ensure that it relates not only to the rights and freedoms explicitly mentioned but to human rights and fundamental freedoms in general. Furthermore, its paragraph 2 should be expressed more emphatically, using the word "shall" instead of "should", which would be more consistent with standard drafting technique for conventions. Finally, the Rapporteur notes the omission of reference to criminal measures being prescribed by law (as required by the relevant Articles 10 and 11 ECHR), but recognises that this requirement is satisfied by the second paragraphs of Articles 4-6.

Article 11 – Prevention of justification

20. The Rapporteur is uncertain as to the purpose of this proposal. Two possibilities suggest themselves: first, that it is intended to exclude political (or other) justification as a defence against criminal charges relating to the offences contained in Articles 4-7; second, that it is intended to allow interference with the freedom of expression of third parties making statements in connection with such offences.

21. As to the first, the Rapporteur is not aware of 'political justification' being a defence against any criminal charge in any jurisdiction; its possible significance in mitigation is an entirely different matter. Indeed, as explained in paragraph 8 above, if a statement incites violence or armed resistance or uprising, justification is irrelevant. (Whilst the political nature of an offence may be relevant in extradition proceedings, this issue is addressed in Article 18.) Article 11 is thus unnecessary and inappropriate to achieve the first purpose.

22. As to the second, it is again necessary to distinguish between justification (or *apologie du terrorisme*) and incitement, as was made clear in the study underlying the Council of Europe publication "*Apologie du terrorisme*" and "incitement to terrorism".¹⁰ To oblige states to adopt measures against *apologie du terrorisme* in such extremely wide terms as are proposed by Article 11 would create a serious risk of violations of the right to freedom of expression. Furthermore, the study also noted that European practice in response to *apologie du terrorisme* varied widely, even between States with comparable experiences of terrorist attacks. For these reasons Article 11 is unacceptable also as a provision aimed at those commenting on terrorism.

23. More generally, the term "justifiable" belongs to a moral category and as such is legally imprecise and unsuitable for the operative provisions of a convention. The Rapporteur therefore supports the proposal of the Chair of the CODEXTER in footnote 39 of the Draft Convention, to refer to the matter as a political statement in a preambular paragraph.

Article 11bis – Non-abuse of refugee status

24. This proposal resembles Article 1F of the 1951 Convention relating to the status of refugees, which excludes from the protection of the Convention those who have committed certain acts prior to becoming refugees.¹¹ (In that sense, the Rapporteur recalls also the provisions of Article 33(2) of the 1951 Convention.¹²) Whilst it is important to reaffirm the fact that existing refugee law is not a shield behind which terrorists can shelter from extradition or prosecution, no provision akin to Article 11bis appears in any of the treaties listed in the Annex, or in either the 1977 Convention on the suppression of terrorism or its 2003 Amending Protocol.

25. Whilst it can readily be seen that in most circumstances offences committed under the Draft Convention would satisfy the Article 1F test, further analysis of this question is necessary before a definitive answer can be given. Otherwise, the effect of Article 11bis would be to amend or derogate from the 1951 Refugee Convention by adding to the grounds for exclusion in Article 1F certain offences arising under

¹⁰ Council of Europe Publishing, 2004.

¹¹ Namely war crimes, crimes against humanity, crimes against peace, serious non-political crimes and acts contrary to the purposes and principles of the United Nations.

¹² This paragraph denies protection against *refoulement* to refugees who are a danger to national security or who, having been convicted of a particularly serious crime, constitute a danger to the community.

Article 4-7 of the Draft Convention. Such an unconsidered, even inadvertent method is not an acceptable way of amending a treaty, least of all a multilateral international convention, without the consent of all parties to that treaty.

26. In any case, Article 11*bis* would add nothing useful to existing provisions of international law, as States Party to the 1951 Refugee Convention are already under an obligation to incorporate the provisions of Articles 1F and 33(2) into their national legislation and to apply them effectively.¹³ Furthermore, the obligation in Article 15 – which gives effect to the essential purpose of the Convention by ensuring prosecution of the offences it creates – applies without exception: the 1951 Refugee Convention does not protect a refugee against extradition unless he or she would also face persecution;¹⁴ but if a refugee cannot be extradited, he or she must be prosecuted by the requested state. For all these reasons, therefore, Article 11*bis* should not be included in the present convention.

Article 12 – Protection, compensation and support of victims of acts of terrorism

27. The Rapporteur is aware that the Steering Committee on Human Rights (CDDH) has recently adopted draft guidelines relating to this issue, for presentation to the Committee of Ministers. Further consideration should therefore be given to this article in the light of the eventual Guidelines.

Article 13 – Duty to investigate

28. Paragraph 2 of this article implies powers of arrest and detention. Whilst detention pending extradition is permitted under Article 5(1)(f) ECHR, it must also comply with the procedural safeguards of Articles 5(2) and (4)¹⁵ ECHR. The eventual Explanatory Report's comments on this provision should stress that it is subject to the conditions and safeguards contained in Article 9 (as amended according to the Rapporteur's above proposal).

Article 18 – Exclusion of the political exception clause

29. The Rapporteur has serious doubts about the propriety of this proposal. Whilst all of the offences contained in the conventions listed in the Annex are excluded from being considered as political for the purposes of extradition, by virtue of the 1977 European Convention on the Suppression of Terrorism and its 2003 Amending Protocol, it is not necessarily the case that all forms of offence created by the present Draft Convention should be subject to an equivalent provision (see further the comments on Article 4 above). It should also be noted that the 2003 Amending Protocol has not yet received enough ratifications to come into force, despite having been open for signature for over one-and-a-half years. Since these "principal" offences are not yet all excluded from the category of 'political', it would be inconsistent and presumptive at this stage so to exclude the 'secondary' offences created by the Draft Convention.

Article 18*bis* – Discrimination clause

30. The Rapporteur welcomes the provisions of Article 18*bis* paragraph 1, but considers that they should be expressed not as *removing* the obligation to cooperate, but as *imposing* an obligation *not* to cooperate, thus reflecting more accurately Committee of Ministers' Guideline XIII paragraph 3(ii). In addition, the article includes not only a non-discrimination clause but also other human rights grounds. For both these reasons, he considers that the article should be renamed "Grounds for refusing extradition or mutual legal assistance".

31. That said, Article 18*bis* as currently drafted leaves an important lacuna, relating to states' obligation to refuse to comply with requests for extradition or mutual legal assistance in circumstances where the request results from a flagrant denial of justice or where compliance would result in the individual concerned suffering a flagrant denial of justice.¹⁶ There are thus two sets of circumstances: requests for extradition or mutual legal assistance must be refused when made for discriminatory reasons or when resulting from a flagrant denial of justice; requests for extradition must be refused when compliance would result in a risk of being exposed to the death penalty, life imprisonment without the possibility of parole, torture or inhuman or

¹³ All Council of Europe member States, with the exception of Andorra, San Marino and Ukraine, are parties to the 1951 Refugee Convention.

¹⁴ If, however, such a refugee was a danger to national security or, following conviction of a serious offence, to the community, then under Article 33(2) of the 1951 Refugee Convention they would be liable to extradition even if involving a risk of persecutory ill-treatment, subject to the provisions of the ECHR (see further under Article 18*bis* below).

¹⁵ See in particular the judgments of the European Court of Human Rights in *Al-Nashif v. Bulgaria* and *Chahal v. UK*.

¹⁶ See *Soering v. UK* and *Einhorn v. France* (admissibility decision). See also Committee of Ministers' Guideline XIII, along with the accompanying document "Texts of reference".

degrading treatment or punishment, or a flagrant denial of justice. In both circumstances, however, the requested state, if refusing to extradite a person, would be obliged under Article 15 to prosecute them. The eventual Explanatory Report could refer to this important point.

Article 25 – Effects of the Convention

32. In relation to footnote 64, the Rapporteur strongly believes that the Draft Convention should not contain any provision which would place European Union member states, in their mutual relations, outside the scope of the Convention to the extent that EU rules exist on the matters contained therein. Such a provision was proposed in the Draft Convention on laundering and the financing of terrorism etc. and was strongly opposed by the Committee on Legal Affairs and Human Rights, which recommended its deletion. If the present Draft Convention is to ensure harmonisation of measures and enhancement of cooperation against terrorism across Europe, then a provision permitting EU member states not to comply with its provisions appears contrary to its object and purpose. The Rapporteur also points out that as long as the EU itself is not a party to this Convention, such EU rules would not necessarily be subject to the same essential conditions and safeguards. In principle, nothing prevents the EU member states from establishing special rules on the matters covered by this Draft Convention, provided that they are consistent with the latter's provisions. This is sufficiently borne out by Article 25, paragraph 2.

Conclusions

33. The Rapporteur therefore proposes the following recommendations:

- i. in the title, before the word "Convention", add the words "Council of Europe";
- ii. in the Preamble, alinea 5 ("Recalling the need..."), replace the current wording with the following: "Reaffirming that it is absolutely necessary for all measures taken in the fight against terrorism to respect human rights, the rule of law and, where applicable, international humanitarian law";
- iii. in the Preamble, add a new alinea as follows: "Reaffirming that acts of terrorism are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and recalling the obligation of all States Parties to prevent such acts and, if not prevented, to prosecute and ensure the punishment of offenders by penalties which take into account their grave nature";
- iv. in Article 1 ("Terminology"), paragraph 1, at the end, add the following words: ", when the purpose of the act which constitutes the principal offence, by its nature or context, is to intimidate a population or to compel a government or an international organisation to do or to abstain from doing any act";
- v. in Article 2 ("Purpose"), at the end, add the following words: "and full respect for human rights and the rule of law";
- vi. in Article 3 ("National prevention policies"), paragraph 1, at the end, add the following words: "and international humanitarian law";
- vii. in Article 4 ("Public provocation to commit an act of terrorism"), paragraph 2, after the words "provided that the provocation", add the following words: "incites violence and";
- viii. in the eventual Explanatory Report's comments on Articles 4-7, to stress that all measures taken in relation to the offences must comply with the conditions and safeguards contained in Article 9, and in particular to respect fully Article 10 or 11 of the ECHR, as appropriate;
- ix. delete Article 6*bis* ("Non-reporting");
- x. if amendment ix. above is not adopted, in Article 6*bis*, delete paragraphs 1 and 2;
- xi. in Article 7 ("Ancillary offences"), paragraph 1, add the word "knowingly" at the beginning of subparagraphs a. and b.;
- xii. in Article 7*bis* ("Non-application of the Convention"), replace the words "This Convention shall not apply where any of the offences established in accordance with Articles 4-7" with the words "Without prejudice to the obligation to establish the offences listed in Articles 4-7 in compliance with the

conditions and safeguards contained in Article 9, Articles 15 and 16 shall not apply where any of such offences”;

- xiii. delete Article 8*bis* (“Confiscation”);
- xiv. in Article 9 (“Conditions and safeguards”), paragraph 1, replace the words “the establishment, implementation and application of the criminalisation under Articles 4-7 of” with the words “all measures taken further to”;
- xv. in Article 9, paragraph 1, after the words “freedom of expression” add the words “notably the legitimate exercise of freedom of political speech”;
- xvi. in Article 9, paragraph 1, delete the word “and” before the words “freedom of religion”, and after those words, add the words “and the right to liberty and security,” [followed by a comma];
- xvii. in Article 9, paragraph 2, replace the words “should furthermore be subject to” with the words “shall comply with” and replace the second instance of the word “should” with the word “shall”;
- xviii. delete Article 11 (“Prevention of justification”);
- xix. delete Article 11*bis* (“Non-abuse of refugee status”);
- xx. in the eventual Explanatory Report’s comments on Article 13, stress that all measures taken further to this article must comply with the conditions and safeguards contained in Article 9, in particular the provisions of Article 5 ECHR;
- xxi. delete Article 18 (“Exclusion of the political exception clause”);
- xxii. replace Article 18*bis* (“Discrimination clause”) with the following:

“Article 18*bis* - Grounds for refusing extradition or mutual legal assistance

1. States Party shall refuse to comply with requests for extradition or mutual legal assistance made in relation to the offences set forth in Articles 4-7 where there are substantial grounds for believing that the request:

- a. has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons; or
- b. is the result of a flagrant denial of justice.

2. States Party shall refuse to comply with requests for extradition made in relation to the offences set forth in Articles 4-7 where there are substantial grounds for believing that complying with the request would result in the person concerned facing a real risk of:

- a. being exposed to the death penalty, unless that risk has been removed by sufficient assurances given by the requesting State;
- b. being sentenced to life imprisonment without the possibility of parole, unless that risk has been removed by sufficient assurances given by the requesting State;
- c. being subjected to torture or to inhuman or degrading treatment or punishment;
- d. suffering a flagrant denial of justice.”

xiii. in Article 7*bis* ("Non-application of the Convention"), replace the words "This Convention shall not apply where any of the offences established in accordance with Articles 4-7" with the words "Without prejudice to the obligation to establish the offences listed in Articles 4-7 in compliance with the conditions and safeguards contained in Article 9, Articles 15 and 16 shall not apply where any of such offences";

xiv. delete Article 8*bis* ("Confiscation");

xv. in Article 9 ("Conditions and safeguards"), paragraph 1, replace the words "the establishment, implementation and application of the criminalisation under Articles 4-7 of" with the words "all measures taken further to";

xvi. in Article 9, paragraph 1, after the words "freedom of expression" add the words "notably the legitimate exercise of freedom of political speech";

xvii. in Article 9, paragraph 1, delete the word "and" before the words "freedom of religion", and after those words, add the words "and the right to liberty and security," [followed by a comma];

xviii. in Article 9, paragraph 2, replace the words "should furthermore be subject to" with the words "shall comply with" and replace the second instance of the word "should" with the word "shall";

xix. delete Article 11 ("Prevention of justification");

xx. delete Article 11*bis* ("Non-abuse of refugee status");

xxi. in the eventual Explanatory Report's comments on Article 13, stress that all measures taken further to this article must comply with the conditions and safeguards contained in Article 9, in particular the provisions of Article 5 ECHR;

xxii. delete Article 18 ("Exclusion of the political exception clause");

xxiii. replace Article 18*bis* ("Discrimination clause") with the following:

"Article 18*bis* - Grounds for refusing extradition or mutual legal assistance

1. States Party shall refuse to comply with requests for extradition or mutual legal assistance made in relation to the offences set forth in Articles 4-7 where there are substantial grounds for believing that the request:

a. has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons; or

b. is the result of a flagrant denial of justice.

2. States Party shall refuse to comply with requests for extradition made in relation to the offences set forth in Articles 4-7 where there are substantial grounds for believing that complying with the request would result in the person concerned facing a real risk of:

a. being exposed to the death penalty, unless that risk has been removed by sufficient assurances given by the requesting State;

b. being sentenced to life imprisonment without the possibility of parole, unless that risk has been removed by sufficient assurances given by the requesting State;

c. being subjected to torture or to inhuman or degrading treatment or punishment;

d. suffering a flagrant denial of justice";

xxiv. in Article 31 ("Follow-up"), paragraph 1, sub-paragraph a., at the end add the following: "and shall make a specific assessment of the impact of the convention on human rights in the States Parties."

II. Explanatory memorandum
by Mr Bartumeu Cassany, Rapporteur

Introduction

1. The Rapporteur warmly welcomes the work of the Committee of Experts on Terrorism (CODEXTER) on the Draft Convention on the prevention of terrorism, whilst repeating the Assembly's previous calls for a comprehensive Council of Europe convention on terrorism.² He also greatly appreciates the decision of the Committee of Ministers to involve the Assembly in this work; already at its meeting on 16 December 2004, the Committee on Legal Affairs and Human Rights has held an exchange of views with the Chairperson of the CODEXTER, Mrs Gertraude Kabelka. He wishes to point out that the text on which this report is based represents "work in progress", with the CODEXTER scheduled to hold further meetings in February and March 2005 prior to adopting a final draft of the Convention. The conclusions of this report, therefore, must be provisional, representing a basis for the Assembly's participation in the further work of the CODEXTER.

2. Alongside and indeed prior to its calls for a new convention, the Assembly has consistently called for the fight against terrorism to be conducted with full and careful respect for human rights and fundamental freedoms.³ The Rapporteur recalls the Committee of Ministers' Guidelines on human rights and the fight against terrorism, adopted on 11 July 2002, which, being based on existing binding standards, represent the minimum applicable human rights standards. The proposed Convention must not fall beneath these standards, nor obligations set out in other international instruments by which member States are bound, such as the 1951 UN Convention relating to the status of refugees. In this sense, one must recall the statement of the European Court of Human Rights in *Klass v. Germany*: "Contracting States may not, in the name of the struggle against terrorism, adopt whatever measures they deem appropriate." The Rapporteur, therefore, makes the following proposals, in the hope of ensuring that the eventual Draft Convention might meet all of the Assembly's expectations.

Title of the draft convention

3. Consistent with the current practice of the Council of Europe, the Rapporteur proposes amending the title of the Draft Convention to "Draft Council of Europe Convention on the prevention of terrorism".

Preamble

4. The fifth alinea of the Preamble ("Recalling the need..."), whilst quite correct in substance, would have more impact if it employed the word "Reaffirming..." Furthermore, it could be improved by introduction of the wording of paragraph (d) of the Preamble to the Committee of Ministers' Guidelines, which would also have the advantage of consistency.

Article 1 - Terminology

5. Without more, it is not necessarily the case that all the offences contained in the annexed treaties are acts of terrorism (for example, unlawful acts against the safety of maritime navigation could be committed for purposes of insurance fraud). What is lacking is reference to specific, relevant intent. This omission could be corrected by adding words to the effect that an act which constitutes a "principal offence" becomes an act of terrorism when its purpose, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.⁴

Article 2 - Purpose

6. This Article quite correctly notes the negative effect of acts of terrorism on the full enjoyment of human rights (notably the right to life). The Rapporteur considers that mention should here also be made of the importance of respect for human rights to the fight against terrorism, as stated by the Assembly in Resolution 1400 (2004): "The protection of human rights plays a key role in the fight against terrorism. These rights are central to our credibility. Any violation of these rights weakens the international coalition in the fight

² See Recommendations 1677 (2004) and 1644 (2004) and Opinion No. 242 (2003).

³ In addition to the above, see also Recommendations 1687 (2004), 1550 (2002) and 1426 (1999) and Resolution 1258 (2001).

⁴ Wording based on Article 2.1.(b), International Convention for the suppression of the financing of terrorism.

Reporting committee: Committee on Legal Affairs and Human Rights

Reference to committee: Doc 10357, Reference No 3032 of 23 November 2004

Draft opinion unanimously adopted by the Committee on 24 January 2005

Members of the Committee: Mr Eduard **Lintner** (*Chairperson*), Mr Dick Marty, Mr Jerzy **Jaskiernia**, Mr Erik **Jurgens** (*Vice-Chairpersons*), Mrs Birgitta Ahlqvist, Mr Zekeriya Akçam, Mr Athanasios **Alevras**, Mr Gulamhuseyn **Alibeyli**, Mr Alexander Arabadjiev, Mr Miguel Arias, Mrs Teuta Arifi, Mr Abdülkadir **Ateş**, Mrs Maria Eduarda **Azevedo**, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad **Becerril**, Mrs Marie-Louise **Bemelmans-Videc**, Mr Sali Berisha, Mr Rudolf **Bindig**, Mr Giorgi Bokeria, Mr Malcolm **Bruce**, Mrs Pia Christmas-Møller, Mr Boriss **Cilevics**, Mr Viorel Coifan, Mr Marcello Dell'Utri, Mr Martin Engeset, Mrs Lydie Err, Mr Václav **Exner**, Mr Valeriy **Fedorov**, Mr Robert Fico, Mr György Frunda, Mr József Gedei, Mr Stef Goris, Mr Valery Grebennikov, Mr Süleyman Gündüz, Mrs Gultakin **Hajiyeva**, Mrs Karin Hakl, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Sergei **Ivanov**, Mr Roman Jakič, Mr Neven Jurica, Mr Antti Kaikkonen, Mr Hans Kaufmann (alternate: Mr Theo **Maissen**), Mr Ulrich Kelber, Mr Andrés Kelemen, Mr Nikolay Kovalev (alternate: Mr Yuri **Sharandin**), Mr Henryk Kroll, Mr František Kroupa, Mr Jean-Pierre **Kucheida**, Mrs Sabine **Leutheusser-Schnarrenberger**, Mr Andrea Manzella, Mr Alberto Martins, Mr Tito Masi, Mr Kevin **McNamara**, Mr Philippe Monfils, Mr Philippe Nachbar, Mr Tomislav Nikolić, Mr Ionel Olteanu, Mrs Ann Ormonde, Mrs Agnieszka Pasternak, Mr Ivan **Pavlov**, Mr Johan Pehrson, Mr Piero Pellicini, Mrs Sólveig Pétursdóttir, Mr Rino Piscitello, Mr Petro Poroshenko, Mrs Maria Postoica, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando (alternate: Mr Leo **Brincat**), Mr Martin **Raguz**, Mr François Rochebloine (alternate: Mr Michel **Dreyfus-Schmidt**), Mr Armen Rustamyan, Mr Michael Spindelegger, Mr Vaclav Stankevici, Mr Petro Symonenko, Mr Miltiadis **Varvitsiotis**, Mr John Wilkinson (alternate: Mr Tony **Lloyd**), Mrs Renate Wohlwend, Mr Vladimir Zhirinovskiy, Mr Zoran Žižic

N.B. The names of those members who were present at the meeting are printed in italics.

Secretariat of the Committee: Mr Schokkenbroek, Mr Schirmer, Mrs Clamer, Mr Milner

