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Amnesty International's representations on the February 2005 draft Council of Europe Convention on the Prevention of Terrorism

Introduction

Amnesty International submits the following observations and recommendations to the Committee of Ministers of the Council of Europe and its Committee of Experts on Terrorism (also known as CODEXTER) on the February 2005 draft of the Council of Europe Convention on the Prevention of Terrorism, which was adopted in its second reading at the 7th meeting of CODEXTER and is set out in document CODEXTER (2004) 27 Rev 6 of 14 February 2005.

Amnesty International warmly welcomes the expanded human rights clause in the Preamble as well as the deletion of **Articles 6bis** (on non-reporting); **Article 11** (on justification) and **Article 11bis** (on refugee status), which were set out in the December 2004 draft of this Convention.

Article 1- Terminology

While noting the deletion of a reference to principle offences in **Article 1- Terminology**, Amnesty International remains concerned that this provision, upon which the subsequent duties to prevent and repress are based, remains unclear, particularly in view of the fact that some of the treaties in the Annex, themselves define offences by referring to other treaties or define offences broadly. In the interest of ensuring legal certainty, the organization urges the CODEXTER to reconsider the wording of this Article.

Amnesty International also urges the CODEXTER to delete the last paragraph of the **Preamble** which attempts to define terrorism. The organization considers that this amended attempted formulation of a definition, (which encompasses acts that by their nature or context have the purpose of unduly influencing a government or international organization), does not sufficiently distinguish between unlawful acts and legitimate, non-violent opposition to the actions or non-action of states which are protected under international human rights instruments. The organization concurs with the Opinion of the Commissioner for Human Rights that that inclusion of such a definition “appears to contradict the approach adopted by the Convention, particularly evident in Article 1, which is precisely to avoid definitions of this type”.

Article 2 - Purpose

The organization urges the CODEXTER to strengthen the human rights language in **Article 2 - Purpose** so as to set out a fuller, overarching human rights clause which underscores that the measures taken by states under this Convention to prevent and repress acts of terrorism must respect international human rights and humanitarian law. In doing so Amnesty

International notes that this principle, which is included in the Preamble, is the very basis of the Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism. Including overarching language in this Article would clearly reaffirm the fundamental values of the Council of Europe, and would provide clear guidance to States Parties. In the words of the Council of Europe's Commissioner for Human Rights "Protecting human rights is a precondition for any anti-terrorist measure. Such protection is therefore an integral part of such measures and is never incompatible with states' obligations to protect their citizens." Amnesty International remains of the view that the following phrase retained in the current draft of this article is too vague and does not accurately reflect the binding nature of states' obligations under international treaties: "*with due regard to existing multilateral or bilateral treaties or arrangements between states.*"

Article 4 – Public provocation to commit a terrorist offence

Amnesty International remains concerned about the potential breadth of the amended definition of public provocation to commit a terrorist offence set out in **Article 4**, and its impact on the right to freedom of expression. The organization urges the CODEXTER to redraft this Article, in a manner to ensure that - consistent with international standards and the case law of the European Court of Human Rights - it provides a clear definition of the acts to be criminalized in accordance with the principle of legality (*nullum crimen, nulla poena sine lege*). In addition, Amnesty International urges CODEXTER to ensure that this provision does not leave scope for states to criminalize persons for the legitimate activities, including the lawful exercise of the right to freedom of expression. To this end, the organization urges the CODEXTER to consider and be guided in its re-drafting by the Johannesburg Principles on National Security, Freedom of Expression, and Access to Information, in particular principles 5-10 (a copy of the Johannesburg Principles is attached as Appendix 1).

Article 8 – Sanctions and measures

Amnesty International reiterates its recommendation that **Article 8 – Sanctions and measures** be supplemented by an additional a provision which expressly prohibits the imposition and carrying out of the death penalty as a lawful sanction, in light of the fact that this Convention will be opened for signature and ratification by non-Council of Europe States which retain the death penalty as a possible punishment. In addition, the organization urges that the CODEXTER amend paragraph 2 of Article 8 so as to ensure that only previous final convictions obtained as a result of proceedings meeting international fair trials standards may be considered during sentencing. It should be noted that the Opinion of Parliamentary Assembly of the Council of Europe mirrors these recommendations.

Article 18bis – Grounds for refusing extradition and mutual legal assistance

In respect of **Article 18bis- Grounds for refusing extradition and mutual legal assistance**, Amnesty International continues to urge that paragraph (2) be amended to expressly extend

the exclusion of the obligation to extradite if there is a risk of other inhuman or degrading treatment or risk of a flagrant denial of justice, as well as in the event of a risk of torture. Doing so would be the minimum required to ensure consistency with Guideline XIII of the Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism, as well as the case law of the European Court of Human Rights. Amnesty International notes that the Parliamentary Assembly of the Council of Europe and the Commissioner for Human Rights made similar recommendations. In addition, Amnesty International urges the CODEXTER to ensure that this article is supplemented so as to set out parallel exclusions to the duty to afford mutual legal assistance.

Comments on other provisions of the February draft

In addition, Amnesty International reiterates its observations and recommendations, set out in its document entitled *Preliminary Observations on the December 2004 draft of the European Convention on the Prevention of Terrorism* (AI Index: IOR 61/002/2005, enclosed in appendix II of this document for easy reference), with regard to those provisions which remain principally unchanged, including in particular:

Article 5- Recruitment for Terrorism

Given the potential serious impact of provisions criminalizing membership of an organization on the right to freedom of association, Amnesty International recommends that CODEXTER consider, among other things, the impact of the absence of the inclusion of a requirement of intent to recruit as well as the impact on freedom of association of existing procedures of proscription, particularly where there is no procedure for independent, thorough judicial review of a decision to proscribe an organization.

Article 12 - Protection, compensation and support of victims of terrorism

While Amnesty International welcomes the intention to include in this Convention an Article requiring states to take measures to support and protect victims of terrorist acts, the organization considers that the draft Article should be strengthened in a manner which is consistent with international standards including, among others, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Among other things, Amnesty International considers that, if retained in the Convention, this article should reaffirm the duty of states to respect the dignity and private and family life of victims; ensure that they receive shelter; material and social assistance, necessary medical and psychological care and treatment; have access to justice and receive fair and adequate reparation, including *inter alia* rehabilitation, restitution and compensation, regardless of the identification, arrest or conviction of those responsible for the terrorist act. This article should also be extended to address the duties of State Parties to assist those nationals and residents who were victims of terrorist acts in the territory of another state. It should be noted that such elements are consistent with the provisions of the Council of Europe's draft Guidelines on the Protection of Victims of Terrorist Acts, which are currently under consideration by the Committee of Ministers.

Article 13 - Duty to investigate

Amnesty International is concerned that Article 13(3) omits mention of fundamental human rights guarantees applicable to persons suspected of crimes, including, among others those, set out in Articles 3, 5 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In its experience, such fundamental guarantees are often violated in cases when an individual is suspected of committing serious crimes, such as those required by this Convention to be established, investigated and prosecuted.

The organization therefore urges that the requirement of respect for the fundamental rights of the suspect, including those set out in Articles 3, 5 and 6 of the European Convention on Human Rights, be expressly incorporated into this Article.

Article 17 - International cooperation in criminal matters

Amnesty International urge the inclusion of a paragraph in this article which specifies that all forms of cooperation, including extradition and mutual assistance, must be consistent with the obligations of States Parties under international human rights law and, in particular, the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted consistently “with ‘the general spirit of the Convention’ an instrument designed to maintain and promote the ideals and values of a democratic society.”

In addition, Amnesty International considers that this article should be supplemented by a provision which excludes the duty of cooperation if there is a risk that the cooperation provided may result in the torture or other inhuman or degrading treatment or punishment of a person, or that risk that a person will be subjected to an unfair trial or the imposition of the death penalty as a possible penalty.

Article 19 - Spontaneous information

Amnesty International is concerned at the broad ambit of the proposed draft of this Article which does not limit the application to investigations and proceedings relating to acts of terrorism, nor does it specify that such exchange of information must respect the right to privacy and be carried out in accordance with international standards of data protection.

Amnesty International has also raised concern about the use and transmission by authorities of information adduced as a result of torture or other ill-treatment, which undermines the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment set out in Article 3 of the European Convention on Human Rights and Article 7 of the International Covenant on Civil and Political Rights, and is inconsistent with states obligations under these provisions. In the light of such practices, the organization urges the inclusion of an express prohibition of both the transmission and use of information so obtained.

Periodic assessment of the impact of the Convention

Given the potential impact of the implementation of this Convention on the respect for human rights, Amnesty International reiterates its recommendation that the Convention expressly

include undertakings for the regular periodic assessment of the impact of the application of this Convention on the respect for human rights in each of the State Parties.

Appendix 1: the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information

U.N. Doc. E/CN.4/1996/39 (1996)

INTRODUCTION

These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg.

The Principles are based on international and regional law and standards relating to the protection of human rights, evolving state practice (as reflected, *inter alia*, in judgments of national courts), and the general principles of law recognized by the community of nations.

These Principles acknowledge the enduring applicability of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights and the Paris Minimum Standards of Human Rights Norms In a State of Emergency.

PREAMBLE

The participants involved in drafting the present Principles:

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;

Convinced that it is essential, if people are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

Reaffirming their belief that freedom of expression and freedom of information are vital to a democratic society and are essential for its progress and welfare and for the enjoyment of other human rights and fundamental freedoms;

Taking into account relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the UN Convention on the Rights of the Child, the UN Basic Principles on the Independence of the Judiciary, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights;

Keenly aware that some of the most serious violations of human rights and fundamental freedoms are justified by governments as necessary to protect national security;

Bearing in mind that it is imperative, if people are to be able to monitor the conduct of their government and to participate fully in a democratic society, that they have access to government-held information;

Desiring to promote a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security, so as to discourage governments from using the pretext of national security to place unjustified restrictions on the exercise of these freedoms;

Recognizing the necessity for legal protection of these freedoms by the enactment of laws drawn narrowly and with precision, and which ensure the essential requirements of the rule of law; and

Reiterating the need for judicial protection of these freedoms by independent courts;

Agree upon the following Principles, and recommend that appropriate bodies at the national, regional and international levels undertake steps to promote their widespread dissemination, acceptance and implementation:

I. GENERAL PRINCIPLES

1. Freedom of Opinion, Expression and Information

1.1. Prescribed by Law

1.2. Protection of a Legitimate National Security Interest

1.3. Necessary in a Democratic Society

2. Legitimate National Security Interest

3. States of Emergency

4. Prohibition of Discrimination

II. RESTRICTIONS ON FREEDOM OF EXPRESSION

5. Protection of Opinion

6. Expression That May Threaten National Security

7. Protected Expression

8. Mere Publicity of Activities That May Threaten National Security

9. Use of a Minority or Other Language

10. Unlawful Interference With Expression by Third Parties

III. RESTRICTIONS ON FREEDOM OF INFORMATION

11. General Rule on Access to Information

12. Narrow Designation of Security Exemption

[13. Public Interest in Disclosure](#)

[14. Right to Independent Review of Denial of Information](#)

[15. General Rule on Disclosure of Secret Information](#)

[16. Information Obtained Through Public Service](#)

[17. Information in the Public Domain](#)

[18. Protection of Journalists' Sources](#)

[19. Access to Restricted Areas](#)

[IV. RULE OF LAW AND OTHER MATTERS](#)

[20. General Rule of Law Protections](#)

[21. Remedies](#)

[22. Right to Trial by an Independent Tribunal](#)

[23. Prior Censorship](#)

[24. Disproportionate Punishments](#)

[25. Relation of These Principles to Other Standards](#)

[I. GENERAL PRINCIPLES](#)

Principle 1: Freedom of Opinion, Expression and Information

- (a) Everyone has the right to hold opinions without interference.
- (b) Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.
- (c) The exercise of the rights provided for in paragraph (b) may be subject to restrictions on specific grounds, as established in international law, including for the protection of national security.
- (d) No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

Principle 1.1: Prescribed by Law

- (a) Any restriction on expression or information must be prescribed by law. The law must be accessible, unambiguous, drawn narrowly and with precision so as to enable individuals to foresee whether a particular action is unlawful.
- (b) The law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the validity of the restriction by an independent court or tribunal.

Principle 1.2: Protection of a Legitimate National Security Interest

Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

Principle 1.3: Necessary in a Democratic Society

To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

- (a) the expression or information at issue poses a serious threat to a legitimate national security interest;
- (b) the restriction imposed is the least restrictive means possible for protecting that interest; and
- (c) the restriction is compatible with democratic principles.

Principle 2: Legitimate National Security Interest

(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.

(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

Principle 3: States of Emergency

In time of public emergency which threatens the life of the country and the existence of which is officially and lawfully proclaimed in accordance with both national and international law, a state may impose restrictions on freedom of expression and information but only to the extent strictly required by the exigencies of the situation and only when and for so long as they are not inconsistent with the government's other obligations under international law.

Principle 4: Prohibition of Discrimination

In no case may a restriction on freedom of expression or information, including on the ground of national security, involve discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, nationality, property, birth or other status.

II. RESTRICTIONS ON FREEDOM OF EXPRESSION

Principle 5: Protection of Opinion

No one may be subjected to any sort of restraint, disadvantage or sanction because of his or her opinions or beliefs.

Principle 6: Expression That May Threaten National Security

Subject to Principles 15 and 16, expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

Principle 7: Protected Expression

(a) Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security includes, but is not limited to, expression that:

- (i) advocates non-violent change of government policy or the government itself;
 - (ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials;
 - (iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes;
 - (iv) is directed at communicating information about alleged violations of international human rights standards or international humanitarian law.
- (b) No one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agency

Expression, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.

Principle 10: Unlawful Interference With Expression by Third Parties

Governments are obliged to take reasonable measures to prevent private groups or individuals from interfering unlawfully with the peaceful exercise of freedom of expression, even where the expression is critical of the government or its policies. In particular, governments are obliged to condemn unlawful actions aimed at silencing freedom of expression, and to investigate and bring to justice those responsible.

III. RESTRICTIONS ON FREEDOM OF INFORMATION

Principle 11: General Rule on Access to Information

Everyone has the right to obtain information from public authorities, including information relating to national security. No restriction on this right may be imposed on the ground of national security unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest.

Principle 12: Narrow Designation of Security Exemption

A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.

Principle 13: Public Interest in Disclosure

In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.

Principle 14: Right to Independent Review of Denial of Information

The state is obliged to adopt appropriate measures to give effect to the right to obtain information. These measures shall require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible; and shall provide for a right of review of the merits and the validity of the denial by an independent authority, including some form of judicial review of the legality of the denial. The reviewing authority must have the right to examine the information withheld.

Principle 15: General Rule on Disclosure of Secret Information

No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.

Principle 16: Information Obtained Through Public Service

No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain

Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

Principle 18: Protection of Journalists' Sources

Protection of national security may not be used as a reason to compel a journalist to reveal a confidential source.

Principle 19: Access to Restricted Areas

Any restriction on the free flow of information may not be of such a nature as to thwart the purposes of human rights and humanitarian law. In particular, governments may not prevent journalists or representatives of intergovernmental or non-governmental organizations with a mandate to monitor adherence to human rights or humanitarian standards from entering areas where there are reasonable grounds to believe that violations of human rights or humanitarian law are being, or have been, committed. Governments may not exclude journalists or representatives of such organizations from areas that are experiencing violence or armed conflict except where their presence pose a clear risk to the safety of others.

IV. RULE OF LAW AND OTHER MATTERS

Principle 20: General Rule of Law Protections

Any person accused of a security-related crime involving expression or information is entitled to all of the rule of law protections that are part of international law. These include, but are not limited to, the following rights:

- (a) the right to be presumed innocent;
- (b) the right not to be arbitrarily detained;
- (c) the right to be informed promptly in a language the person can understand of the charges and the supporting evidence against him or her;
- (d) the right to prompt access to counsel of choice;
- (e) the right to a trial within a reasonable time;
- (f) the right to have adequate time to prepare his or her defence;
- (g) the right to a fair and public trial by an independent and impartial court or tribunal;
- (h) the right to examine prosecution witnesses;
- (i) the right not to have evidence introduced at trial unless it has been disclosed to the accused and he or she has had an opportunity to rebut it; and
- (j) the right to appeal to an independent court or tribunal with power to review the decision on law and facts and set it aside.

Principle 21: Remedies

All remedies, including special ones, such as habeas corpus or amparo, shall be available to persons charged with security-related crimes, including during public emergencies which threaten the life of the country, as defined in Principle 3.

Principle 22: Right to Trial by an Independent Tribunal

- (a) At the option of the accused, a criminal prosecution of a security-related crime should be tried by a jury where that institution exists or else by judges who are genuinely independent.

The trial of persons accused of security-related crimes by judges without security of tenure constitutes a prima facie violation of the right to be tried by an independent tribunal.

(b) In no case may a civilian be tried for a security-related crime by a military court or tribunal.

(c) In no case may a civilian or member of the military be tried by an *ad hoc* or specially constituted national court or tribunal.

Principle 23: Prior Censorship

Expression shall not be subject to prior censorship in the interest of protecting national security, except in time of public emergency which threatens the life of the country under the conditions stated in Principle 3.

Principle 24: Disproportionate Punishments

A person, media outlet, political or other organization may not be subject to such sanctions, restraints or penalties for a security-related crime involving freedom of expression or information that are disproportionate to the seriousness of the actual crime.

Principle 25: Relation of These Principles to Other Standards

Nothing in these Principles may be interpreted as restricting or limiting any human rights or freedoms recognized in international, regional or national law or standards.

Appendix 2: Amnesty International's Preliminary Observations on the December 2004 draft of the European Convention on the Prevention of Terrorism (AI Index: IOR 61/002/2005)