

Geneva, 19 November 2024

NOTE VERBALE

The Permanent Delegation of the Council of Europe to the United Nations and other international organisations in Geneva presents its compliments to the Secretariat of the Office of the High Commissioner for Human Rights and has the honour to transmit a communication addressed to Prof. Ben Saul, UN Special Rapporteur on the promotion and protection of Human Rights and Fundamental Freedoms while countering terrorism.

The Permanent Delegation of the Council of Europe to the United Nations and other international organisations in Geneva avails itself of this opportunity to renew to the Secretariat of the Office of the High Commissioner for Human Rights of the United Nations the assurance of its highest consideration.



Secretariat
United Nations Office of the High Commissioner for Human Rights

DIRECTORATE OF SECURITY, INTEGRITY
AND RULE OF LAW

Counter Terrorism Coordinator

**Prof. Ben Saul
UN Special Rapporteur on the
promotion and protection of
human rights and
fundamental freedoms
while countering terrorism**

18 November 2024

Subject: Communication from special procedures

Ref: OL OTH 133/2024

Dear Prof Saul,

As a follow-up to our previous letter, please find enclosed a Reply from the Council of Europe Committee on Counter-Terrorism (CDCT) to your communication dated 4 October 2024.

Yours sincerely,



Carlo Chiaromonte

Cc. Ms Sylvie Bollini
Head of Office
Permanent Delegation of the Council of Europe to the United Nations Office
and other international organisations in Geneva

Response to the communication from the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (ref: OL OTH 133/2024)

Background

The draft Protocol amending the Council of Europe Convention on the Prevention of Terrorism (CETS No 196), hereafter the draft Amending Protocol, prepared by the Council of Europe Committee on Counter-Terrorism (CDCT) was approved by the CDCT in May 2024, formally closing expert discussions on the substance of the draft. With the Explanatory Report to the Amending Protocol examined and adopted by the CDCT on 14 November 2024, the draft Amending Protocol will be transmitted to the Council of Europe Committee of Ministers for review and adoption. It will subsequently be opened for State signatures and ratifications at a date still to be determined.

The observations of the Special Rapporteur have been carefully examined by the CDCT, which has sought to address them by providing additional information regarding its work on the new definition and the draft Amending Protocol, as well as the general approach within the CDCT and more broadly within the Council of Europe when it comes to ensuring respect for human rights, democracy and the rule of law by member States when fighting terrorism.

Definition of a terrorist offence within CETS No. 196

The new definition of a terrorist offence, which should replace the current wording of Article 1 of CETS No. 196, has been the subject of discussions within the CDCT and its specialised Working Group (CDCT-DEF) since 2017. Article 1 appears in the “Terminology” section of CETS No. 196 which facilitates the understanding of the following operational clauses of the treaty where reference to a “terrorist offence” is made. The objective, as indicated at the outset of this process, was to establish a definition of a terrorist offence for the purposes of international co-operation, and not to attempt to revise the definition, scope or content of offences at national level, nor to provide a general definition of terrorism. This aim has underpinned and framed all subsequent discussions on the content and language to be proposed.

Before considering a possible approach to defining the concept of a terrorist offence, the CDCT analysed in detail the existing approaches to the issue. It looked at the wording used in, amongst others, UN Security Council Resolutions, the UN Draft Comprehensive Convention on Terrorism, Directive (EU) 2017/541, regional conventions containing relevant wording (e.g. the Shanghai Convention on Combating Terrorism, Separation, and Extremism and the OAU Convention on the Prevention and the Combating of Terrorism), as well as the practices of special tribunals which have dealt with the matter. The CDCT looked at commonalities and differences in existing texts, as well as the drafting approaches taken in preparing definitions (e.g. acts- v. consequence-based approach) in order to determine the most suitable approach for the needs of the CDCT. In doing so, it also took into account perceived shortcomings of each of these methodologies which might have an impact on the CDCT’s own approach.

Based on this analysis, the CDCT-DEF presented possible options regarding elements of the offence that reflected identified common denominators, basing itself on the consequence-based approach when defining the acts that are not covered in the treaties listed in the Appendix of CETS No. 196. This proposal was the starting point of the negotiations which began in May 2023, during the 10th CDCT Plenary. The European Commission participated in the negotiations on behalf of the European Union, alongside EU member States. The majority of delegations supported a shift towards an acts-based approach in defining a terrorist offence, one that could be harmonised with existing state obligations, including the Directive (EU) 2017/541. After being agreed by all members of the CDCT as an acceptable starting point, the text of the proposed draft definition was put forward for examination at the 11th CDCT Plenary meeting in December 2023, along with input received from some CDCT members.

Comments were requested from delegations on multiple occasions during the early discussions and throughout the formal negotiations. Those solicited by the CDCT from 2018 to 2023 were available to members throughout this period and were presented again in May 2023, when formal negotiations on the definition of a terrorist offence began, as a reminder of different considerations. New comments were requested following the presentation of a possible draft definition in May 2023, and were shared ahead of the CDCT Plenary meeting in December 2023. Overall, the comments either contained suggestions of new language to be added, queried the need for specific language, or invited more clarification on specific points.

As rightfully pointed out in the observations of the Special Rapporteur, some of these submissions raised issues mentioned in your letter, including that of the third specific intent element, the breadth of some of the wording, the requisite *mens rea*, and a need for a wider exclusion clause. These questions were examined by CDCT members in May and December 2023, respectively, from the standpoint of the task in question, namely the development of a definition that would facilitate international co-operation under the Council of Europe Convention on the Prevention of Terrorism (CETS No 196) and its Additional protocol (CETS No 217). It was accordingly decided that certain issues would be best addressed in the Explanatory Report and not the text of the treaties, while others were either abandoned due to being seen as more applicable to state-level legislative decision-making, or postponed for a possible future revision of other provisions of CETS No. 196 (e.g. expansion of the exclusion clause).

It is only after these discussions had been completed that the CDCT proceeded with approving the text of the future definition of terrorism in its existing wording. The text is considered to reflect well what members understand as a "terrorist offence", with language that caters to the breath of legal systems represented in the Council of Europe, particularly with regard to the criminalisation of underlying offences. It is not seen as introducing ambiguity or opening doors for possible infringement of human rights and fundamental freedoms, as it is not expected to be transposed, element by element, by States, but rather provide a framework for mutual understanding of the term in the context of other operational clauses of CETS No. 196.

Obligation to respect human rights and fundamental freedoms

In addition to the above, it should be noted that the introduction of the new definition of a terrorist offence does not in any way alter the existing obligation of the Parties to implement counter-terrorism measures in line with their human rights obligations stemming from relevant international treaties, including, but not limited to, the European Convention on Human Rights and Fundamental Freedoms. This is an existing obligation under Article 12 of CETS No. 196, reiterated in the Preamble of the Amending Protocol. The same Preamble moreover reaffirms that "... all measures taken to prevent or suppress terrorist offences in this protocol shall be in accordance with ... other obligations under international law, including, where applicable, international humanitarian law." This language demonstrates the view of the drafters, i.e. the CDCT, that the text of the new definition of a terrorist offence can in no way be interpreted to allow for a derogation of a human right or other international law obligation. All member states of the Council of Europe are Parties to the European Convention on Human Rights and Fundamental Freedoms and almost all Parties to CETS No. 196 are bound by at least one, if not more human rights treaties.

While it is true that the Council of Europe does not have a mechanism parallel to the EU transposition infringement proceedings, it does possess mechanisms of soft and hard pressure on states in case of practices that go against the spirit and the text of its standards.

In the counter-terrorism field the issue of the implementation of the CETS No. 196 and its Protocol/s is assessed by the Convention-based body, the Consultation of the Parties (CoP) to CETS No. 196/217.¹ Results from these assessments are presented to the CDCT and thereafter to the Council of Europe Committee of Ministers, where possible problems concerning implementation, including respect for obligations under human rights law, can be discussed both at a technical and political level.

The Council of Europe also works with its member states on respect for human rights and fundamental freedoms, including in the context of the fight against terrorism, through its Commissioner for Human Rights. In his/her communications with states to date, the Commissioner has addressed on several occasions allegations of sweeping or mis-application of counter-terrorism legislation and has brought these issues to the attention of other bodies of the Council of Europe.

Equally, other bodies of the Council of Europe deal with the issue of the observation of human rights in the context of the fight against terrorism within the remit of their work, such as the Parliamentary Assembly that discusses these issues on a political level.

Last, but not least, the Council of Europe is a rare organisation that provides judicial redress to individuals faced with human rights violations through the European Court of Human Rights. The Court has to date pronounced itself on multiple occasions against state counter-terrorism practices that went beyond what is understood to be legitimate,

¹ Please see the [website](#) of the Consultation of the Parties.

necessary or proportionate in the face of a viable national security threat.² In doing so it has ordered states to change legislation, pay compensation, or otherwise remedy the situation caused by their unlawful practices even in circumstances where such decisions might not have been politically opportune.

It is therefore our strong belief that the Council of Europe is well equipped to manage any hypothetical abuses that may stem from misinterpretation or misapplication of the future Amending Protocol, as indeed the Organisation has done on many occasions in the past.

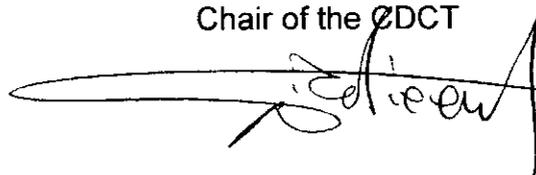
Input from civil society

The CDCT hosted the “International Conference on the Investigation and Prosecution of Terrorist Offences Committed in the Context of Armed Conflict” in May 2024. The event, at which the Special Rapporteur delivered a keynote speech, was a good example of how the CDCT collaborates with civil society on many of its initiatives and always remains open to receiving input from the civil society sector, even when its deliberations are governed by the strict intergovernmental format in which it operates. This has already occurred in the past during the preparation of other standards and would be equally welcome regarding its current work.

The CDCT wishes to thank the Special Rapporteur for his close interest in the work of the CDCT. The Committee looks forward to welcoming him within its work when suitable opportunities arise, and to continuing working together on strengthening respect for human rights and fundamental freedoms in the context of the fight against terrorism.

Mr Nicola PIACENTE

Chair of the CDCT



15 November 2024

² See, for example, *Ireland v. the United Kingdom*, No. 5310/71, judgment of 18 January 1978, *Nada v. Switzerland* (Grand Chamber), No. 10593/08, judgment of 12 September 2012, and *Al-Hawsawi v. Lithuania*, No. 6383/17, judgment of 16 January 2024.