HIGHLIGHT

# ADDITIONAL PROTOCOL TO THE COUNCIL OF EUROPE CONVENTION ON THE PREVENTION OF TERRORISM

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KEYWORDS: terrorism – foreign terrorist fighters – State cooperation – criminal offences – armed conflict.

The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (the Protocol),[1] which supplements the 2005 Council of Europe Convention on the Prevention of Terrorism (the 2005 Convention),[2] aims at addressing the security threat caused by the so-called "foreign terrorist fighters" (FTF). This kind of terrorism is characterised by the operation in relevant parts of Syria and Iraq of a terrorist organisation with aspirations to become a caliphate (the self-proclaimed Islamic State of Iraq and the Levant or *Daesh*), which inspires, facilitates or directly perpetrates terrorist acts throughout the world.

At the universal level, United Nations Security Council (UNSC) resolution 2178 (2014) had established legal obligations with regard to the criminalisation of the preparatory acts of this form of terrorism.[3] In response to this important development, the Council of Europe's Committee of Experts on Terrorism (CODEXTER) created a committee charged with drafting an Additional Protocol to the 2005 Convention. The work was completed in May 2015 after consultation with the Parliamentary Assembly.[4] The resulting text will enter into force after six states (including four members of the Council of

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[1] Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, CETS No 217, 19 May 2015.

[2] Council of Europe Convention on the Prevention of Terrorism, CETS No 196, 16 May 2005.

[3] Security Council of the United Nations, resolution No 2178 of 24 September 2014.

[4] Parliamentary Assembly of the Council of Europe Doc. 13763, *Comments to the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (rapporteur Lord John E. Tomlinson), 21 April 2015.


ISSN 2499-8249
doi: 10.15166/2499-8249/35

Europe) ratify it.[5] In line with the 2005 Convention, accession to the Protocol is open to states not parties to the Council of Europe.

Out of the 14 articles of the Protocol, the most relevant provisions are Arts 2 to 6. Therein the following modes of conduct are defined: "participating in an association or group for the purpose of terrorism" (Art. 2), "receiving training for terrorism" (Art. 3), "travelling abroad for the purpose of terrorism" (Art. 4), "funding travelling abroad for the purpose of terrorism" (Art. 5) and "organising or otherwise facilitating travelling abroad for the purpose of terrorism" (Art. 6). With regard to each provision, states are obliged to "adopt such measures as may be necessary" to introduce criminal offences within their domestic orders. In addition, Art. 4 underscores the possibility for state parties to the Protocol to "establish conditions required by and in line with its constitutional principles" to prohibit travelling abroad for the purposes of terrorism. This reference can be interpreted as a recommendation to adopt additional measures regarding denial of entry into or travel from the territory of state parties, in line with UNSC resolution 2178 (2014).

Other than regulating these instances of conduct, Art. 7 of the Protocol provides for the creation of a network of national "focal points" in order to facilitate the exchange of information concerning "persons travelling abroad for the purpose of terrorism". Finally, two important legal safeguards are introduced in Arts 8 and 9. The former requires compliance with human rights obligations, including those of the European Convention on Human Rights, the International Covenant on Civil and Political Rights and "other obligations under international law". The latter operates a *renvoi* to the 2005 Convention in order to interpret the terms of the Protocol.[6]

The necessity of the Protocol as part of the regional efforts to address the phenomenon of FTF cannot be overstated. While it is true that the 2005 Convention had defined different forms of terrorist liability in very broad terms,[7] more specificity was needed. In fact, some instances of conduct which are particular to the *modus operandi* of FTF (such as travelling for the purposes of terrorism) could barely find a legal basis in that text. From this point of view, thus, the Protocol is a step to be welcome.

At the same time, however, the impact of the Protocol on state cooperation may be limited by two factors. First, it is to be seen how the "focal point" contributes to facilitating intelligence sharing, since this is a field where much distrust amongst states re-

[5] The Protocol, Art. 10, para. 2.

[6] For more background details on the provisions of the Protocol, see Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE) COD-CTE (2015) 3 final, *Draft Explanatory Report prepared by the Committee on Foreign Terrorist Fighters and Related Issues*, 26 March 2015, www.coe.int.

[7] The 2005 Convention, Arts 6 and 7 (respectively regulating "recruitment for terrorism" and "training for terrorism").

mains.[8] Second, the *renvoi* to the 2005 Convention operated by Art. 9 of the Protocol entails that, in interpreting the latter, Art. 26, para. 5, of the former applies. This provision excludes "activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law" from its scope of application. As is known, the relationship between terrorism and the laws of war is all but clear.[9] In particular, since there is not a single approach to the applicability of the body of norms regulating the conduct of hostilities to the pursuance of terrorist acts, it cannot be excluded that states follow different approaches thereon.

A final issue concerns the possibility that human rights issues result from the broad definition of preparatory acts of terrorism made in the Protocol. Depending on how states implement the criminal offences within their domestic legal systems, the criminalisation of preparatory acts of terrorism may be at odds with fundamental guarantees safeguarded by the European Convention on Human Rights such as the right to private or family life (Art. 8) or the freedom of assembly and association (Art. 11).[10] While this tension between justice and security is nothing new in the field of counter-terrorism, it is to be expected that political and judicial oversight of state conduct will contribute to the search for the right fit, at a moment when the pendulum has moved toward the "securitisation" of counter-terrorism policies.

[8] For a brief assessment of the European Union context, see A. Garrido Muñoz, *Not Only a Matter of Lex Specialis: IHL, the European Union and Its Two Definitions of Terrorism*, in *Blog of the European Journal of International Law*, 1 December 2014, www.ejiltalk.org.

[9] In this regard see M. Scheinin, *The Council of Europe's Draft Protocol on Foreign Terrorist Fighters is Fundamentally Flawed*, in *Just Security*, 18 March 2015, www.justsecurity.org.

[10] For more details, see the Joint Submission by Amnesty International and the International Commission of Jurists to the Committee on Foreign Fighters and Related Issues, IOR 60/1281/2015, 19 March 2015, www.amnesty.org.