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Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Lord John E. TOMLINSON, United Kingdom, Socialist Group

Summary

Curbing the flow of "foreign terrorist fighters" travelling from Europe to join jihadist groups abroad has become a top priority for governments across Europe. It's thought that up to 5 000 young Europeans may have gone to fight in Syria and Iraq, and many return to their home countries radicalised and with potentially deadly new skills.

A new additional protocol to the Council of Europe's existing convention on the prevention of terrorism – building on United Nations Security Council Resolution 2178 (2014) – has been swiftly negotiated to meet this new threat. However, the Committee on Legal Affairs and Human Rights believes some doubts about the text have not been sufficiently addressed. For example, the offence of "travelling abroad for the purpose of terrorism" might be problematic from the point of view of freedom of movement.

The committee proposes some changes to the text which would help to strengthen human rights safeguards, including putting greater emphasis on the right to a fair trial and the principle of legal certainty.

1. Reference to committee: Doc. 13753, Reference 4116 of 20 April 2015.

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A. Draft opinion[2]

1. The Parliamentary Assembly is concerned about the impact that terrorism has on democracy, the rule of law and human rights. It has always attached utmost importance to respect for human rights in combating terrorism, as reiterated in Resolution 1840 (2011) on human rights and the fight against terrorism. States must be in a position to take appropriate measures to fight terrorism; but "[t]here is no need for a 'trade-off' between human rights and effective counter-terrorist action" (see paragraph 2 of the resolution). Sufficient safeguards exist in international human rights law, including the European Convention on Human Rights (ETS No. 5) and its protocols, which allows for flexible responses to emergencies threatening the very existence of societies, and more generally for the protection of public order or national security interests or other legitimate reasons.

2. The Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) is a response to the United Nations Security Council Resolution 2178 (2014) on threats to international peace and security caused by terrorist acts. It obliges States to criminalise certain conduct which might be related to the commission of terrorist offences and is particularly aimed at preventing and curbing the flow of "foreign terrorist fighters".

3. The Assembly notes, in this connection, that the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism was drafted very speedily, shortly after the terrorist attacks in Paris on 7, 8 and 9 January 2015. Some prominent international non-governmental organisations (NGOs), such as Amnesty International, the International Commission of Jurists and the Open Society Justice Initiative, have criticised this rush and expressed concern about the potential negative impact of this text on human rights, such as the freedom of movement, the presumption of innocence or legal certainty, as well as about the unclear separation between its application in times of peace and war, and the applicability of international humanitarian law. Doubts have also been raised about the criminalisation of preparatory acts which do not appear to require a direct intent to commit the principal offence (labelled as acts of terrorism), and which are several stages removed from the main principal (terrorist) offence which may take place.

4. The Assembly is fully aware of the above-mentioned concerns and considers that they have not been sufficiently reflected in the draft explanatory report to the Draft Additional Protocol. In particular, the introduction of the offence of "travelling abroad for the purpose of terrorism" might be problematic from the point of view of freedom of movement and the right to nationality. The Assembly recalls that there is no commonly agreed definition of "terrorism" and that terrorists are criminals, not soldiers, and that their crimes do not amount to acts of war. As stressed in Resolution 1840 (2011), "terrorism should be dealt primarily by the criminal justice system, with its inbuilt and well-tested fair trial safeguards to protect the presumption of innocence and the right to liberty" (paragraph 6) and "[m]easures limiting human rights must be phrased clearly and interpreted narrowly, in particular when criminal liability is involved, and must be accompanied by adequate judicial and political review" (paragraph 5.3).

5. The Assembly does not see a particular need to expand the current legal framework on combating terrorism. But in light of what is written in the draft explanatory report, it considers that sufficient safeguards exist in the Convention on the Prevention of Terrorism, which shall apply to States Parties, if the Additional Protocol is adopted and enters into force. In particular, this convention clearly stipulates that it does not apply to situations of armed conflict. The Assembly nevertheless considers that the human rights safeguards in the text of the Draft Additional Protocol itself should be further strengthened, as recommended below. Moreover, the implementation of the Additional Protocol will depend on the States Parties transposing it into their national criminal law, if need be.

6. The Assembly recommends that the Committee of Ministers make the following amendments to the draft Protocol Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism*:*

6.1. in the Preamble, add a new eighth paragraph that would read: "Having regard to Opinion ... (2015), adopted by the Parliamentary Assembly of the Council of Europe on ... April 2015";

6.2. at the end of Article 1, add the following: "and their obligations under international human rights law";

6.3. in Article 8 paragraph 1, after the words "in particular", add "the right to a fair trial, the principle of legal certainty,"; after the words "the Convention for the Protection of Human Rights and Fundamental Freedoms", add "and its Additional Protocols"; and after the words "the International Covenant on Civil and Political Rights", add ", the Convention on the Rights of the Child";

2. Draft opinion adopted unanimously by the committee on 21 April 2015.

6.4. In Article 9, change the second sentence to read as follows: “As between the Parties, all the provisions of the Protocol shall be regarded as additional Articles to the Convention and shall apply accordingly, with the exception of Article 9.”

B. Explanatory memorandum by Lord Tomlinson, rapporteur

1. Procedure

1. At its 1255th meeting on 15 April 2015, the Committee of Ministers (Ministers' Deputies) invited the Parliamentary Assembly to provide it with an opinion on the draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism ("Draft Additional Protocol"), with the request that this be done during its part-session in April 2015; the Assembly decided to deal with this matter under the urgent procedure provided for in Rule 51 of its Rules of Procedure.

2. On 20 April 2015, the Assembly referred the request of the Committee of Ministers to the Committee on Legal Affairs and Human Rights.

3. At its meeting in Paris on 18 March 2015, the Committee on Legal Affairs and Human Rights appointed me as rapporteur, in anticipation of the decision taken on 20 April 2015.

2. The context

4. As noted by Mr Jacques Legendre (France, EPP/CD), in his report on "Terrorist attacks in Paris: together for a democratic response",[3] nearly 5 000 young Europeans have gone to fight in Syria and in Iraq (for the Islamic State of Iraq and the Levant, ISIL) and many of them are coming back to Europe having acquired fighting skills. As they pose a considerable security threat within Europe, proposals have been made within some member States to deprive them of their European passports, should they have another nationality.[4]

5. On 24 September 2014, the United Nations Security Council adopted its Resolution 2178 (2014) on threats to international peace and security caused by terrorist acts. It is aimed, in particular, at preventing and curbing the flow of "foreign terrorist fighters" and obliges States Parties to criminalise certain conducts which might be related to the commission of terrorist offences, such as travelling abroad for the purpose of committing a terrorist crime. As stated by the United Nations High Commissioner for Human Rights, some of the measures taken by States on the basis of this resolution might be very problematic from the point of view of international human rights law.[5]

6. The issue of radicalisation of foreign terrorist fighters was examined at the 27th meeting of the Council of Europe's Committee of Experts on Terrorism (CODEXTER) in November 2014. At the said meeting, CODEXTER proposed the setting up of a committee that would draft an Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), to address the recommendations contained in United Nations Security Council Resolution 2178 (2014). On 22 January 2015, the Committee of Ministers adopted the terms of reference for the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE).[6] Having held three meetings between February and March 2015, the COD-CTE submitted the Draft Additional Protocol to CODEXTER, which examined and adopted it at its meeting from 8 to10 April 2015. On 10 April 2015, CODEXTER submitted the text to the Committee of Ministers.

7. The COD-CTE was established shortly after the terrorist attacks in Paris on 7, 8 and 9 January 2015. In his speech before the Assembly on 29 January 2015, the Secretary General of the Council of Europe called for a decisive, international response to the threat of terrorism, leaving no gaps or "legal loopholes for terrorists to exploit". In its Resolution 2031 (2015) "Terrorist attacks in Paris: together for a democratic response", adopted on 28 January 2015, the Assembly called on member States to "ensure that a fair balance be struck between defending freedom and security while avoiding the violation of those very rights" and welcomed and fully supported the preparation of an additional protocol on "foreign terrorist fighters" to the Convention on the Prevention of Terrorism.[7] At the time when the COD-CTE was preparing the Draft

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3. Doc. 13684 of 24 January 2015, paragraphs 31 and 32. See also Resolution 2016 (2014) "Threats against humanity posed by the terrorist group known as 'IS': violence against Christians and other religious or ethnic communities", adopted on 2 October 2014.
4. The Committee on Political Affairs and Democracy is currently preparing a report on foreign fighters in Syria (rapporteur: Mr Dirk van der Maelen, Belgium, Socialist Group).
5. Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism, 19 December 2014, A/HRC/28/28, see in particular paragraphs 49 and 50.
6. CM(2015)19 final, 22 January 2015.
7. Paragraphs 14.1 and 15.2.

Additional Protocol, Amnesty International, the International Commission of Jurists[8] and Open Society Justice Initiative[9] made a number of submissions complaining about the lack of transparency of the COD-CTE's work, criticising the hastiness of the whole process and the significant implications the drafting of such a text may have for the protection of human rights. Some commentators, such as Martin Scheinin, the former United Nations special rapporteur on human rights and counter-terrorism (2005-2011), expressed a number of concerns as to the usefulness and the legal precision of the Draft Additional Protocol.[10] Moreover, in his statement of 23 March 2015,[11] the Council of Europe Commissioner for Human Rights recalled that restricting human rights in order to combat terrorism is "a serious mistake and an ineffective measure which can even help terrorists' cause" and urged decision-makers "to take the greatest care when drafting and adopting new anti-terrorist measures".

8. On several occasions, the Committee on Legal Affairs and Human Rights has condemned all forms of terrorism. In its reports, it has always insisted that the latter must be combated effectively by means that fully respect human rights and the rule of law.[12] I was myself rapporteur on "Human rights and the fight against terrorism" a couple of years ago.[13] On the basis of my report, in which I examined the impact of counter-terrorism measures on human rights and presented an overview of Council of Europe applicable standards in this context, the Assembly adopted Resolution 1840 (2011) on 6 October 2011. The Assembly stressed therein, *inter alia*, that there is no need for a "trade-off" between human rights and effective counter-terrorist action" (paragraph 2).

3. Comments on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism

3.1. General comments

9. The Draft Additional Protocol aims at supplementing the Council of Europe Convention on the Prevention of Terrorism ("the convention"). It would add provisions on the criminalisation of certain acts which are related to terrorist offences: participating in an association or group for the purpose of terrorism (Article 2), receiving training for terrorism (Article 3), travelling abroad for the purpose of terrorism (Article 4), funding travelling abroad for the purpose of terrorism (Article 5) and organising or otherwise facilitating travelling abroad for the purpose of terrorism (Article 6). The Draft Additional Protocol also contains a provision on the exchange of information between States Parties and the setting of up a contact point available on a 24-hour, seven-days-a-week basis (Article 7). It will be open to all signatories of the convention, including States which are not members of the Council of Europe, and will enter into force three months after the deposit of the sixth instrument of ratification, acceptance or approval, including at least four member States of the Council of Europe (Article 10, paragraphs 1-2).

10. In their submissions concerning the Draft Additional Protocol, Amnesty International and the International Commission of Jurists[14] focused on two important points: the broad scope of the application of offences defined in the Draft Additional Protocol and the unclear relationship between the convention and the Draft Additional Protocol. As regards the first issue, it is true that the offences defined in Articles 2-6 of the Draft Additional Protocol refer to "terrorist offences". While there is no commonly agreed definition of "terrorism" or "terrorist offence" in public international law,[15] according to Article 1.1 of the convention, a "terrorist offence" means any of the offences defined in one of treaties listed in its Appendix (such as the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970 or the International Convention Against the Taking of Hostages, adopted in New York on 17 December 1973). In fact, most of these conventions do not apply to armed conflicts and are therefore irrelevant in the context of the ongoing armed conflicts in Syria and Iraq and the phenomenon of foreign fighters.[16] Moreover, conduct that is normally characterised as an act of terrorism in peacetime would also be prohibited as a war crime under international humanitarian law. This raises additional doubts as to the usefulness of an Additional

8. www.icj.org/council-of-europe-icj-and-ai-third-submission-on-draft-foreign-fighters-protocol/.
9. Comments on the Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism of 24 March 2015, text on file with the Secretariat.
10. See article by M. Scheinin, Council of Europe Draft Protocol on Foreign Terrorist Fighters is Fundamentally Flawed, 18 March 2015.
11. The Commissioner is concerned about the new anti-terrorism measures.
12. For a list of reports on this subject, see AS/Jur/Inf (2015) 01 of 9 January 2015.
13. Doc. 12712 of 16 September 2011.
14. See, in particular, their submission to CODEXTER of 7 April 2015.
15. See also paragraph 19 of the draft explanatory report to the Additional Protocol.
16. See article by M. Scheinin, supra note 10.

Protocol to Convention No. 196. As noted by M. Scheinin,[17] as regards persons travelling from Europe to conflict zones, such as Syria or Iraq, the provisions of the Draft Additional Protocol would be inapplicable; and even if they were applicable in principle to such persons when they return to their own (European) countries, their application in practice would be very difficult, as the prosecution would need to prove their intent to commit terrorist offences upon return.

11. Without prejudging the usefulness of the Draft Additional Protocol and the likelihood of its future application, I am convinced that there is a need for more clarity about the scope of terrorist offences and the application of international humanitarian law, which are already dealt with by the provisions of the convention itself (respectively in Articles 1 and 26, paragraphs 4 and 5). The relationship between the Draft Additional Protocol and Convention No. 196 would be regulated by Article 9 of the Draft Additional Protocol: "the words and expressions used in this Protocol shall be interpreted within the meaning of the convention. As between the Parties, all the provisions of the convention shall apply accordingly, with the exception of Article 9" (Article 9 of the convention refers to ancillary offences and since Articles 2 to 6 of the Draft Additional Protocol criminalise some of them, its application has been excluded). It is very important to stress that Convention No. 196 applies, as this would clarify the relationship between its application and that of international humanitarian law (see Article 26.5 of the convention, which excludes its application to the activities of armed forces in an armed conflict) and the meaning of "terrorist offence", which is defined in Article 1 of the convention.

12. I would therefore like to propose that the second sentence of Article 9 of the Draft Additional Protocol be rephrased as follows: "As between the Parties, all the provisions of the Protocol *shall be regarded as additional Articles to the Convention* and shall apply accordingly, with the exception of Article 9." (See, for example, the additional protocols to the European Convention on Human Rights (ETS No. 5), in which similar formulations have been used.)

3.2. Specific comments

13. The acts criminalised in the Draft Additional Protocol are mainly of a preparatory nature in relation to terrorist acts (for example, travelling abroad for the purpose of terrorism). Moreover, it is also proposed to criminalise any attempt to travel abroad for the purpose of terrorism (Article 4.3), as required by United Nations Security Council Resolution 2178 (2014). In its submissions, Amnesty International and the International Commission of Jurists complained about the lack of a sufficiently direct (causal or proximate) link with the principal criminal act (which is a terrorist offence). They also complained about the lack of the requirement of a clear and unequivocal intent to commit all elements of a crime.

14. The draft explanatory report to the Draft Additional Protocol specifies that "[t]he obligation to adopt, where necessary, criminal offences for certain conduct does not require the Parties to establish self-standing offences to the extent that under the relevant legal system these acts may be considered as preparatory acts to the commission of terrorist offences or are criminalised under other provisions, including those related to attempt" (paragraph 21). As regards Article 4.3, "[t]he offence of attempt must be established not only under but also in accordance with the domestic law of a Party. Parties may choose to criminalise the attempt to travel under existing provisions as a preparatory act or an attempt to the main terrorist offence" (paragraph 53). As regards the issue of intent, the offences defined in Articles 2 to 6 of the Draft Additional Protocol must be committed "intentionally" and they require a further subjective element – either a terrorist purpose (Articles 2 to 4) or knowledge about the terrorist purpose (Articles 5 and 6). Although I fully understand the concerns of non-governmental organisations (NGOs) as regards legal certainty in relation to new criminal offences, much will depend on how States Parties implement the Protocol. In view of the variety of national criminal legislations, some provisions of the Draft Additional Protocol might not necessarily require the introduction of new offences into States' criminal codes, if the latter adequately criminalise the preparation of a criminal offence or an attempt to commit it. Practice will also show the problems that the prosecution authorities might encounter in trying to prove the existence of the intent to commit the offences defined in the Draft Additional Protocol.

15. Bearing in mind the possible implications for the respect of human rights of any new criminal provisions, I would like to propose, in addition to the need to refer to the Assembly's Opinion in the Preamble of the text to be adopted, two additional amendments to the text, in order to take into account the human rights concerns expressed by various stakeholders in the process of the elaboration of this text.

– At the end of Article 1, I would propose to add the following words: "and their obligations under international human rights law";

17. Ibid.

– In Article 8.1, I would propose to add after the words “in particular”, the words “the right to a fair trial, the principle of legal certainty,”; after the words “the Convention for the Protection of Human Rights and Fundamental Freedoms”, the words “and its Additional Protocols”, and after the words “the International Covenant on Civil and Political Rights”, the words “, the Convention on the Rights of the Child”;

16. These changes aim to strengthen the human rights clauses contained in Articles 1 and 8.1 of the Draft Additional Protocol. Concerning the former, a clear mention of international legal obligations concerning respect for human rights would be needed to show States’ commitment to respect human rights in combating terrorism.

17. As regards the latter, I propose to add a clear reference to the right to a fair trial (as enshrined in Article 6 of the European Convention on Human Rights) and the principle of legal certainty (as enshrined in Article 7). The right to a fair trial, and in particular the principle of the presumption of innocence, are of crucial importance in the context of criminalisation of certain conducts that might lead to committing terrorists acts, but which are not obviously linked with such acts, such as travelling abroad. As proving the intent to commit a terrorist offence might be very difficult for the prosecution in such circumstances, the rights guaranteed by Article 6 of the European Convention on Human Rights must prevail. Similarly, the principle of legal certainty – *nulla poena sine lege* – must be stressed, given that the Additional Protocol may oblige States Parties to change their criminal legislation (see also the reasons invoked in paragraph 14 above). Moreover, I am of the opinion that it is necessary to add a reference to the Additional Protocols to the European Convention on Human Rights, which enshrine other human rights that are of crucial importance in this context. In particular, the introduction of the offence of “travelling abroad for the purpose of terrorism” might put at risk the freedom of movement and the right to leave any country, including one’s own,[18] which are guaranteed in Article 2 of Protocol No. 4 to the European Convention on Human Rights. Although these rights are not absolute, any restrictions imposed on them (in the context of criminal investigation), such as travel bans or the withdrawal of passports, should be in accordance with the criteria set up in this provision, as interpreted by the European Court of Human Rights. In addition, I propose to add a reference to the United Nations Convention on the Rights of the Child of 1990, as the phenomenon of “foreign fighters” concerns – to a certain extent – individuals under the age of 18, whose rights in the context of a criminal procedure need special protection.

18. Last but not least, I would like to express some additional concerns about the respect for human rights in the context of criminalisations foreseen in Articles 2 to 6 of the Draft Additional Protocol. The deprivation of nationality (even if the individual in question has other nationalities) in the context of penalising any form of contribution to the committing of a terrorist crime raise serious concerns in view of the right to a nationality and States’ international legal obligation to avoid statelessness. States should always do their utmost to provide sufficient safeguards against statelessness.[19] Moreover, any new measure taken by States in the context of the implementation of the Additional Protocol (if adopted) – such as instituting criminal proceedings against an individual – should never be based solely on the criterion of his/her ethnic origin or nationality, which would be discriminatory.

18. For more details on the case law of the European Court of Human Rights concerning this right, see, for example, the issue paper “The right to leave a country” by the Council of Europe Commissioner for Human Rights, 2013.
19. See, for example, Assembly Resolution 1989 (2014) on access to nationality and the effective implementation of the European Convention on Nationality, adopted on 9 April 2014.