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

Kristian Bartholin

eucrim
European Law Forum: Prevention • Investigation • Prosecution

Article

AUTHOR

Kristian Bartholin

CITATION SUGGESTION

K. Bartholin, "The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism", 2015, Vol. 10(3), eucrim, pp124–128. DOI: https://doi.org/10.30709/eucrim-2015-016

Published in
2015, Vol. 10(3) eucrim pp 124 – 128
ISSN: 1862-6947
https://eucrim.eu

I. Background

United Nations Security Council Resolution 2178 (hereinafter "UNSCR 2178") was adopted by the Security Council acting under Chapter VII of the Charter of the United Nations on 24 September 2014. It aims at stemming the flow of so-called "foreign terrorist fighters" (i.e., individuals who travel to another State than that of their nationality or residence for the purpose of "the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training"[1]) to Syria and Iraq to join "ISIL, ANF and other cells, affiliates, splinter groups or derivatives of Al-Qaida."[2]

Given the estimated relatively high number of "foreign terrorist fighters" from Europe,[3] it seemed natural for the Council of Europe to assist the efforts of both the Security Council and its Member States in getting a grip on the problem by providing a clear legal framework for the criminalisation of conduct associated with the phenomenon of foreign terrorist fighters at the pan-European level.

On 22 January 2015, the Committee of Ministers of the Council of Europe, at the suggestion of the Steering Committee responsible for counter-terrorism measures (CODEXTER), decided to establish an *ad hoc* Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE) tasked with drafting an additional protocol supplementing the Council of Europe Convention on the Prevention of Terrorism from 2005 with a series of provisions criminalising the acts of:

- Being recruited, or attempting to be recruited, for terrorism;
- Receiving training, or attempting to receive training, for terrorism;
- Travelling, or attempting to travel, to a state other than the state of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;
- Providing or collecting funds for such travels;
- Organising and facilitating (other than "recruitment for terrorism") such travels.

Moreover, the COD-CTE was requested to examine "whether any other act relevant for the purpose of effectively combating the phenomenon of foreign terrorist fighters, in the light of UNSCR 2178, should be included in the draft Additional Protocol."[4]

A draft Additional Protocol was prepared by the COD-CTE from 23 February to 26 March 2015. It was finalised by CODEXTER on 8-10 April 2015 and submitted to the Committee of Ministers for final adoption.

On 19 May 2015, the Committee of Ministers of the Council of Europe adopted the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, and on 16 September 2015, the Committee of Ministers decided to open the Protocol for signature in Riga, Latvia, on 22 October 2015.

The Additional Protocol is not a "stand-alone instrument," but *supplements* the Council of Europe Convention on the Prevention of Terrorism (hereinafter "the Convention"). The Convention already contains provisions on national and international measures for the prevention of terrorism, on victims of terrorism, on human rights and rule-of-law safeguards in the fight against terrorism, and on criminalisation of the following acts:

- Public provocation to commit a terrorist offence (Art. 5);
- Recruitment for terrorism (Art. 6);

- Training for terrorism (Art. 7).

The Additional Protocol, containing 14 articles, is consequently focused on the criminalisation of five types of conduct (Arts. 2 to 6) associated with foreign terrorist fighters, as well as the establishment of a mechanism for the exchange of police information concerning foreign terrorist fighters on a 24/7 basis (Art. 7). Given the importance of balancing the need to provide an effective tool for states to prevent and suppress the phenomenon of foreign terrorist fighters with the need to ensure the observance of relevant human rights standards and the principles of rule of law in the application of measures provided for in the Additional Protocol, it was considered pertinent to repeat (and somewhat enlarge) the provision on human rights and rule-of-law safeguards, contained in the Convention, in the Additional Protocol itself (Art. 8).

In the following, the reader will be provided with a brief overview of the main provisions of the Additional Protocol, their relation with the Convention and with UNSCR 2178, and some considerations by the author on the way ahead in international cooperation on the prevention and suppression of terrorism.

II. Participating in an Association or Group for the Purpose of Terrorism (Art. 2)

1. For the purpose of this Protocol, "participating in an association or group for the purpose of terrorism" means to participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group.

2. Each Party shall adopt such measures as may be necessary to establish "participating in an association or group for the purpose of terrorism", as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Criminalising the act of "being recruited, or attempting to be recruited, for terrorism" turned out to be much more challenging than originally envisaged. One of the main stumbling blocks for the drafters was the perceived "passivity" of this particular conduct. Would it be enough to consider the crime to have been committed if the perpetrator had been approached by a recruiter and agreed to join? Or would it be necessary for the crime to have been committed that the perpetrator took active steps to be recruited? Finally, would mere inactive membership *eo ipso* be sufficient reason for criminalisation?

In the end, the drafters decided to opt for a different solution, namely criminalisation of the participation in an association or group for the purpose of terrorism – a closely related conduct, which presupposes that "recruitment" (in whatever form) has already taken place.

The perpetrator must "participate in the activities of an association or group for the purpose of committing or contributing to the commission of one or more terrorist offences by the association or the group," thereby ensuring a sufficiently active behaviour on the part of the perpetrator to warrant criminalisation. The perpetrator must furthermore commit the crime "unlawfully and intentionally," thus excluding, e.g., police agents who infiltrate a terrorist group from the scope of criminalisation, since such agents will be acting "lawfully."

Taking into account that this type of conduct is often several stages removed from the actual commission of a terrorist offence, the drafters decided not to oblige the signatory parties to criminalise attempt.

III. Receiving Training for Terrorism (Art. 3)

1. For the purpose of this Protocol, "receiving training for terrorism" means to receive instruction, including obtaining knowledge or practical skills, from another person in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence.

2. Each Party shall adopt such measures as may be necessary to establish "receiving training for terrorism", as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Art. 6 of the Convention criminalises the provision of training for terrorism to others. The practical experience of parties to the Convention has, however, demonstrated a need to also criminalise the receiving of training for terrorism at the international level. Furthermore, UNSCR 2178 itself calls for the criminalisation of receiving training for terrorism in the context of defining foreign terrorist fighters' activities, cf. Operative Paragraph 6 (a).

Art. 3 of the Additional Protocol is intended to meet that demand. It is in many ways a "mirror provision" of Art. 6 of the Convention with the significant exception that the additional requirement of *mens rea* contained in that provision, namely that the perpetrator must know that the skills provided are intended to be used for terrorism, is not repeated in Art. 3 of the Additional Protocol. This is, however, logical when taking into account that it must be assumed that the person receiving the training must know what the purpose of acquiring the skills is.

As in all of the substantive criminal law provisions of the Additional Protocol, the perpetrator must act "unlawfully and intentionally." In the case of receiving training for terrorism, it is considered to be acting "unlawfully" if the perpetrator carries out otherwise lawful activities, e.g., attending a university course in chemistry or taking flying lessons with a licensed instructor, if it can be demonstrated that the perpetrator had the intent to use the skills acquired to carry out a terrorist offence.

Training can be received in person or via the Internet. However, the mere act of visiting websites or otherwise receiving communications, which could potentially be used for training for terrorism, is not sufficient to have committed the offence described in Art. 3 of the Additional Protocol.

As was the case for Art. 2 of the Additional Protocol, the drafters did not consider it necessary to criminalise attempt.

IV. Travelling Abroad for the Purpose of Terrorism (Art. 4)

1. For the purpose of this Protocol, "travelling abroad for the purpose of terrorism" means travelling to a State, which is not that of the traveller's nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism.

2. Each Party shall adopt such measures as may be necessary to establish "travelling abroad for the purpose of terrorism", as defined in paragraph 1, from its territory or by its nationals, when committed unlawfully and intentionally, as a criminal offence under its domestic law. In doing so, each Party may establish conditions required by and in line with its constitutional principles.

3. Each Party shall also adopt such measures as may be necessary to establish as a criminal offence under, and in accordance with, its domestic law the attempt to commit an offence as set forth in this article.

The right to freedom of movement is enshrined in Art. 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, as well as in Art. 12 of the International Covenant on Civil and Political Rights of the United Nations – restricting such basic human rights should only be done as a last resort. Taking into account the seriousness of the threat posed by foreign terrorist fighters to states all over the world, combined with the fact that the aforesaid human rights instruments allow for restrictions to be imposed on the exercise of these rights under certain conditions, *inter alia* for protection of national security, the drafters concluded that, on balance, criminalisation of the act of travelling abroad for the purpose of terrorism is both necessary and warranted.

This is one of the key provisions of the Additional Protocol, and its wording closely reflects the content of Operational Paragraph 6 (a) of UNSCR 2178. There are, however, certain differences.

Whereas UNSCR 2178 uses the wording "for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training" to describe the unlawful activities of foreign terrorist fighters, the Additional Protocol in Art. 4, paragraph 1, uses the wording "for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism."

The reason is that the drafters considered the latter wording to be more in line with that used in Council of Europe criminal law instruments in general and the Convention in particular. The drafters did not intend to add to, or subtract from, the meaning contained in UNSCR 2178.

Another – and more significant – difference is found in Art. 4, paragraph 2, *in fine*, which states that, in transposing Art, 4 into their domestic legislation, "each Party may establish conditions required by and in line with its constitutional principles." This leaves parties under the Additional Protocol with a certain margin of appreciation when criminalising the act of travelling abroad for the purpose of terrorism – a margin which, however narrow in practice, was not foreseen by, or contained in, UNSCR 2178. By providing this leeway, the Additional Protocol facilitates the criminalisation of travel activity related to the phenomenon of foreign terrorist fighters in those legal systems, which, for constitutional reasons, would otherwise face fundamental obstacles in implementing this particular aspect of UNSCR 2178.

It should be noted that the obligation to criminalise such travels in Art. 4 of the Additional Protocol covers travels from a party's territory, or undertaken by its nationals from the territories of other states, cf. Art. 4, paragraph 2. The drafters also decided that, in line with UNSCR 2178, the attempt to commit the offence of travelling abroad for the purpose of terrorism shall also be criminalised.

V. Funding Travelling Abroad for the Purpose of Terrorism (Art. 5)

1. For the purpose of this Protocol, "funding travelling abroad for the purpose of terrorism" means providing or collecting, by any means, directly or indirectly, funds fully or partially enabling any person to travel abroad for the purpose of terrorism, as defined in Article 4, paragraph 1, of this Protocol, knowing that the funds are fully or partially intended to be used for this purpose.

2. Each Party shall adopt such measures as may be necessary to establish the "funding of travelling abroad for the purpose of terrorism", as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

The basis for this provision of the Additional Protocol is found in Operative Paragraph 6 (b) of UNSCR 2178 to which it broadly corresponds. However, it differs in one important aspect: Operative Paragraph 6 (b) only requires that the perpetrator be "in the knowledge" that the funds provided or collected are to be used for travelling abroad for the purpose of terrorism in order to establish *mens rea*. But the wording of Art. 5, paragraph 1, *in fine*, "knowing that the funds are fully or partially intended to be used for this purpose" combined with the requirement contained in paragraph 2 of the provision, that the offence should be committed "unlawfully and intentionally," effectively limits the obligation for parties to criminalise the act of funding travelling abroad for the purpose of terrorism to situations in which the perpetrator has demonstrated one of the higher degrees of criminal intent.

Concerning the definition of "funds," reference was made by drafters to the definition contained in Art. 1, paragraph 1, of the International Convention for the Suppression of the Financing of Terrorism, and the provision of the Additional Protocol shall be applied without prejudice to Art. 2, paragraph 1, of the aforesaid Convention.

The drafters did not consider it necessary to criminalise the attempt to commit the offence described in Art. 4, but it is of course left open to states to decide whether or not to do so.

VI. VI. Organising or Otherwise Facilitating Travelling Abroad for the Purpose of Terrorism (Art. 6)

1. For the purpose of this Protocol, "organising or otherwise facilitating travelling abroad for the purpose of terrorism" means any act of organisation or facilitation that assists any person in travelling abroad for the purpose of terrorism, as defined in Article 4, paragraph 1, of this Protocol, knowing that the assistance thus rendered is for the purpose of terrorism.

2. Each Party shall adopt such measures as may be necessary to establish "organising or otherwise facilitating travelling abroad for the purpose of terrorism", as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

Art. 6 of the Additional Protocol is based on Operative Paragraph 6 (c) of UNSCR 2178. The main differences are the following: Firstly, "acts of recruitment" are not covered by this provision, as this offence has already been criminalised in Art. 6 of the Convention. Secondly, as in the case of Art. 5, the drafters considered it prudent to reserve the obligation for parties to criminalise the act of organising or otherwise facilitating travelling abroad for the purpose of terrorism to those situations in which the perpetrator has demonstrated one of the higher degrees of criminal intent, hence the wording of Art. 6, paragraph 1, *in fine*, "knowing that the assistance thus rendered is for the purpose of terrorism" in combination with the requirement that the offence be committed "unlawfully and intentionally," cf. Art. 4, paragraph 2.

The idea behind this limitation is to avoid obliging parties to criminalise the conduct described in Art. 6 in cases of very low degrees of criminal intent, such as *"dolus eventualis."* For example, a travel agent may have some vague suspicion that the client to whom he is selling a ticket (thereby in principle "organising" the travelling abroad for the purpose of terrorism) is a foreign terrorist fighter but does not have any explicit knowledge thereof.

The term "facilitation" is used to cover all types of conduct other than those falling under "organisation", e.g., smuggling a foreign terrorist fighter across a border.

As in the case of Art. 5, the drafters did not consider it necessary to criminalise attempt in connection with the act of organising or otherwise facilitating travelling abroad for the purpose of terrorism, but states may choose to do so.

VII. The Exchange of Information (Art. 7)

1. Without prejudice to Article 3, paragraph 2, sub-paragraph a, of the Convention and in accordance with its domestic law and existing international obligations, each Party shall take such measures as may be necessary in order to strengthen the timely exchange between Parties of any available relevant information concerning persons travelling abroad for the purpose of terrorism, as defined in Article 4. For that purpose, each Party shall designate a point of contact available on a 24-hour, seven-days-a-week basis.

2. A Party may choose to designate an already existing point of contact under paragraph 1.

3. A Party's point of contact shall have the capacity to carry out communications with the point of contact of another Party on an expedited basis.

This provision of the Additional Protocol is essentially inspired by Operative Paragraph 3 of UNSCR 2178, which calls on states to "intensify and accelerate the exchange of operational information regarding actions and movements of terrorists or terrorist networks, including foreign terrorist fighters, especially with their States of residence or nationality, through bilateral or multilateral mechanisms, in particular the United Nations."

The purpose of Art. 7 is to facilitate the exchange of police information concerning suspected foreign terrorist fighters through contact points available on a 24/7 basis, thereby enabling states to intercept such individuals before they can join the terrorist groups in question, or at least to trace their travel routes. The mechanism established under Art. 7 can, however, not be used for the sending and receiving of requests for mutual legal assistance in criminal matters or for the extradition of suspects. Neither can it be used for the exchange of intelligence.

VIII. The Way Ahead

Both the Convention and its Additional Protocol are unique for being the only international legal instruments dealing with the prevention of terrorism, including through criminal law measures. None of the standards contained in these two instruments are, however, especially tailored for application in Europe. It is our hope that they may yet serve as inspiration for regional cooperation on countering terrorism, including the phenomenon of foreign terrorist fighters in other parts of the world.

Criminal law measures against terrorism, such as the Additional Protocol, are important but cannot stand alone. Hence, on 19 May 2015, the Committee of Ministers of the Council of Europe adopted an "Action Plan to combat extremism and radicalisation leading to terrorism (2015 – 2017)." Initiatives include the elaboration of a recommendation on "terrorists acting alone" – a problem closely related to that of "foreign terrorist fighters" – as well as a series of social and educational measures to counter extremism and radicalisation.

In so far as the legal questions are concerned, the main remaining challenge in the international efforts to combat terrorism efficiently is the lack of an internationally agreed legal definition of "terrorism." Neither the Convention nor its Additional Protocol contains such a definition. Instead they refer to other international

instruments covering different aspects of terrorism, which do not provide a concise and comprehensive definition. And this state of affairs is by no means specific to the Council of Europe legal instruments in the counter-terrorism field.

The result is an apparent lack of legal precision, which may theoretically pose problems in the application of criminal law. In practice, however, this situation will normally have little effect on the individual, who will be able to predict with a high degree of certainty whether an act would be illegal or not simply by looking at the terrorism definition and related criminal law provisions contained in the applicable domestic legislation. The real challenge concerns international cooperation in criminal matters, e.g., on extradition of suspects between states, which apply different definitions of terrorism and hence cannot cooperate.

Denying terrorists shelter anywhere in the world and bringing them to justice is probably the most efficient way of preventing and suppressing terrorism – not having an internationally agreed legal definition of terrorism is standing in the way of this achievement.

* The views expressed in this article are those of the author and do not necessarily reflect the position of the Council of Europe.

1. Cf. UNSCR 2178 (2014) Operative Paragraph 6 (a), *in fine*.↩
2. Cf. UNSCR 2178 (2014) Operative Paragraph 10.↩
3. According to the International Centre for the Study of Radicalisation and Political Violence (ICSR), in 2014 approximately 3850 persons or 19 % of the estimated total of "foreign terrorist fighters" present in Syria and Iraq originated in the European Union.↩
4. Cf. the Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, paragraph 7.↩

About eucrim

Co-funded by
the European Union

https://doi.org/10.30709/eucrim-2015-016