

# The Contribution of the Council of Europe to the Fight against Foreign Fighters

The Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism 2005

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## ABSTRACT

This article examines the Council of Europe's role in addressing the threat of foreign terrorist fighters through the Draft Additional Protocol to the 2005 Convention on the Prevention of Terrorism. Developed in response to UN Security Council Resolution 2178 (2014), the protocol supplements the "Mother Convention" by requiring State Parties to criminalize conduct such as participation in terrorist associations, receiving terrorist training, travelling abroad for terrorism purposes, and related funding or facilitation. It outlines the scope, definitions, and human rights safeguards built into these offences, situating them within existing international and EU counter-terrorism instruments.

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On 24 September 2014, the Security Council of the United Nations, acting under Chapter VII of the Charter of the United Nations, expressing grave concern over the acute and growing threat posed by foreign terrorist fighters,<sup>1</sup> unanimously adopted Resolution 2178 (2014) on “Threats to international peace and security caused by terrorist acts” (hereinafter UNSCR 2178).

The main measures enumerated in UNSCR 2178 (Art. 6) include establishing as criminal offences the travelling or attempting to travel to another state “for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;” the “willful provision or collection” of funds to be used for travelling to another state to carry out terrorist acts, as well as the “willful organisation or other facilitation” of such travels.

In the view to implement the Security Council of the United Nations UNSCR 2178, at its 27<sup>th</sup> plenary meeting (November 2014), the Committee of Experts on Terrorism (CODEXTER), in its position as steering committee of the Council of Europe responsible for the formulation of counter-terrorism policies examined the issue of radicalization and foreign terrorist fighters. Under the direction of the Council of Europe Secretary General, they decided to adopt the draft terms of reference, to be submitted to the Committee of Ministers, for an *ad hoc* committee to be established in order to elaborate and negotiate, under the authority of the CODEXTER, a Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.

On 22 January 2015, the Committee of Ministers, at the suggestion of CODEXTER, set up this *ad hoc* committee for the purpose of drafting an additional protocol (hereinafter the Draft Additional Protocol) to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) from 2005 (hereinafter the Mother Convention). It also adopted the Terms of Reference for the Committee on Foreign Terrorist Fighters and Related Issues (COD-CTE).

The COD-CTE, under the auspices of CODEXTER, was tasked with preparing the Additional Protocol to the Mother Convention and with examining the following:

The criminalization of the following acts when committed intentionally:

- 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;
- Organizing and facilitating (other than “recruitment for terrorism”) such travels;

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.

The main objective of the Additional Protocol is to supplement the aforesaid Mother Convention with a series of provisions aimed at implementing the criminal law aspects of UNSCR 2178.

After three meetings held by COD-CTE, CODEXTER adopted at the plenary meeting on 8-10 April 2015 a Draft Additional Protocol to Convention (2005)196 and its explanatory report (to be submitted to the Committee of Ministers for final approval and, later, to the State Parties for signature, which has been scheduled for June 2015).

The Draft Additional Protocol calls upon State Parties to criminalize the following misconduct:

- 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);
- Organizing or otherwise facilitating travelling abroad for the purpose of terrorism (Art. 6).

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

Pursuant to the terms of reference set up by the Committee of Ministers, CODEXTER considered the criminalization of participation in an association or group for the purpose of terrorism and receiving training for terrorism to be two additional tools aimed at implementing the criminal law aspects of UNSCR 2178 and completing the provisions of the Mother Convention.

The Mother Convention has not, in fact, called on states to outlaw the terrorist association or group *per se* but only “recruitment for terrorism,” which is the “active” solicitation of another person to commit or participate in the commission of a terrorist offence or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group.

Neither the Mother Convention nor the draft protocol define the terrorist association or group and/or state the difference between “association” and “group.” In fact, pursuant to the Mother Convention’s explanatory report, the terms “association or group” can be interpreted as “proscribed” organizations or groups in accordance with national legislation.

Looking at the EU’s binding instruments, the 2002/475 JHA Council Framework Decision on combating terrorism (that refers only to the terrorist group) criminalizes not only the participation in the activities of a terrorist group (including the supplying of information or material resources, or the funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities), but also the directing a terrorist group (Art. 2 of the Framework Decision).

The 2002/475 JHA Council Framework Decision also contains a clear definition of terrorist group (a structured group of more than two persons established over a period of time and acting in concert to commit terrorist offences<sup>2</sup>).

It should be highlighted that Art. 2 of the draft protocol does not perfectly mirror Art. 6 of the Mother Convention and the initial relevant term of reference (being recruited, or attempting to be recruited, for terrorism). Since the initial work of the COD-CTE, it became clear that the criminalization of “passive recruitment” would create problems in some legal systems. The drafters therefore decided that State Parties should criminalize behavior they deemed closely related to that of “being recruited for terrorism,” namely “participating in an association or group for the purpose of terrorism” (which is misconduct, usually following a recruitment process). The agreed upon draft of Art. 2 is limited to the participation 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 group (irrespective of the effective perpetration of a terrorist offence).

Being recruited for the purpose of committing a terrorist offence of an individual neither being a member of, nor acting on behalf of an association or group has therefore not been criminalized, neither in the draft protocol nor in the above-mentioned EU Framework Decision.

## II. Receiving Training for Terrorism (Art. 3)

The draft protocol criminalizes receiving training for terrorism purposes (irrespective of the effective perpetration of a terrorist offence after training), that is receiving 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.

Art. 3 of the Protocol was intended to mirror Art. 7 of the Mother Convention (criminalizing active training for terrorism) by binding State Parties to criminalize the receiving of training enabling the recipient to carry out or contribute to the commission of terrorist offences.

Receiving training for terrorism purposes is not regulated either by the Framework Decision 2002/475/JHA on combating terrorism or by the Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA.

Pursuant to the draft explanatory report of the draft protocol, the receiving of training for terrorism may take place in person (for example by attending training camps) or through various electronic media, including the Internet.

It must be highlighted, however, that the mere visiting of websites containing information or receiving communications that are potentially useful for training for terrorism is not deemed sufficient to consider the crime of receiving training for terrorism as having been perpetrated. Following the case law of several national systems that already criminalized the receiving of training for terrorism purposes, the drafters of the Protocol meant that the perpetrator must normally take an active part in the training, for example by participating in interactive training sessions via the Internet.

Pursuant to the protocol, the criminalization of this offence is not confined to the (either active or passive) training within a terrorist association or group. Law enforcement agencies are thus enabled to investigate and prosecute perpetrators, including those ultimately acting alone, and all training activities having the potential to lead to the commission of terrorist offences.

Contrary to the 2002/475 JHA Council Framework Decision, which criminalizes incitement and the aiding and abetting of offences related to a terrorist group (such as participation in or direction of a terrorist group), and to the Council Framework Decision 2008/919/JHA, which criminalizes incitement and the aiding and abetting of training for terrorism, the drafters of the new Council of Europe draft instrument did not consider it necessary to criminalize the attempt or the aiding or abetting of participating in an association or group for the purpose of terrorism (Art. 2) and receiving training for terrorism (Art. 3).

## III. Travelling Abroad for the Purpose of Terrorism

The core of the draft protocol is the specific implementation at the regional level of the Council of Europe of the UNSCR 2178 through the criminalization of the following:

- Travelling abroad for the purpose of terrorism;

- Funding travelling abroad for the purpose of terrorism;
- Organizing or otherwise facilitating travelling abroad for the purpose of terrorism.

Taking into account the specific provision of the above-mentioned resolution,<sup>3</sup> the draft protocol criminalises travelling abroad for the purpose of terrorism, that is travelling or attempting to travel to a state (travel to the state of destination for terrorism purposes may be direct or via transit through other states en route), 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 for the providing or receiving of training for terrorism.

State Parties are thus bound to criminalize anyone "travelling abroad for the purpose of terrorism" from their own territories or their own nationals (irrespective of the geographical location of the starting point of the travel), when committed unlawfully and intentionally.

When criminalizing travelling for terrorism purposes, each State Party may establish conditions required by and in line with its constitutional principles.

According to the clarifications provided for by the draft explanatory report to the draft protocol, the following prerequisites must be fulfilled for the travels specified by the draft protocol to be prosecuted:

- 1) The real purpose of the travel must be for the perpetrator to commit or participate in terrorist offences, or to receive or provide training for terrorism, in a state other than that of his nationality or residence (irrespective of the effective perpetration of a terrorist offence);
- 2) The perpetrator must commit the crime intentionally and unlawfully;
- 3) The act of travelling must be criminalized under very specific conditions and only when the terrorism purpose is proven:
  - a) In accordance with the domestic law of a State Party, with the specific, applicable criminal procedures of said Party and pursuant to the general principle of the rule of law;
  - b) through evidence submitted to an independent court for scrutiny.

Members of CODEXTER considered the seriousness of the threat posed by foreign terrorist fighters to require a robust response, which, for Council of Europe Member States, should be fully compatible with human rights and the rule of law and proportionate with the principles of the ECHR (and, in particular, with the right to freedom of movement as enshrined in Art. 2 of Protocol No. 4 to the ECHR, taking into account that the aforementioned Convention allows for the right to freedom of movement to be restricted under certain conditions, including the protection of national security),<sup>4</sup> its applicable case-law, and national legislation and case-law.

The draft protocol does not contain an obligation for State Parties to ban or criminalize all travel to certain destinations. Parties are also not bound to introduce administrative measures, such as the withdrawal of passports.

The drafters of the Protocol considered that the wording of Paragraph 6 (a) of UNSCR 2178 does not contain an obligation for states to criminalize the act of travelling "for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training" as a separate criminal offence.

In fact, in some legal systems, the act of travelling for the purpose of terrorism may normally be criminalized as a preparatory act to the main terrorist offence or as an attempt to commit a terrorist offence.

It can be easily observed that great relevance has been given to active and passive training for terrorism purposes. This misconduct has been criminalized *per se* by the Mother Convention (active training) and by the Draft Additional Protocol (passive training). Active and passive training for terrorism also comprises the purpose of the act of travelling.

Neither the activities of armed forces during an armed conflict, which are governed by international humanitarian law, are governed by the provisions of the draft protocol, nor are the activities undertaken by military forces of a State Party in exercise of their official duties, as far as they are governed by other rules of international law.

Members of COD-CTE decided not to criminalize the travels for terrorism purposes undertaken by the so-called returnees; that is by foreign terrorist fighters returning to the State Parties in which they are citizens or residents.

## IV. Funding Travelling Abroad for the Purpose of Terrorism (Art. 5) and Organizing or Otherwise Facilitating Travelling Abroad for the Purpose of Terrorism (Art. 6)

These two offences can be criminalized as preparatory acts or as aiding and abetting the main offence, that is travel for terrorism purposes.

The wording of Art. 5 recalls the wording of Operative Paragraph 6 (b) of UNSCR 2178 and of Art. 2, paragraph 1 of the International Convention for the Suppression of the Financing of Terrorism of the United Nations of 1999.

The funding of travelling abroad for terrorism purposes is committed by “providing or collecting” funds fully or partially enabling any person to commit the crime of travelling abroad for the purpose of terrorism. Looking at the draft explanatory report to the draft protocol, the funds may come from a single source, e.g., as a loan or a gift provided to the traveller by a person or legal entity or from various sources through some kind of collection organized by one or more persons or legal entities. The funds may be provided or collected “by any means, directly or indirectly.”

Organizing and facilitating travelling abroad for terrorism purposes refers to a variety of conduct related to practical arrangements connected with travelling and to any other conduct than that falling under “organization,” which assists the traveler in reaching his or her destination.

In order to deem these two offences as having been committed, it is required that:

- 1) The perpetrator acts intentionally and unlawfully;
- 2) The perpetrator is aware that the funds are fully or partially intended to finance travelling abroad for the purpose of terrorism;
- 3) The perpetrator is aware that organization and facilitation refer to travelling abroad for the purpose of terrorism.

As regards the definition of “funds,” the drafters refer to the definition contained in Art. 1, paragraph 1 of the UN International Convention for the Suppression of the Financing of Terrorism.

The drafters did not consider it necessary to criminalize attempt or the aiding or abetting of these two offences. State Parties are, however, free to do so if they consider it appropriate in their domestic legal systems.

The draft protocol, due also to the participation of the EU in the negotiations in Strasbourg, might help the EU (in view of implementing the European Agenda on Security for the period 2015-2020 set out by the European Commission)<sup>5</sup> to update the above-mentioned 2008 Framework Decision on terrorism through the criminalization of travel for terrorism purposes, to strengthen its response to terrorism and foreign terrorist fighters, and to provide Member States with better tools to tackle this phenomenon.

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1. Pursuant to UNSCR 2178, foreign terrorist fighters are individuals who travel to a state other than their 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, including in connection with armed conflict.↵
  2. Pursuant to the 2002/475 JHA Council Framework Decision, "structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership, or a developed structure.↵
  3. ....all states shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense:
    - (a) their nationals who travel or attempt to travel to a state other than their state of residence or nationality and other individuals who travel or attempt to travel from their territories to a state other than their 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;
    - (b) the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals to a state other than their 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;
    - (c) the willful organization or other facilitation, including acts of recruitment, by their nationals or in their territories of the travel of individuals who travel to a state other than their 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.↵
  4. See also Art. 12 of the International Covenant on Civil and Political Rights of the United Nations.↵
  5. See Communication from the Commission to the European parliament, the Council, the European Economic and Social Committee, and the Committee of Regions COM (2015) 185 final.↵
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