COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Strasbourg, 21/05/2015
[PC-OC/DOCS2015/PC-OC(2015)08]
http://www.coe.int/tcj

PC-OC(2015)08
English only

EUROPEAN COMMITTEE ON CRIME PROBLEMS

(CDPC)

COMMITTEE OF EXPERTS

ON THE OPERATION OF EUROPEAN CONVENTIONS

ON CO-OPERATION IN CRIMINAL MATTERS

(PC-OC)

Possible Contribution of the PC-OC to the Action Against Terrorism and in particular concerning Foreign Terrorist Fighters

Reflection paper
prepared by Ms Ana Salinas de Frias, (consultant)

Professor of Public International Law
University of Malaga (Spain)

1. INTRODUCTION

Amongst the new difficulties that States must confront, as far as terrorism as a global phenomenon is concerned, it is clear that Foreign Terrorist Fighters (FTF) is one of the most challenging ones. This is so not only because of the remarkable fact that thousands of European nationals are travelling to take part in different ways in terrorist activities (training, actively participating in terrorist actions and attacks, joining to terrorist groups such as the ISIS, immolations, etc.), but also because of the role that these radicalised Europeans play once they return to their countries of origin or any third country, committed as they become to an extremist ideology.

Aware of this deep threat UNSC Resolution 2178 (2014)[1] underlines the need to strengthen international co-operation among States, insisting, in particular, on the improvement of *"(...) international, regional, and subregional cooperation, if appropriate through bilateral agreements, to prevent the travel of foreign terrorists fighters from or through their territories, including through increased sharing of information (...) recalls its decision in resolution 1373 (2001) that Member States shall afford one another the greatest measure of assistance in connection with criminal investigations or proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings, and underlines the importance of fulfilling this obligation with respect to such investigations or proceedings involving foreign terrorist fighters (...)"*. It finally makes reference to the need for States *"to help build the capacity to address the threat posed by foreign terrorist fighters, including to prevent and interdict foreign terrorist fighters travel across land and maritime borders, in particular the States neighbouring zones of armed conflict where there are foreign terrorist fighters, and welcomes and encourages bilateral assistance by Member States to help build such national capacity"*. Compliance with this UNSC Resolution has become a priority for any International Organisation involved in the action against terrorism.

Needless to say that the main strength of the CoE is precisely that it disposes of an acutely fuelled legal machine built up on a number of extremely pertinent, useful and updated international Conventions able to foster international co-operation not only among their member States but beyond this, with third States not Members of the Organisation but invited to become parties to them. This fact is of utmost importance with regard to the question which this reflection paper tries to answer: **Is there anything the PC-OC could do to contribute to the action of the Council of Europe against terrorism, in particular as regards international co-operation in areas relevant to Foreign Terrorist Fighters?** Taking account of the existence of the CODEXTER as a specialised Committee with regard to the action against terrorism, we shall focus our attention on the Conventions monitored by the PC-OC that pay specific attention to the strengthening of legal co-operation on criminal matters among States: the European Convention on Extradition and its four Additional Protocols (CETS No. 24, No. 86, No. 98, No. 209 and No. 212) and the European Convention on Mutual Assistance on Criminal Matters and its two Additional Protocols (CETS No. 30, No. 99 and No. 182). Mention of other CoE Conventions such as the European Convention on the Transfer of Proceedings in Criminal Matters (CETS no. 73) may occasionally be made.

2. THE FACTS

It is a fact that the number of concluded judicial cases concerning FTFs is significantly small compared to the estimated number of foreign combatants currently acting in Syria, Iraq or, now, Libya[2]. Yet, specific legal provisions have been included in many European States' legal

[1] S/RES/2178(2014), §11-14.

[2] The estimated number of FTFs by the White House in February 2015 reached to 20.000 belonging up to 100 different countries. See State Department Fact Sheet on Meeting on Foreign Terrorist Fighters,

frameworks that can be applied to those who plan and leave to participate in training and jihad, and to those who come back, e.g. statutory regimes in place that allow terrorism-related crimes committed abroad to be prosecuted and punished, either on the basis of special statutory provisions stipulating terrorism and related offences as offences covered by extra-territorial criminal jurisdiction, or on the basis of the regular law provisions governing the applicability of national criminal law to offences committed abroad.

This includes also those cases where such terrorist activities have been committed in the framework of an armed conflict, as national criminal laws criminalise war crimes, and also Article 1 of the Additional Protocol to the European Convention on Extradition (CETS No. 86) allows extradition to be granted for war crimes or crimes against humanity, according to the description of those offences within the Geneva Conventions and the UN Convention on the Prevention and Punishment of Crime of Genocide, as they will never be considered to be political offences.

On the contrary, the case of returnees is different, and decisions to arrest are usually made on a case-by-case basis. Charges brought before the courts so far concern suspected offences committed sometimes in the member States but most often in Syria. The concluded court cases feature successful prosecution of both aspiring fighters and returnees.

3. PRELIMINARY QUESTION

Perhaps the obvious question to be answered in the first place is: is there any specificity in the case of international judicial co-operation as far as terrorism is concerned and, in particular, with regard to FTFs? First of all States' sensitiveness as far as investigation and prosecution of terrorist offences are concerned is to be recalled, but also some particular features of international co-operation in this specific field, where mutual confidence and mutual recognition of legal procedures, judicial decisions and sentences are most important; speedy action is required; and there is a strong need to react at a preliminary stage: preventative detentions or co-ordinated simultaneous interventions in different countries, despite the fact that lone terrorists is the most common phenomenon nowadays.

All of these specificities demand from States a strong and clear will to voluntarily and expressly accept limitations to their sovereignties in order to make transnational co-operation fruitful. And in the specific case of FTFs, collecting evidence in cases of suspected travel and participation in training and jihad in the case of Syria or Libya may pose particular challenges as national authorities encounter great difficulties in gathering of evidence on activities that have taken place in the conflict zone, given the fact that no criminal investigations can be carried out in Syria or any other conflict zone related to the ISIS, and due to the impossibility of seeking co-operation and legal assistance from functioning national authorities in these two countries at least.

In this scenario, international co-operation and co-ordination among countries and also with social media operators and providers of electronic communication services have become a key factor in ensuring an effective response to the phenomenon. In this same vein, financial investigations assume a growing significance in cases related to planned travel and participation in training and jihad in Syria, expertise on the side of specialised prosecutors dealing with money laundering and other financial offences having played a crucial role in this field.

---

http://london.usembassy.gov/terror099.html. They may include between 3000 to 5000 Europeans, according to declarations made in January 2015 by EUROPOL Director-General, as stated in http://epthinktank.eu/2015/01/28/foreign-fighters-and-european-responses/.

The international community, through different organisations, programmes and systems, has been able to identify challenges stemming from recent investigations and prosecutions of aspiring FTFs and returnees, recruiters and facilitators that may help to better design more efficient criminal justice responses to the FTF phenomenon. They must be built on a functional criminal justice system that is capable of handling ordinary criminal offences while protecting the human rights of the accused.

4. HARMONISING NATIONAL RESPONSES TO FTFs CHALLENGE: SUBSTANTIVE AND PROCEDURAL LEGAL ISSUES

a. It seems that the first aspect to be dealt with concerns national responses to the phenomenon of FTF. As a matter of fact many countries, and among them many European countries, have recently amended their criminal laws or penal codes in order to somehow typify the fact of an individual travelling abroad in order to join a terrorist group or a terrorist organisation, or in order to become trained for carrying out terrorist activities abroad.

In any case the first problem comes with the diverse wording that such a definition may adopt in any particular national legislation unless a sort of harmonisation takes place among CoE member States, a problem that could be hopefully solved once the new protocol to the European Convention on the Prevention of Terrorism (CETS No. 196) is open to signature in the coming days and is ratified by States parties. This would mean not only the adoption in practice of a common definition of this offence which could be applied in a uniform way, but also a powerful tool to prevent the commission of terrorist attacks.

b. In this same vein it is important to adapt some other legal tools to this new means used for carrying out terrorist attacks or for recruiting terrorists. That is the case of the so-called special investigative techniques (SIT), of which the critical role in the development of undercover investigations is well recognised and of utmost importance for the identification and detention of FTF and in particular in order to obtain and produce evidence concerning terrorist activity that is admissible in trial.

Also in this regard, and as it has been underlined by the Global Counter Terrorism Forum (GCTF): *"(...) lawfully approved forms of electronic surveillance such as wiretapping, tracking devices, and the monitoring of Internet and other electronic communications have proven to be effective tools to combat terrorist activities"*.[3] However, here again a diverse codification at national level may in fact become an obstacle in the case of pursuing a criminal behaviour such as the one practised by FTF. Moreover, it must also be recalled that laws authorising electronic surveillance need to be flexible enough to account for rapid changes in the communication technology that FTF recruiters most use and perfectly master, as has been demonstrated in several judicial cases[4] or in reported dramatic executions[5]. Therefore, it is of utmost importance to somehow harmonise the criminalisation of all activities thereby contemplated and defined. As the GCTF has set forth: *"Adequate incorporation into national legislation of the international counterterrorism provisions and obligations constitutes a key element in a comprehensive and coherent counterterrorism legal framework that is sufficiently precise to give fair notice of conduct that is prohibited and guards against potential misuse of criminal laws"*.[6]

[3] See GCTF, Criminal Justice Sector/Rule of Law Working Group. The Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector, p. 12.

[4] See, e.g., cases of Jarmoune, El Abboubi or Delnevo.

[5] e.g. the case of the execution of the Jordanian pilot, or the execution of a group of Coptic Egyptians by the ISIS.

[6] See GFCT cited above.

On the other hand it is not only important for States to engage in close electronic surveillance in order to eliminate terrorist contents from the Internet, but also to develop a wide range of proactive and positive counter-narratives offering non-violent and productive alternatives that might assist in building up mechanisms to reinforce tolerance and peaceful cohabitation, but also to be used as means to channel frustration, anger and concerns that may turn into violent extremism and radicalisation.[7]

c. No less important is the ability to make recourse to pre-trial detention of terrorist suspects, as a fast legal response is crucial in preventing terrorist attacks. In this regard, judicially approved and supervised pre-trial detention of terrorist suspects is already being profusely used in many CoE member States in order to ensure the presence of the individual at trial and protect society from the danger posed by the defendant. However, the legal basis for, and procedures for review of pre-trial detention of terrorist suspects, and in particular of FTF, as well as its permissible duration, varies among different countries and different legal traditions. For this purpose, and taking into account the lack of a commonly applicable legal framework for all CoE member States, the knowledge, guidance and application in practice of limits and guarantees established by the ECtHR case law is of utmost importance, as detention must conform to fundamental due process guarantees and rights, that is: it must be limited to cases in which the necessity for detention has been established, has to be fairly administered and respect the presumption of innocence.

d. In order for international co-operation to be effective in this field agile mechanisms are fundamental to effectively prevent and respond to terrorism. In this regard some consideration should be given to extradition, as the privileged tool envisaged by applicable CoE Conventions. In this vein institutional barriers often prohibit or delay effective counterterrorism co-operation between governmental organs and this can mean a significant obstacle. It is of utmost importance to encourage co-operation and co-ordination among domestic government agencies that have responsibilities or information relevant to counterterrorism, as on many occasions effective investigation of terrorist threats or actions often involves the gathering and analysis of information collected by multiple agencies within a single government or by agencies belonging to different countries.

As it has been suggested as a best practice by the GCTF: *"The effectiveness and efficiency of formal international cooperation would be enhanced through: a) the strengthening of central authorities to effectively respond to international request for assistance; b) raising awareness among prosecutors and other relevant officials of the relevant national and international extradition and mutual legal assistance framework and practice; and c) strengthening mutual understanding and trust trough confidence-building measures, while recognizing that, consistent with applicable international law, requests for extradition or mutual assistance should not be refused for improper grounds including political motivation"*.[8]

We would add that perhaps co-operation in practice could privilege the use of direct contacts and request between prosecutors and judges and magistrates' offices instead of using the diplomatic channels which is demonstrated to be more difficult and slow. In fact Article 4.1 of the Second Additional Protocol to the MLA Convention would allow us to do so, as it envisages in its final sentence: *"However, they [requests] may be forwarded directly by the judicial authorities of the requesting Party to the judicial authorities of the requested Party and returned through the same channels"*, a possibility that is underlined again in Article 4.3.

[7] See GCTF, Foreign Terrorist Fighters (FTF) Initiative, The Hague-Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon, p, 2-3.
[8] See GCTF Rabat Memorandum cited above, p. 9-10.

Making an extensive use of this possibility would be extremely useful in order to accelerate investigations and prosecutions; therefore a strong invitation on the part of the PC-OC to CoE member States to ratify this Second Additional Protocol would be of the utmost practical importance.[9]

In addition to this, the encouragement of institutional mechanisms -such as interagency task forces- to co-ordinate among various agencies of government is a common suggestion regarded as best practice. This has been considered to be a key factor for overcoming obstacles, including the possibility for countries to develop a professional cadre of practitioners in every component of the criminal justice system, as well as the strengthening of the use of joint investigation teams as they are already foreseen in Article 20 of the Second Additional Protocol to the MLA Convention, which have proved to be particularly useful in some terrorist cases which have occurred in Europe.

The possible use of these joint investigation teams with respect to third States particularly concerned by the FTFs phenomenon and CoE non-member States through the adoption of the necessary international bilateral agreements could even be considered.

Additionally, and as far as Article 17 of the Second Additional Protocol to the MLA Convention dealing with Cross-border observations is concerned, the PC-OC could consider the possibility of including in its paragraph 3 terrorist offences as one of the offences listed in that paragraph that allows cross border observations, a factor that could be particularly useful with regard to FTFs and their mobility.

e. It should also be underlined that there is no mention in the CoE MLA Convention of the use of the Internet and its current relevance as far as the action against terrorism and, in general, the fight against crime is concerned. A plausible explanation could be the date of its adoption (2001). However, there are a number of factors causing very serious problems as far as action against terrorism in general, and against FTFs in particular, are concerned, such as the lack of comprehensive national legislation to cover relevant Internet-related activities with terrorist purposes; lack of proper training for judges and prosecutors on the virtual world; significant differences amongst national laws which can create difficulties in gathering evidence; problems regarding the freezing of a personal account on a social network when the Internet Service Provider is located in a different jurisdiction; delays in the execution of letters rogatory; and different approaches in the member States regarding trans-border access to data, in particular in obtaining data stored in a server located in a different member State.

Considering the possibility of amending the Second Additional Protocol to the MLA Convention in order to give some guidance on these issues would be of much help in addressing the legal challenges posed by the gathering and admissibility of e-evidence in terrorism cases.

f. The adoption of administrative measures to address and disrupt planned travel and return could also be suggested by the PC-OC to CoE member States as it has been, in fact, already adopted by some of them. These measures include, *inter alia*, the following: a) travel ban and blocking/withdrawal of passports, an action that may be grounded on Article 1.3 of the CoE MLA Convention according to amendment introduced by its Second Additional Protocol (CETS No. 182, Article 1.3); b) expulsion, deportation and prevention of re-entry, taking due account of the ECtHR case law on these issues; c) freezing of funds and cancellation of social benefit payments; and d) other measures, such as the removal of those who have left for Syria from the public registers of their former place of residence in the member States, or dissolution of associations or groups that engage in conduct with the goal of committing terrorist acts, always

[9] There are still 13 CoE member States to ratify this legal instrument.

subject to interpretation made by the ECtHR in its case law concerning limitations to the right of assembly and freedom of speech and association.

States should be encouraged –with due respect for the rule of law and human rights- to deploy new tools to share advanced passenger information (API) and passenger name records (PNR) in time for other transit States to take action against suspected FTFs. States could also be invited by the PC-OC to make greater use of INTERPOL's Lost and Stolen Passport Database and to implement international standards for passport control and the use of biometric information.

g. As it has been already underlined by the GCT Rabat Memorandum: *"Criminal justice sector actors must also receive the requisite training and resources to build their capacity in order to carry out their responsibilities (...) A competent and impartial judiciary attuned to the complexity and importance of terrorism cases, including human rights aspects, is also critical to an effective criminal justice approach to counterterrorism within a rule of law framework. Training and resources necessary to handle these cases appropriately should be available to investigators, prosecutors, and judges"*.[10]

In this vein, capacity building must be considered from a double point of view: *ad intra*, improving knowledge of all actors involved in the action against terrorism on ECtHR case law at CoE member State level; and *ad extra*, persuading CoE non-member States to get engaged in CoE Conventions applicable to the action against terrorism, and in particular not only to the CoE Convention on the Prevention of Terrorism, but also to the MLA Convention and its two Additional Protocols, the CoE Extradition Convention and its four Additional Protocols, and some other complementary CoE Conventions.[11]

h. Intelligence sharing and respect for the rule of law is one of the most sensitive questions despite it being considered a best practice, as definition of the mandate of intelligence agencies and member States respective legal authorities under domestic laws competent to collection of intelligence –in particular in the case of FTF- is necessary to facilitate the appropriate use of intelligence information as evidence in criminal investigation and proceedings, while respecting human rights and the rule of law principles.

This is a very sensitive matter on which a common agreement among States is difficult to attain, even in the framework of international intergovernmental co-operation and with the support of such a committed organization as the CoE. Nevertheless, effective guidance has been provided by the ECtHR case law concerning e.g. the implementation of protective measures in a manner that ensures that the essence of the case is disclosed to the accused or his or her counsel, allowing for an effective defence; and also that the same protective measures are, where appropriate, available to the defence when it needs to use intelligence information. However, it would be crucial to avoid the fact that a conviction is solely based on the testimony of an anonymous or secret witness, or the fact that the information has been obtained by means that may violate international human rights law, in particular the prohibition of torture.

In any case States should ensure that their procedures allow for the sufficient overview and independent review of the information to ensure that the appropriate balance between national security and the right to a fair trial of the accused are adequately considered. One suggested best practice in this regard is, where applicable, that rules of procedure are drafted in order to ensure that all evidentiary rulings involving the handling of intelligence information in criminal proceedings are immediately appealable to a higher court without the need first to proceed to trial.

[10] See Memorandum cited above, p. 3 and 9.
[11] e.g. CETS No. 51, No. 70, No. 73, No. 112, No.141 and No. 167.

5. CONCLUSIONS AND RECOMMENDATIONS

1. The action against FTFs requires a common, comprehensive and co-operative approach that, in the case of CoE member States, would count on the invaluable assistance of a number of Conventions that are worth ratifying in the shortest possible period.

2. Ratification of these Conventions may assist in harmonising national legal frameworks and avoiding differences in criminalisation and subsequent possible prosecution gaps. Such a harmonised approach may be necessary to address technical difficulties and legal challenges in the gathering and admissibility of e-evidence.

3. Even if the Additional Protocol (CETS No. 99) has amended Article 2.a of the CoE Convention on Mutual Assistance in Criminal Matters to eliminate any obstacle to co-operation with regard to any fiscal offence, it seems that the possibility of refusing the assistance request still exists when it concerns an offence which the requested Party considers a political offence or an offence connected with a political offence, a factor that is contradictory when compared to Article 20 of the Convention on the Prevention of Terrorism (CETS No. 196). In any case those CoE member States not yet Parties to this Additional Protocol should be invited to become Parties to it, in particular taking into account its relevance as far as fiscal offences are concerned and the importance of fiscal investigations underlined above concerning FTFs, recruiters and returnees.

4. Taking due account of the fact that some detained or prosecuted FTFs are alleged to have been combatants fighting in the framework of an armed conflict, ratification of the Second Additional Protocol to the MLA Convention by all CoE member States that have not yet ratified it would be most desirable; consequently the PC-OC should encourage them to ratify this legal instrument at their earliest convenience.

5. The fact of counting on an extremely well-developed and updated multilateral Convention on Extradition constitutes a key factor for international legal co-operation regarding the FTF phenomenon, as bilateral agreements may greatly vary from one model to another, and also because the principle of reciprocity shows clear limitations. Increased recourse to direct contacts between Ministries of Justice to face existing excessive delays in the transmission of extradition requests and the assistance in identifying contact points between central authorities is strongly advised, as well as the setting up of an informal network of experts in judicial co-operation. In the same vein the suggestion to improve translation of extradition requests that are often of poor quality, and the acceptance of a copy in order to proceed early while the original of the extradition request is on its way (the use of copies through the Ministries of Justice in advance of the transmission of the original extradition request that may significantly accelerate the process) could be strongly recommended by the PC-OC to member States.

6. Finally, in the absence of an applicable international Convention, and given the fact that the principle of reciprocity in its own shows important limitations, the PC-OC could strongly encourage CoE member States who are not yet parties to the Convention on the Transfer of the Proceedings in Criminal Matters (CETS No. 73) and to the additional Protocol to the CoE Convention on the Transfer of Sentenced Persons (CETS No. 167), to become parties to them.

7. Additionally ratification of all UN Conventions with regard to the fight against terrorism by all CoE member States is currently of utmost importance as far as an efficient and reinforced action against terrorism and, in particular, against FTF is concerned. It is also crucial that CoE member States ratify the UN Palermo Convention against Organized Crime and its Additional Protocols. It is the more so if we take into account that terrorist organisations, terrorist groups and recruiters usually work in closed connection with organised crime, in particular as far as the financing of terrorist activities is concerned.