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EU counter-terrorism offences

What impact on national legislation and case-law?

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Foreword

This book is the result of the international conference "EU Counter-Terrorism Offences: What Impact on National Legislation and Case-law?" organised by ECLAN (European Criminal Law Academic Network) and the Institute for European Studies (Université Libre de Bruxelles) on 27-28 May 2011. This event took place in the framework of the project ECLAN II which has been carried out with the financial support of the European Commission (DG Justice), of the Ministry of Justice of the Grand Duchy of Luxembourg and of the Institute for European Studies (Université Libre de Bruxelles). The publication of this volume is funded by the Ministry of Justice of the Grand Duchy of Luxembourg.

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PART I

Introduction and overview of EU legal instruments in the fight against terrorism

Introduction

Francesca Galli and Anne Weyembergh

1. The background to the publication

In recent times, evaluations have become increasingly important when it comes to EU policy related to cooperation in penal matters. This has been recognised by the EU institutions, and especially by the European Commission [1] and by the Justice and Home Affairs Council [2]. It can also be read in planning texts adopted by the European Council, such as the The Hague Programme of 5 November 2005 [3] and the Stockholm Programme of December 2009 [4] and political texts such as the Lisbon Treaty [5]. There are a number of reasons for this trend. One is the increasing number and importance of EU instruments in the field. Faced with this development, one of the main current challenges is to ensure that existing EU penal law is fully and correctly implemented. In this regard, an evaluation of the implementation of existing criminal policy texts is essential. An evaluation of the existing EU texts and of their implementation is also required before further developing policies in the penal sector. Each new intervention by the EU legislator should be preceded by a demonstration of the added value of the draft instrument. Part of this should be about identifying and measuring the effects of the existing law. Finally, evaluation is also a key part of efforts to boost levels of mutual trust within the EU criminal justice area. Proper evaluation

[1] See especially the Commission's Communications "on evaluation of EU policies on freedom, security and justice", COM (2006) 332 final, 28 June 2006 and "on the creation of a forum for discussing EU justice policies and practice", COM (2008) 38 final, 4 February 2008. See also COM (2005) 195 final, 19 May 2005, p. 8 and f.

[2] See JHA conclusions of 24 January 2005.

[3] *OJ*, no. C 53, 3 March 2005, p. 1.

[4] *OJ*, no. C 115, 4 May 2010, p. 1.

[5] Article 70 TFEU.

can help drive up the quality and efficiency of national systems and improves mutual knowledge and understanding of each others' systems.

This collective book presents and discusses the latest counter-terrorism policies at the EU level, and particularly the approximating instruments in the field, namely the Framework Decisions 2002/475/JHA on combating terrorism and 2008/919/JHA amending the previous one. The objective is, in particular, to evaluate the impact of introducing an EU definition of terrorism and the three new offences of provocation, training and recruiting for terrorism purposes on the development of selected EU Member States' substantive criminal law and case law.

It is a follow-up to the studies by ECLAN on the evaluation of EU policies in the field of judicial cooperation in criminal matters, which aims to develop a methodology to assess the implementation and impact of European criminal law [6]. It applies the methodology developed by these ECLAN studies. The choice of which EU instruments to assess was determined by the ECLAN contact points on the basis of their importance, sensitivity and representativeness but also on the basis of the period of implementation. A sufficient period of time had to go by to allow for an assessment of their transposition and of the instruments' practical implementation [7]. The chosen topic is, moreover, in line with the research project entitled 'The prevention of terrorism within the European Union: impact on criminal law and the redefinition of the relationship between European criminal law and national criminal justice systems' conducted by the *Institut d'Etudes Européennes* of the ULB [8].

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[6] Particularly noteworthy are the two following publications: A. Weyembergh and S. de Biolley (eds.), *Comment évaluer le droit pénal européen?*, Bruxelles, Editions de l'Université de Bruxelles, 2006, 242 p. and A. Weyembergh and V. Santamaria (eds.), *The evaluation of European criminal law – The example of the Framework Decision on combating trafficking in human beings*, Bruxelles, Editions de l'Université de Bruxelles, 2009. See also other projects and publications such as the project led by the University of Maastricht on "Evaluation and Monitoring European Cooperation in Criminal Matters" and N.M. Dane and A. Klip (eds.), *An additional evaluation mechanism in the field of EU judicial cooperation mechanisms in the field of EU judicial cooperation in criminal matters to strengthen mutual trust*, Celsus Juridische Uitgeverij, 2009.

[7] By virtue of Article 11 of the 2002 FD, Member States had to adopt the necessary measures to implement the instrument by 31 December 2002 and by virtue of Article 3 of the 2008 FD, Member States had to adopt the necessary measures to implement the instrument by 9 December 2010.

[8] This is led with the financial support of the Belgian Fond National pour la Recherche Scientifique (FNRS).

2. The instruments under evaluation: Council Framework Decision of 13 June 2002 on combating terrorism as amended by Council Framework Decision of 28 November 2008 (see Annexes II and III).

A. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [9]

1. History and scope

The need to put in place a common and robust EU policy against terrorism was discussed for years before any action was taken. Finally, a proposal for a Framework Decision on the fight against terrorism was presented by the Commission on 19 September 2001 [10], a few days after the attacks of 11 September 2001. The proposal was negotiated during the Belgian Presidency of the EU Council. Thanks to the favorable timing for any negotiation in this field, it was formally adopted on 13 June 2002 [11].

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[9] On the Framework Decision see A. Weyembergh and V. Santamaria, "Lutte contre le terrorisme et droits fondamentaux dans le cadre du troisième pilier. La Décision-cadre du 13 juin 2002 relative à la lutte contre le terrorisme et le principe de la légalité", in J. Rideau (ed.), *Les droits fondamentaux dans l'Union européenne. Dans le sillage de la Constitution européenne*, Bruxelles, Bruylant, 2009, p. 197 and f.; M.A. Beernaert, "La décision-cadre du 13 juin 2002 relative à la lutte contre le terrorisme", *Revue internationale de droit pénal*, 2006, p. 277 and f.; S. Peers, "EU Responses to Terrorism", *ICLQ*, no. 52, 2003, p. 227; B. Saul, "International Terrorism as a European Crime: The Policy Rationale for Criminalization", *European Journal of Crime, Criminal Law and Criminal Justice*, 11(4), 2003, p. 323-349; E. Dimitriu, "The EU's Definition of Terrorism: The Council Framework Decision on Combating Terrorism", *German Law Journal*, 5(5), 2004, p. 585-602. On the EU counter-terrorism policy more broadly, see A. Adam, *La lutte contre le terrorisme: étude comparative Union européenne – Etats-Unis*, Paris, L'Harmattan, 2005; J. Argomaniz, *The EU and counter-terrorism: politics, polity and policies after 9/11*, New York, Routledge, 2011; J. Auvret-Finck (ed.), *L'Union européenne et la lutte contre le terrorisme : état des lieux et perspectives*, Bruxelles, Larcier, 2010; D. Brown, *The European Union, counter terrorism and police co-operation, 1992-2007: unsteady foundations?*, Manchester, Manchester University Press, 2010; O. Bures, "EU Counterterrorism Policy: A Paper Tiger?", *Terrorism and Political Violence*, 18(1), 2006, p. 57; F. Eder and M. Senn (eds.), *Europe and transnational terrorism: assessing threats and countermeasures*, Baden-Baden, Nomos, 2009; M. Jimeno-Bulnes, "After September 11th: the fight against terrorism in national and European law. Substantive and procedural rules: some examples", *European law journal*, 10, 2004, p. 235; D. Keohane, *The EU and counter-terrorism*, London, Centre For European Reform, 2005; D. Mahncke and J. Monar (eds.), *International Terrorism. A European Response to a Global Threat?*, Brussels, Peter Lang, 2006; J. Monar, "Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems", *Government and Opposition*, 42(3), 2007, p. 292; J. Monar, "The EU's Approach post-September 11: Global Terrorism as a Multidimensional Law Enforcement Challenge", *Cambridge Review of International Affairs*, 20(2), 2007, p. 267; A. Weyembergh, "La coopération pénale européenne face au terrorisme: rupture ou continuité ?", in K. Bannelier *et al.* (eds.), *Le Droit international face au terrorisme après le 11 septembre 2001*, Paris, Pedone, 2002.

[10] COM (2001) 521final, 19 September 2001.

[11] Council Framework Decision of 13 June 2002 on combating terrorism, *OJ*, no. L 164, 22 June 2002, p. 3-7.

This Framework Decision is meant to put into practice Article 31(e) TUE, which explicitly refers to terrorism as one of the priorities for the approximation of Member States' legislation, *i.e.* the adoption of measures establishing minimum standards on offences and sanctions. With the exception of some specificities, the instrument is modeled on other framework decisions aiming at approximating substantive criminal law in the European Union. The most important provisions in the Framework Decision focus on the approximation of offences (Articles 1 to 4) but others concern sanctions (Article 5), the acknowledgment of particular mitigating circumstances (Article 6), the liability of legal persons (Article 7) and the relevant penalties (Article 8), jurisdiction and prosecutions (Article 9), the protection and the assistance to victims (Article 10) and the coming into force of the instrument (Articles 11-13).

By virtue of Article 1, Member States must take all necessary measures to incorporate into national legislation terrorist offences as defined on the basis of three elements:

- Material acts, listed in para. 1(a) to 1(i), as being criminalised in national legislation (*e.g.* attacks upon a person's life which may cause death, attacks on the physical integrity of a person and kidnapping or hostage-taking or threatening to commit any of the acts listed);
- The seriousness of the danger resulting from the material acts listed: acts that, "because of their nature or context, could seriously harm a country or an international organisation";
- The moral element or terrorist intent of the author: acts must have been committed intentionally "with the aim of seriously intimidating a population or unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation".

By virtue of Article 2, States must also punish offences related to a terrorist group. Two kinds of acts are identified: directing a terrorist group and participation in a terrorist group, including providing information or material means via any kind of financing of these activities with the knowledge that this participation will contribute to the criminal activities of the group.

A terrorist group is defined as: "a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences". "Structured group" is defined as "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".

Article 3 requires States to take measures to criminalise, as terrorist offences, aggravated theft, extortion and drawing up false administrative documents with a view to committing a terrorist offence.

By virtue of Article 4, States are required to sanction incitement and conspiracy to commit a terrorist offence, to direct or participate in a terrorist group and to be involved in terrorist activities. The attempt to commit a terrorist offence or an offence linked with terrorist activities must also be punished.

2. Models for a European definition of terrorism

The definitions of the offences cited above have been mainly influenced by three different sources: international law [12], the law of the European Union and domestic legislation.

At the international level, there have been some unsuccessful attempts to agree on a general definition of terrorism [13]. More generally, the United Nations have avoided defining terrorism as such for a long time. The international approach has long been a sectoral one [14], with the focus being on material acts. In order to reinforce judicial cooperation in criminal matters, material acts were depoliticised, with their specific intent being left aside. The Council of Europe has adopted a similar approach [15].

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[12] With regards to the criminalisation of terrorism in international law, see International Bar Association, *Terrorism and International Law: accountability, remedies and reform*, Oxford, Oxford University Press, 2011; Y. Ronen, "Incitement to terrorist acts and international law", *Leiden Journal of International Law*, 23(3), 2010, p. 645-674; M. Letho, *The criminalisation of terrorism financing*, Leiden, Martinus Nijhoff , 2010; M.J. Glennon, *Terrorism et droit international/Terrorism and international law*, Leiden, Martinus Nijhoff, 2008; B. Saul, *Defining terrorism in international law*, Oxford, Oxford University Press, 2006; A. Cassese, "The multifaced criminal notion of terrorism in international law", *Journal of International criminal Justice*, 4, 2006, p. 933-958; J. Friedrichs, "Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism", *Leiden Journal of International Law*, 19, 2006, p. 69-91; J.C. Martin, *Les règles internationales relatives à la lutte contre le terrorisme*, Bruxelles, Bruylant, 2006; H. Duffy, *The "war on terror" and the framework of international law*, Cambridge, Cambridge University Press, 2005; G. Guillaume, "Terrorism and international law", *International and Comparative Law Quarterly*, 53(3), 2004, p. 537-548; International Bar Association, *International terrorism: legal challenges and responses*, New York, Transnational publishers, 2003; K. Bannelier *et al*. (eds.), *op. cit*.; E. Hugues, "La notion de terrorisme en droit international: en quête d'une définition juridique", *JDI*, 3, 2002, p. 761 and f.; A. Cassese, "Terrorism is also disrupting some crucial legal categories of international law", *European Journal of International law*, 12(5), 2001, p. 993-1001; M. Flory and R. Higgins (eds.), *Terrorism and international law*, London, Routledge, 1997; G. Guillaume, "Terrorisme et droit international », *RCADI*, III, T. 215, 1989, p. 287 and f.; H. Labayle, "Droit international et lutte contre le terrorisme", *AFDI*, 1986, p. 106 and f.

[13] See for instance the Convention of 16 November 1937 for the prevention and punishment of terrorism (formally adopted but never come into force), in S. Glaser, *Droit international pénal conventionnel*, Bruxelles, Bruylant, 1970, p. 233 and f.

[14] See for instance the Convention on Offences and Certain Other Acts Committed On Board Aircraft (1963), Convention for the Suppression of Unlawful Seizure of Aircraft (1970), Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (1973), International Convention against the Taking of Hostages (1979), Convention on the Physical Protection of Nuclear Material (1980). For a complete list see http://www.un.org/terrorism/instruments.shtml.

[15] See the Council of Europe Convention for the Suppression of Terrorism of 27 January 1977, STE 90; the Protocol amending the European Convention on the Suppression of Terrorism of 15 May 2003, STE 190; the Council of Europe Convention for the Prevention of Terrorism of 16 May 2005, STE 196. For a comment on the approach of the Council of Europe, see Council of Europe (ed.), *Les Droits de l'Homme et la Lutte contre le Terrorisme. Les Lignes Directrices du Conseil de l'Europe*, Strasbourg, Editions du Conseil de l'Europe, 2005.

By identifying a legal and general category as 'terrorist offences', where intent constitutes the key element, the Framework Decision breaks with the traditional treatment of terrorist offences as described above. However, the Framework Decision was certainly influenced by the global approach, which has recently evolved. Since the 1990s the UN has sought to adopt a Comprehensive Convention on Terrorism which would define terrorism as such [16]. This new approach was launched by the two last UN conventions adopted before the drafting of the Framework Decision 2002, namely the Convention for the suppression of terrorist bombing of 15 December 1997 and the Convention for the suppression of terrorism financing of 9 December 1999. Although they remain *ad hoc* instruments, adopting a sectoral approach, they both employ terms such as 'terrorist' and 'terrorism'. In addition, the Convention on terrorism financing of 1999 does come up with a definition of terrorism. For this purpose, it refers to all UN *ad hoc* instruments listed in the annex but also to "any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act" [17].

Remarkably, during the Framework Decision negotiations, numerous delegations insisted on using the UN definition within the EU instrument. The final version of the Framework Decision has certainly been influenced by this [18].

EU law, especially the definition of 'criminal organisation' in Article 1 of the Joint Action of 21 December 1998 on the criminalisation of participation in a criminal organisation in the Member States [19] has also clearly inspired the definition of a terrorist organisation.

National legislation has also been a point of reference for the Framework Decision. This is particularly true for Member States where, as a result of domestic threats experienced in the 1960s to the 1980s, terrorist offences were already enshrined in

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[16] See M. Hmoud, "Negotiating the Draft Comprehensive Convention on International Terrorism. Major Bones of Contention", *Journal of International Criminal Justice*, 4(5), 2006, p. 1031-1043; S.P. Subedi, "The war on terror and UN attempt to adopt a comprehensive convention on international terrorism", in P. Eden and T. O'Donnel (eds.), *September 11, 2001: a turning point in international and domestic law*, New York, Transnational publishers, 2005, p. 207-225; P. D'Argent, "Examen du projet de convention générale sur le terrorisme international", in K. Bannelier *et al.*, *op. cit.*, p. 121 and f., and J.C. Martin, *op. cit.,* p. 69. See also 'Renewed effort towards completion of Comprehensive Convention against Terrorism applauded in Legal Committee' (8 October 2008), http://www.un.org/News/Press/docs/ 2008/ gal3340.doc.htm.

[17] Article 2(1)(b) UNGA International Convention for the Suppression of the Financing of Terrorism (1999).

[18] See the position of the Netherlands as supported by Denmark, Portugal and the United Kingdom (Council of the European Union, doc 12647/1/01 rev 10). See also Council of the European Union, doc 12647/2/01 rev 2. With regards to the value of this reference to UN conventions, see E.J. Husabo, "The implementation of new rules on terrorism through the pillars of the European Union", in E.J. Husabo and A. Strandbakken (eds.), *Harmonisation of criminal law in Europe*, Antwerpen/Oxford, Intersentia, 2005, p. 58 and f.

[19] *OJ*, no. L 351, 29 December 1998, p. 1 and f.

national criminal codes: the United Kingdom, France, Italy, Spain, Portugal, Germany. Despite the differences in national legislations, the definition of terrorist offences results from a combination of existing offences and the perpetrator's terrorist intent.

3. Negotiations

The definition of offences has been at the centre of the negotiations, thus markedly influencing the initial proposal.

The proposal only contained two articles on offences: Article 3 on terrorist offences and Article 4 on incitement, aiding and abetting, conspiracy and attempt. It did not explicitly distinguish between offences related to a terrorist group or to terrorism activities. These offences were, however, covered by the category of 'terrorist offences'. This category also covered directing and participating in a terrorist organisation, aggravated theft and extortion.

Changes introduced in the course of the negotiations mainly aimed at tightening up the wording of the definition of terrorism. Such a trend was evident from the very beginning of the discussions [20]. First, as a result of the negotiations, many of the material acts listed in Article 1 were more strictly defined than in the initial proposal. Second, whereas the requirement of seriousness of the danger was quite discrete or almost non-existent in the initial proposal, it was generally worded and even several times repeated concerning various material acts. Third, if on the one hand, the terrorist intent has been enlarged to encompass serious attacks against international organisations too, it has been more narrowly defined from various points of view [21].

4. Evaluation

This section will provide a few elements of the overall assessment as a fuller assessment is the focus of the following contribution by Sabine Gless.

The Framework Decision was severely criticised in particular for not being sufficiently democratic. As with other third pillar instruments, the European Parliament was only consulted and its opinion had only a relatively minor impact on the final version of the text. Such a democratic deficit has affected all framework decisions but it was even more the case for this Framework Decision, which obliged some Member States to insert an offence that did not exist into their national law and not simply to redefine preexisting offences in their internal legislation.

As mentioned above, efforts have been made during the negotiations to define the offences more narrowly and to find a better balance between the need to combat terrorism effectively and to protect suspects' and defendants' rights [22]. However,

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[20] See Doc. 12647/01. For a deeper comparison between the initial proposal and the final text, see A. Weyembergh and V. Santamaria, *op. cit.*, p. 197 and f.

[21] See F. Dias and P. Caeiro, "A Lei de Combate ao terrorismo", *Revista de legislaçao e de jurisprudencia*, 3935, 2005, p. 70 and f.

[22] A. Weyembergh, "L'impact du 11 septembre sur l'équilibre sécurité/liberté dans l'espace pénal européen", in E. Bribosia et A. Weyembergh (eds.), *op. cit.*, p. 153-195; M. Den Boer, "The EU and Counter-terrorism: Human Rights in the Balance?", in *The law on Terror: Terrorism and Human Rights*, Nijmegen, Wolf Legal Publishers, 2003, p. 29-45; R. Goldstone,

the Framework Decision has been the subject of considerable criticism and one may indeed wonder whether it has succeeded in its attempt to overcome the usual difficulties met in the pursuit of a general definition of terrorism [23].

Many authors have denounced the definition as being imprecise and general and thus not in compliance with the principle of legality [24]. Such criticisms were addressed to each of the constituent elements of the terrorist offences. First, some material acts listed, such as the "threatening to commit" a terrorist act, are defined very broadly. Second, the criterion of dangerousness and the notion of intent, which are meant to lend specificity to terrorist offences, are extremely imprecise. The EU network of independent experts in human rights has concluded that these elements are not sufficient to define a terrorist offence precisely enough [25].

A number of formal safeguards have been raised during the negotiations and a special provision has been introduced in the text: "This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union" [26]. Such safeguards can be seen as reassuring because they give information on the meaning to give to the terms used and on the intentions of the authors of the text. However, they may also be analysed as a symptom of the negotiators' uneasiness, as an admission by them of the risks of abuses which arise from the chosen definition. In addition, the declaration annexed by the Council to the Framework Decision [27], which raises

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"The Tension between Combating Terrorism and Protecting Civil Liberties", in R. Ashby Wilson, *Human Rights in the "War on Terror"*, Cambridge, Cambridge University Press, 2005, p. 157-168.

[23] With regards to such difficulties see J.F. Gayraud, "Définir le terrorisme : est-ce possible, est-ce souhaitable ?", *RICPT*, 2, 1988, p. 185 and f.; K. Koufa Kalliopi, *Terrorism and Human rights*, Progress Report, UN document E/CN.4/Sub.2/2001/31, 27 juin 2007, para. 25, p. 8.

[24] See M.L. Cesoni, "Terrorisme et involutions démocratiques", *Rev. dr. pén.*, 2002, p. 141 and f.; I. Thomas, "La mise en œuvre en droit européen des dispositions internationales de lutte contre le terrorisme", *RGDIP*, 2, 2004, p. 475.

[25] See EU Network of Independent Experts in Fundamental Rights, *The balance between freedom and security in the response by the European Union and its Member States to the terrorist threats* (2004), p. 11, at http://europa.eu.int/comm/justice_home/cfr_cdf/doc/obs_thematique_fr.pdf

[26] Article 1(2) FD 2002.

[27] According to this annex : "The Council states that the Framework Decision on the fight against terrorism covers acts which are considered by all Member States of the European Union as serious infringements of their criminal laws committed by individuals whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilisation upon which these societies are founded. It has to be understood in this sense and cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring these democratic values, as was notably the case in some Member States during the Second World War, could now be considered as "terrorist" acts. Nor can it be construed so as to incriminate on terrorist grounds persons exercising their fundamental right to manifest their opinions, even if in the course of the exercise of such right they commit offences" (Council, doc. 14845/1/01, REV 1, 7 Dec. 2001).

the problem of the legitimacy of the struggle of freedom fighters [28], reinforces the subjective interpretation of the definition of terrorism and makes things even more confused. Critical views have been expressed and dangers of abuse have been underlined because the aim of the criminalisation of terrorism at the EU level is not to prevent specific acts from going unpunished [29] but rather to improve police and judicial criminal cooperation and apply exceptional measures (harsher penalties [30] and exceptional procedural rules including particular means of investigations [31]).

Reacting to these criticisms, the supporters of the Framework Decision underlined that the implementation measures at the national level as well as the margin of appreciation left to the judiciary would lead to a restrictive interpretation and application of the instrument and the definition of terrorism. However, it is uncertain whether the national authorities have effectively implemented the definitions provided by the Framework Decision in a stricter way and it is unclear how they might implement them in a stricter way without betraying the substance of the Framework Decision and thus risk being accused of failing to transpose the instrument. Besides, given the nature of the instrument, the margin of manoeuvre left to national legislators is very limited. In addition, although criminal law must be strictly interpreted [32], practice shows that not all judges tend to apply a strict interpretation of criminal provisions [33].

B. Council Framework Decision 2008/919/JHA of 28 November 2008

The EU Framework Decision 2008/919/JHA amends the 2002 Framework Decision in its Article 3 and introduces the offences of 'public provocation to commit a terrorist offence', 'training for terrorism' and 'recruitment for terrorism', as demanded by the earlier Council of Europe Convention of 2005 on the Prevention of Terrorism [34], from which the Framework Decision draws inspiration.

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[28] On terrorism and freedom fighters see J. Hubrecht, "Comment distinguer un 'combattant de la liberté' d'un terroriste?", *Esprit*, 1, 2002, p. 5 and f.; T. Garton Ash, "Is There a Good Terrorist?", *NY Review of books*, 29 November 2001.

[29] Terrorist offences were not criminalised as such in most Member States. However, specific criminal acts were prosecuted under different labels. In this regard see for instance the contribution within this book on the Belgian legislation and case-law.

[30] Article 5(2) FD 2002.

[31] See M.-L. Cesoni (ed.), *Nouvelles méthodes de lutte contre la criminalité: la normalisation de l'exception. Etude de droit comparé (France, EU, France, Pays-Bas)*, Bruxelles, Bruylant, 2007.

[32] On the principle of strict interpretation of criminal law see for instance F. Tulkens and M. Van De Kerchove, *Introduction au droit pénal. Aspects juridiques et criminologiques*, Bruxelles, Kluwer, 1993, p. 284 and f.; J. Messinne, "Tendances récentes en droit pénal et en procédure pénale", *Mélanges offerts à Robert Legros*, Bruxelles, Editions. de l'Université de Bruxelles, 1985, p. 459.

[33] See F. Tulkens and M. Van De Kerchove, *op. cit.*, p. 284-286. See for instance the contribution within this book on the Belgian legislation and case-law.

[34] See A. Hunt, "The Council of Europe Convention on the Prevention of Terrorism", *European Public Law*, 4, 2006, p. 603; Council of Europe (ed.), *"Apologie du terrorisme" and incitement to terrorism*, Strasbourg, Editions du Conseil de l'Europe, 2007.

Proposed by the Commission on 6 November 2007, this amendment is the result of a change in the terrorist threat, which sees an increase in the use of the internet in the self-training and self-radicalisation of potential terrorists with the consequent development of the 'lone wolves' phenomenon. In addition, more and more young Europeans are being recruited to carry out terrorism training in Pakistan or Afghanistan.

By virtue of the Framework Decision, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of [a terrorist offence] where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed. "Recruitment for terrorism" means to solicit another person to commit a terrorist offence or an offence related to a terrorist group. "Training for terrorism" means to provide instruction 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 committing a terrorist offence knowing that the skills provided are intended to be used for this purpose.

The three new offences are crimes of intent and it is not enough to be reckless for one of them to have been deemed to have been committed. The Framework Decision explicitly incriminates these offences when committed via the internet too.

This second Framework Decision suffers from the same democratic deficit as the first one. Despite the urgency of the amendment given developments in the terrorist threat, it would have been preferable, for the purpose of the principle of legality, to wait until the entry into force of the Treaty of Lisbon, which would have resulted in the involvement of the European Parliament as co-legislator and would have reduced the abovementioned democratic deficit.

The insertion of the three new offences has also raised another concern. On the one hand, the offence of provocation is likely to affect the right to freedom of expression *ex* Article 10 ECHR [35]. This right may be legitimately restricted under limited conditions identified in Article 10(2), *i.e.* only when interferences are prescribed by law, pursue a legitimate aim, and are "necessary in a democratic society". On the other hand, extending criminal liability beyond the traditional notion of attempt, the offences of recruitment and training are at risk of curtailing freedom of association and assembly *ex* Article 11 ECHR, which may only be restrained under the previously mentioned conditions of legality, necessity and proportionality [36].

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[35] I. Hare and J. Weistein (eds.), *Extreme Speech and Democracy*, Oxford, Oxford University Press, 2009.

[36] EU Network of Independent Experts in Fundamental Rights, *The requirements of fundamental rights in the framework of the measures of prevention of violent radicalisation and recruitment of potential terrorists*, 2005; OSCE/ODIHR, *Human Rights Considerations in Combating Incitement to Terrorism and Related Offences*, 2006, at http://www.osce.org/odihr/22052.

3. The structure of the publication

Following this introduction and a general critical assessment by Sabine Gless of Framework Decisions 2002/475/JHA and 2008/919/JHA, the book contains three main parts.

The first part will be devoted to the interplay between these two EU instruments and national provisions, including a study of the relevant domestic case law. Nine Member States have been selected in order to ensure a balanced representation based on where they are located in geographical terms, the nature of their judicial systems, having some "old" and some "new" Member States but also and particularly the division between two groups of States: a first group gathering few jurisdictions which have experienced serious and long-lasting periods of political violence and terrorism, developed specific terrorist offences and have been influential in providing a model for shaping a common European counter-terrorism strategy and a second group encompassing States which have defined terrorist offences as autonomous ones in their penal codes only as required by the Framework Decision of 2002 on combating terrorism. These nine Member States are France, Germany, Italy, Spain, the United Kingdom, Austria, Belgium, Denmark and Hungary. This study, which focuses on the legislation and case law of the selected jurisdictions, will follow a common grid of analysis entitled 'Guide for the contributions on national counter-terrorism legislation and case law', which is annexed to this introduction.

A second and briefer part looks at the influence of the two relevant EU framework decisions harmonizing the terrorist offences on European cooperation.

A third and last part is entirely dedicated to the issue of the shift towards prevention in the fight against terrorism and gathers several crosscutting reports for this purpose.

The book ends with a conclusion by Pedro Caeiro.

Annex I – Guide for the contributions to national counter-terrorism legislation and case law [37]

1. Political and criminological context :

1.1. Indicate whether and to what extent terrorism constitutes a major threat in your country – and whether it is a threat of an international or national kind.

2. Identify the legislation adopted to implement the Framework Decisions 2002 and 2008, highlighting in particular:

2.1 Whether your country has implemented both Framework Decisions of 2002 and 2008;

2.2 Whether the deadline for the implementation of the instrument was met;

2.3 If/why one or both instruments have not been implemented (*e.g.* pre-existing measures satisfying the requirements of the new instruments);

2.4 Whether the implementation of the Framework Decisions required the repeal of pre-existing provisions;

2.4 Whether the implementation of the new instruments introduced symbolic or significant legislative changes.

3. The legislation in detail:

3.1 Definition of the offences, penalties, liability of legal persons;

3.2 Rules of competence and prosecution;

3.3 Identify and explain eventual lacunas in the implementation of specific provisions (*e.g.* conflict with pre-existing national provisions, ambiguities in the definition of the framework decisions' provisions).

4. National case law

4.1 If available, please provide detailed information on the number of prosecutions and the number of convictions on the basis of a terrorism charge since 2001;

4.2 Example of concrete cases (Do judges interpret the law in accordance with the legislators' approach? Is their interpretation strict or broad? etc.);

4.3 Identify practical obstacles to the application of the law to concrete cases (contradictions within the framework decisions, the national provisions, lack of clarity, etc).

5. Perception of the instrument at the national level

5.1 The practitioners' assessment of the framework decisions and the legislation implementing them at the national level;

5.2 Do practitioners have an in-depth knowledge of the framework decisions' provisions and of the national legislation implementing them?

5.3 Do politicians, the media and civil society manifest a particular position towards the framework decisions and the relevant legislation at the national level?

5.4 Doctrinal perspective on the topic (bibliography attached).

6. Conclusion

6.1 Direct and indirect impact of the framework decisions and the relevant national legislation on the protection of fundamental rights (legality principle, presumption of innocence, burden of proof, etc.);

6.2. Impact of the framework decisions and the relevant national legislation on the legal framework as a whole and on domestic criminal policies;

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[37] This document is inspired by the *Modèle standard d'évaluation académique.* See A. Weyembergh and V. Santamaria (eds.), *The evaluation of European criminal law – The example of the Framework Decision on combating trafficking in human beings*, Bruxelles, Editions de l'Université de Bruxelles, 2009, p. 9-40.

6.3 Do you consider that the shift towards prevention and the development of special techniques of investigation have substantially expanded in the context of contemporary counter-terrorism frameworks?

Annex II – Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), *OJ*, no. L 164 of 22/06/2002, p. 3 and f.

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Union, and in particular Article 29, Article 31(e) and Article 34(2)(b) thereof,
Having regard to the proposal from the Commission [(1)],
Having regard to the opinion of the European Parliament [(2)],
Whereas:
(1) The European Union is founded on the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms. It is based on the principle of democracy and the principle of the rule of law, principles which are common to the Member States.
(2) Terrorism constitutes one of the most serious violations of those principles. The La Gomera Declaration adopted at the informal Council meeting on 14 October 1995 affirmed that terrorism constitutes a threat to democracy, to the free exercise of human rights and to economic and social development.
(3) All or some Member States are party to a number of conventions relating to terrorism. The Council of Europe Convention of 27 January 1977 on the Suppression of Terrorism does not regard terrorist offences as political offences or as offences connected with political offences or as offences inspired by political motives. The United Nations has adopted the Convention for the suppression of terrorist bombings of 15 December 1997 and the Convention for the suppression of financing terrorism of 9 December 1999. A draft global Convention against terrorism is currently being negotiated within the United Nations.
(4) At European Union level, on 3 December 1998 the Council adopted the Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice [(3)]. Account should also be taken of the Council Conclusions of 20 September 2001 and of the Extraordinary European Council plan of action to combat terrorism of 21 September 2001. Terrorism was referred to in the conclusions of the Tampere European Council of 15 and 16 October 1999, and of the Santa María da Feira European Council of 19 and 20 June 2000. It was also mentioned in the Commission communication to the Council and the European Parliament on the biannual update of the scoreboard to review progress on the creation of an area of "freedom, security and justice" in the European Union (second half of 2000). Furthermore, on 5 September 2001 the European Parliament adopted a recommendation on the role of the European Union in combating terrorism. It should, moreover, be recalled that on 30 July 1996 twenty-five measures to fight against terrorism were advocated by the leading industrialised countries (G7) and Russia meeting in Paris.
(5) The European Union has adopted numerous specific measures having an impact on terrorism and organised crime, such as the Council Decision of 3 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property [(4)]; Council Joint Action 96/610/JHA of 15 October 1996 concerning the creation and maintenance of a Directory of specialised counter-terrorist competences, skills and expertise to facilitate counter-terrorism cooperation between the Member States of the European Union [(5)]; Council Joint Action 98/428/JHA of 29 June 1998 on the creation of a European Judicial Network [(6)], with responsibilities in terrorist offences, in particular Article 2; Council Joint Action 98/733/JHA of 21 December 1998 on making it a

criminal offence to participate in a criminal organisation in the Member States of the European Union [7]; and the Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorist groups [8].

(6) The definition of terrorist offences should be approximated in all Member States, including those offences relating to terrorist groups. Furthermore, penalties and sanctions should be provided for natural and legal persons having committed or being liable for such offences, which reflect the seriousness of such offences.

(7) Jurisdictional rules should be established to ensure that the terrorist offence may be effectively prosecuted.

(8) Victims of terrorist offences are vulnerable, and therefore specific measures are necessary with regard to them.

(9) Given that the objectives of the proposed action cannot be sufficiently achieved by the Member States unilaterally, and can therefore, because of the need for reciprocity, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity. In accordance with the principle of proportionality, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.

(10) This Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law. The Union observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate.

(11) Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Terrorist offences and fundamental rights and principles

1. Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

– seriously intimidating a population, or
– unduly compelling a Government or international organisation to perform or abstain from performing any act, or
– seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons;
(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;
(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;
(i) threatening to commit any of the acts listed in (a) to (h).
2. This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

Article 2

Offences relating to a terrorist group

1. For the purposes of this Framework Decision, "terrorist group" shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. "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.
2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable:
(a) directing a terrorist group;
(b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.

Article 3

Offences linked to terrorist activities

Each Member State shall take the necessary measures to ensure that terrorist-linked offences include the following acts:
(a) aggravated theft with a view to committing one of the acts listed in Article 1(1);
(b) extortion with a view to the perpetration of one of the acts listed in Article 1(1);
(c) drawing up false administrative documents with a view to committing one of the acts listed in Article 1(1)(a) to (h) and Article 2(2)(b).

Article 4

Inciting, aiding or abetting, and attempting

1. Each Member State shall take the necessary measures to ensure that inciting or aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable.
2. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3, with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable.

Article 5

Penalties

1. Each Member State shall take the necessary measures to ensure that the offences referred to in Articles 1 to 4 are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition.
2. Each Member State shall take the necessary measures to ensure that the terrorist offences referred to in Article 1(1) and offences referred to in Article 4, inasmuch as they relate to terrorist offences, are punishable by custodial sentences heavier than those imposable under national law for such offences in the absence of the special intent required pursuant to Article

1(1), save where the sentences imposable are already the maximum possible sentences under national law.
3. Each Member State shall take the necessary measures to ensure that offences listed in Article 2 are punishable by custodial sentences, with a maximum sentence of not less than fifteen years for the offence referred to in Article 2(2)(a), and for the offences listed in Article 2(2)(b) a maximum sentence of not less than eight years. In so far as the offence referred to in Article 2(2)(a) refers only to the act in Article 1(1)(i), the maximum sentence shall not be less than eight years.

Article 6

Particular circumstances

Each Member State may take the necessary measures to ensure that the penalties referred to in Article 5 may be reduced if the offender:
(a) renounces terrorist activity, and
(b) provides the administrative or judicial authorities with information which they would not otherwise have been able to obtain, helping them to:
(i) prevent or mitigate the effects of the offence;
(ii) identify or bring to justice the other offenders;
(iii) find evidence; or
(iv) prevent further offences referred to in Articles 1 to 4.

Article 7

Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Articles 1 to 4 committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on one of the following:
(a) a power of representation of the legal person;
(b) an authority to take decisions on behalf of the legal person;
(c) an authority to exercise control within the legal person.
2. Apart from the cases provided for in paragraph 1, each Member State shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the offences referred to in Articles 1 to 4 for the benefit of that legal person by a person under its authority.
3. Liability of legal persons under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in any of the offences referred to in Articles 1 to 4.

Article 8

Penalties for legal persons

Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 7 is punishable by effective, proportionate and dissuasive penalties, which shall include criminal or non-criminal fines and may include other penalties, such as:
(a) exclusion from entitlement to public benefits or aid;
(b) temporary or permanent disqualification from the practice of commercial activities;
(c) placing under judicial supervision;
(d) a judicial winding-up order;
(e) temporary or permanent closure of establishments which have been used for committing the offence.

Article 9

Jurisdiction and prosecution

1. Each Member State shall take the necessary measures to establish its jurisdiction over the offences referred to in Articles 1 to 4 where:

(a) the offence is committed in whole or in part in its territory. Each Member State may extend its jurisdiction if the offence is committed in the territory of a Member State;

(b) the offence is committed on board a vessel flying its flag or an aircraft registered there;

(c) the offender is one of its nationals or residents;

(d) the offence is committed for the benefit of a legal person established in its territory;

(e) the offence is committed against the institutions or people of the Member State in question or against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union and based in that Member State.

2. When an offence falls within the jurisdiction of more than one Member State and when any of the States concerned can validly prosecute on the basis of the same facts, the Member States concerned shall cooperate in order to decide which of them will prosecute the offenders with the aim, if possible, of centralising proceedings in a single Member State. To this end, the Member States may have recourse to any body or mechanism established within the European Union in order to facilitate cooperation between their judicial authorities and the coordination of their action. Sequential account shall be taken of the following factors:

– the Member State shall be that in the territory of which the acts were committed,

– the Member State shall be that of which the perpetrator is a national or resident,

– the Member State shall be the Member State of origin of the victims,

– the Member State shall be that in the territory of which the perpetrator was found.

3. Each Member State shall take the necessary measures also to establish its jurisdiction over the offences referred to in Articles 1 to 4 in cases where it refuses to hand over or extradite a person suspected or convicted of such an offence to another Member State or to a third country.

4. Each Member State shall ensure that its jurisdiction covers cases in which any of the offences referred to in Articles 2 and 4 has been committed in whole or in part within its territory, wherever the terrorist group is based or pursues its criminal activities.

5. This Article shall not exclude the exercise of jurisdiction in criminal matters as laid down by a Member State in accordance with its national legislation.

Article 10

Protection of, and assistance to, victims

1. Member States shall ensure that investigations into, or prosecution of, offences covered by this Framework Decision are not dependent on a report or accusation made by a person subjected to the offence, at least if the acts were committed on the territory of the Member State.

2. In addition to the measures laid down in the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings [(9)], each Member State shall, if necessary, take all measures possible to ensure appropriate assistance for victims' families.

Article 11

Implementation and reports

1. Member States shall take the necessary measures to comply with this Framework Decision by 31 December 2002.

2. By 31 December 2002, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report drawn up from that information and a report from the Commission, the Council shall assess, by 31

December 2003, whether Member States have taken the necessary measures to comply with this Framework Decision.
3. The Commission report shall specify, in particular, transposition into the criminal law of the Member States of the obligation referred to in Article 5(2).

Article 12
Territorial application

This Framework Decision shall apply to Gibraltar.

Article 13
Entry into force

This Framework Decision shall enter into force on the day of its publication in the *Official Journal*.

(1) *OJ*, no. C 332 E, 27.11.2001, p. 300.
(2) Opinion delivered on 6 February 2002 (not yet published in the *Official Journal*).
(3) *OJ*, no. C 19, 23.1.1999, p. 1.
(4) OJ, no. C 26, 30.1.1999, p. 22.
(5) *OJ*, no. L 273, 25.10.1996, p. 1.
(6) *OJ*, no. L 191, 7.7.1998, p. 4.
(7) *OJ*, no. L 351, 29.12.1998, p. 1.
(8) *OJ*, no. C 373, 23.12.1999, p. 1.
(9) *OJ*, no. L 82, 22.3.2001, p. 1.

Annex III: Council Framework Decision of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism (2008/919/JHA), *OJ*, no. L 330 of 9.12.2008, p. 21-23

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article 29, Article 31(1)(e) and Article 34(2)(b) thereof,
Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (1),

Whereas:

(1) Terrorism constitutes one of the most serious violations of the universal values of human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms on which the European Union is founded. It also represents one of the most serious attacks on democracy and the rule of law, principles which are common to the Member States and on which the European Union is based.
(2) Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (2) is the basis of the counter-terrorist policy of the European Union. The achievement of a legal framework common to all Member States, and in particular, of a harmonised definition of terrorist offences, has allowed the counter-terrorism policy of the European Union to develop and expand, subject to the respect of fundamental rights and the rule of law.
(3) The terrorist threat has grown and rapidly evolved in recent years, with changes in the modus operandi of terrorist activists and supporters including the replacement of structured and hierarchical groups by semi-autonomous cells loosely tied to each other. Such cells inter-link international networks and increasingly rely on the use of new technologies, in particular the Internet.
(4) The Internet is used to inspire and mobilise local terrorist networks and individuals in Europe and also serves as a source of information on terrorist means and methods, thus functioning

as a "virtual training camp". Activities of public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism have multiplied at very low cost and risk.
(5) The Hague Programme on strengthening freedom, security and justice in the European Union, adopted by the European Council on 5 November 2004, underlines that effective prevention and combating of terrorism in full compliance with fundamental rights requires Member States not to confine their activities to maintaining their own security, but to focus also on the security of the Union as a whole.
(6) The Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union [3], recalls that a global response is required to address terrorism and that the expectations that citizens have of the Union cannot be ignored, nor can the Union fail to respond to them. In addition, it states that attention must focus on different aspects of prevention, preparedness and response to further enhance, and where necessary complement, Member States' capabilities to fight terrorism, concentrating particularly on recruitment, financing, risk analysis, protection of critical infrastructures and consequence management.
(7) This Framework Decision provides for the criminalisation of offences linked to terrorist activities in order to contribute to the more general policy objective of preventing terrorism through reducing the dissemination of those materials which might incite persons to commit terrorist attacks.
(8) United Nations Security Council Resolution 1624 (2005) calls upon States to take measures that are necessary and appropriate, and in accordance with their obligations under international law, to prohibit by law incitement to commit terrorist act or acts and to prevent such conduct. The report of the Secretary-General of the United Nations "Uniting against terrorism: recommendations for a global counter-terrorism strategy" of 27 April 2006, interprets the above-mentioned Resolution as providing for a basis for the criminalisation of incitement to terrorist acts and recruitment, including through the Internet. The United Nations Global Counter-Terrorism Strategy of 8 September 2006 mentions that the Member States of the UN resolve to explore ways and means to coordinate efforts at the international and regional level to counter terrorism in all its forms and manifestations on the Internet.
(9) The Council of Europe Convention on the Prevention of Terrorism establishes the obligations of States parties thereto to criminalise public provocation to commit a terrorist offence and recruitment and training for terrorism, when committed unlawfully and intentionally.
(10) The definition of terrorist offences, including offences linked to terrorist activities, should be further approximated in all Member States, so that it covers public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism, when committed intentionally.
(11) Penalties should be provided for natural persons having intentionally committed or legal persons held liable for public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism. These forms of behaviour should be equally punishable in all Member States irrespective of whether they are committed through the Internet or not.
(12) Given that the objectives of this Framework Decision cannot be sufficiently achieved by the Member States unilaterally, and can therefore, because of the need for European-wide harmonised rules, be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the EC Treaty and referred to in Article 2 of the EU Treaty. In accordance with the principle of proportionality, as set out in Article 5 of the EC Treaty, this Framework Decision does not go beyond what is necessary in order to achieve those objectives.
(13) The Union observes the principles recognised by Article 6(2) of the EU Treaty and reflected in the Charter of Fundamental Rights of the European Union, notably Chapters II and VI thereof. Nothing in this Framework Decision may be interpreted as being intended to

reduce or restrict fundamental rights or freedoms such as freedom of expression, assembly, or of association, the right to respect for private and family life, including the right to respect of the confidentiality of correspondence.
(14) Public provocation to commit terrorist offences, recruitment for terrorism and training for terrorism are intentional crimes. Therefore, nothing in this Framework Decision may be interpreted as being intended to reduce or restrict the dissemination of information for scientific, academic or reporting purposes. The expression of radical, polemic or controversial views in the public debate on sensitive political questions, including terrorism, falls outside the scope of this Framework Decision and, in particular, of the definition of public provocation to commit terrorist offences.
(15) The implementation of the criminalisation under this Framework Decision should be proportional to the nature and circumstances of the offence, with respect to the legitimate aims pursued and to their necessity in a democratic society, and should exclude any form of arbitrariness or discrimination,

HAS ADOPTED THIS FRAMEWORK DECISION:

Article 1

Amendments

Framework Decision 2002/475/JHA shall be amended as follows:

1. Article 3 shall be replaced by the following:

"Article 3
Offences linked to terrorist activities

1. For the purposes of this Framework Decision:

(a) "public provocation to commit a terrorist offence" shall mean the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed;
(b) "recruitment for terrorism" shall mean soliciting another person to commit one of the offences listed in Article 1(1)(a) to (h), or in Article 2(2);
(c) "training for terrorism" shall mean providing instruction 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 committing one of the offences listed in Article 1(1)(a) to (h), knowing that the skills provided are intended to be used for this purpose.
2. Each Member State shall take the necessary measures to ensure that offences linked to terrorist activities include the following intentional acts:
(a) public provocation to commit a terrorist offence;
(b) recruitment for terrorism;
(c) training for terrorism;
(d) aggravated theft with a view to committing one of the offences listed in Article 1(1);
(e) extortion with a view to the perpetration of one of the offences listed in Article 1(1);
(f) drawing up false administrative documents with a view to committing one of the offences listed in Article 1(1)(a) to (h) and Article 2(2)(b).
3. For an act as set out in paragraph 2 to be punishable, it shall not be necessary that a terrorist offence be actually committed".

2. Article 4 shall be replaced by the following:

"Article 4

Aiding or abetting, inciting and attempting

1. Each Member State shall take the necessary measures to ensure that aiding or abetting an offence referred to in Article 1(1), Articles 2 or 3 is made punishable.
2. Each Member State shall take the necessary measures to ensure that inciting an offence referred to in Article 1(1), Article 2 or Article 3(2)(d) to (f) is made punishable.
3. Each Member State shall take the necessary measures to ensure that attempting to commit an offence referred to in Article 1(1) and Article 3(2)(d) to (f), with the exception of possession as provided for in Article 1(1)(f) and the offence referred to in Article 1(1)(i), is made punishable.
4. Each Member State may decide to take the necessary measures to ensure that attempting to commit an offence referred to in Article 3(2)(b) and (c) is made punishable".

Article 2

Fundamental principles relating to freedom of expression

This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability.

Article 3

Implementation and report

1. Member States shall take the necessary measures to comply with this Framework Decision by 9 December 2010. In the implementation of this Framework Decision, Member States shall ensure that the criminalisation shall be proportionate to the legitimate aims pursued and necessary in a democratic society and shall exclude any form of arbitrariness and discrimination.
2. By 9 December 2010, Member States shall forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under this Framework Decision. On the basis of a report drawn up from that information and a report from the Commission, the Council shall assess, by 9 December 2011, whether Member States have taken the necessary measures to comply with this Framework Decision.

Article 4

Entry into force

This Framework Decision shall enter into force on the day of its publication in the *Official Journal of the European Union*.

(1) Not yet published in the *Official Journal*.
(2) *OJ*, no. L 164, 22.6.2002, p. 3.
(3) *OJ*, no. C 198, 12.8.2005, p. 1.

The two Framework Decisions
A critical approach [1]

Sabine Gless

1. Introduction

Terrorism is a very serious challenge in many ways, not only for people, but also for the fundamental principles of democracies bound to the rule of law. When for instance, in spring 2011 special US agents finally tracked down Osama Bin Laden and killed him, the execution set off a heated debate among lawyers: was this a legal execution, a justified action of killing a combat in a war against terrorists? Or are terrorists vested with all the rights of a criminal suspect [2], and thus certainly must be captured, out on trial and not killed?

Seven years before, Klaus Tolksdorf, the current president of the German Bundesgerichtshof declared: "The fight against terrorism cannot be a wild, unjust war" and ordered a retrial of Mounir el-Motassadeq, the only person successfully prosecuted for involvement in the September 11 attacks [3]. These attacks, as it is well known, have dramatically altered the context of discussions about fighting terrorism,

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[1] Parts of this contribution have been inspired by Cyrille Fijnaut's work; see S. Gless, "Fighting Terrorism in a "Rechtsstaat", in T. Sapens, M. Groenhuijsen and T. Kooijmanns (eds.), Antwerpen/Cambridge, Intersentia, 2011, p. 929-940. I wish to thank Dario Stagno and Claudine Abt, who have provided valuable help researching facts and editing the text.

[2] K. Ambos, "Terrorists Have Rights Too – What International Law Says about the Killing of Bin Laden", *Spiegel Online*, 2011, at http://www.spiegel.de/international/world/0,1518,762417,00.html; see also E. Guild, "The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the 'Terrorist Lists'", *JCMS*, 2008, p. 173-193, at p. 184-188.

[3] *New York Times*, 5 March 2004, at http://www.nytimes.com/2004/03/05/world/german-judges-order-a-retrial-for-a-9-11-figure.html.

in the US as well as in Europe [4]. According to Amnesty International the goal of suppressing terrorism has been used as a justification "for laws and practices designed simply to stifle dissent and opposition" [5]. Tolksdorf thus is not alone with this view, but shares his opinion with many of his European colleagues [6]. His position as the presiding judge in the appeal against Mr Motassadeq's conviction provided him with a world-wide audience for the claim that even in a terrorist trial all evidence must be made available, including exonerating evidence. Some weeks before, the German Bundesgerichtshof had already acquitted Abdelghani Mzoudi, the second suspect to be tried for involvement in the 9/11 attacks, of accessory to murder and membership in Al Qaeda, namely because, as one of the judges put it, the evidence was not enough to convict him [7].

In Europe, the prevailing view is that a justice system cannot bend to accommodate security concerns, not even those of international efforts to fight terrorism: "We cannot abandon the rule of law. That would be the beginning of a fatal development and ultimately a victory for terrorists" [8]. The reality of criminal justice systems, however, changed after 9/11 [9]. Most countries introduced special laws against terrorists [10]. Traditional international cooperation was modified and new transnational frameworks were established [11] – all sharing a common goal: the fight against terrorism.

My assignment for this publication is a critical evaluation of the changes brought by two relevant EU Framework Decisions:

– FD from 2002 on combating terrorism [12];

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[4] R. Bossong, "The Action Plan on Combating Terrorism", *JCMS*, 2008, p. 27-48, at p. 30, 34 and 42; C. Fijnaut, "The attacks on 11 September 2001, and the Immediate Response of the European Union and the United States", in J. Wouters and F. Naert (eds.), *Legal instruments in the fight against international terrorism. A transatlantic dialogue*, Leiden/Boston, Nijhoff, 2004, p. 15-36, at p. 22-26; E. Guild, *op. cit*., at p. 178-182; V. Mitsilegas, "Transatlantic Counter-Terrorism Cooperation after Lisbon", *Eucrim*, 2010, p. 111-117, at p. 111-113; J. Wouters and F. Naert, "Of Arrest Warrants, Terrorist Offences and Extradition Deals", *Common Market Law Review*, 2004, p. 909-935, at p. 909-911.

[5] Report of Amnesty International, "Human Rights Dissolving at the Borders? Counter-Terrorism and EU Criminal Law", *Amnesty International EU Office*, IOR 61/013/2005, p. 1-44, at p. 2, at http://ejp.icj.org/IMG/AIreport.pdf.

[6] See *e.g.* S. Gless discussing C. Fijnaut.

[7] *New York Times*, 6 February 2004, at http://www.nytimes.com/2004/02/06/world/faulting-us-germany-frees-a-9-11-suspect.html?ref=abdelghanimzoudi; for a more detailed discussion of the relevant German legal framework, see C. Safferling, "Terror and Law – Is the German Legal System able to deal with terrorism?", *German Law Journal*, 2004, p. 515-524.

[8] *New York Times*, 5 March 2004.

[9] R. Bossong, *op. cit*.; C. Fijnaut, "The attacks on 11 September 2001".

[10] See Martin Böse's and Robert Kert's country reports within this same publication.

[11] M. den Boer, C. Hillebrand and A. Nölke, "Legitimacy under Pressure: The European Web of Counter-Terrorism Networks", *JCMS*, 2008, p. 101-124, at p. 109-115; J. Wouters and F. Naert, *op. cit*., p. 910-913.

[12] Framework Decision 2002/475/JHA on combating terrorism, *OJ*, no. L 164, 22 June 2002, p. 3.

– FD from 2008 amending 2002 FD on combating terrorism [13].

Drafted and adopted in Brussels, published in the EU *Official Journal* some years ago, the two legal acts, hardly appear as documents of a wild unjust war.

But in the legal profession critics are not so easily appeased, and thus I keep with my assignment for this publication and take a critical approach. I will discuss four objections against the Framework Decisions:

– their definition of terrorism,
– the duty to punish (on the ground of imprecise EU parameters),
– the obligation to expand Member States' jurisdiction,
– and the possible infringements on human rights.

2. EU-Framework in general

To combat terrorism is high on the EU agenda today [14]. Even before the terrorist attacks of 11 September 2001 the Commission had launched work on European legislation targeting terrorist crimes [15]. After the outrages in the US the initiatives for Framework Decisions defined terrorism and gave punishment parameters to the Member States as well as they established a more efficient cooperation, among other things, by introducing the European arrest warrant, which by now basically replaces traditional extradition procedures between the Member States. Several other legal acts followed [16]. The listing of terrorists, the freezing of their property without legal remedies or fair trial guarantees led to well-known and interesting case law establishing principles of due process [17]. Today legal instruments giving access to data exchange basis when pursuing terrorists are of high priority in practice [18].

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[13] Framework Decision 2008/919/JHA amending Framework Decision on combating terrorism, *OJ*, no. L 330, 9 December 2008, p. 21.

[14] See for instance V.V. Ramraj, M. Hor and K. Roach (eds.), *Global Anti-Terrorism Law and Policy*, Cambridge, Cambridge University Press, 2005, p. 444-447.

[15] E.J. Husabø and I. Bruce, *Fighting Terrorism through Multilevel Criminal Legislation, Security council Resolution 1337, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law*, Leiden/Boston, Martinus Nijhoff Publishers, 2009, p. 55-56.

[16] J. Wouters and F. Naert, *op. cit.*, p. 911-915; V. Mitsilegas, "The Third Wave of Third Pillar Law", *European Law Review*, 2009, p. 523-560, at p. 538-542.

[17] See *e.g.* ECJ, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Commission and Council v. Kadi*; CFI, 11 June 2009, T-318/01, *Commission and Council v. Omar*; ECJ, 29 June 2010, Judgment C-550/09, *E. and F.*; see G. de Búrca, "The European Court of Justice and the International Legal Order After Kadi", *Harvard International Law Journal*, 2010, p. 1-50; S. Gless and D. Schaffner, "Judicial review of freezing orders due to a UN listing by European Courts", in S. Braum and A. Weyembergh (eds.), *Le contrôle juridictionnel dans l'espace pénal européen/The judicial control in EU cooperation in criminal matters*, Bruxelles, 2009, p. 163-193; E. Guild, "The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the 'Terrorist Lists'", *op. cit.*, p. 173-193.

[18] V. Mitsilegas, "Transatlantic Counter-Terrorism Cooperation", *op. cit.* ; K.L. Scheppele, "Other People's PATRIOT Acts: Europe's Response to September 11", *Loyola Law Review*, 2004, p. 89-148, at p. 89.

The Framework Decisions are predominantly vehicles for the harmonization of substantive criminal law as, in addition to defining terrorism, and guiding criminal procedure and the law of mutual legal assistance in criminal matters, they also oblige Member States to criminalize certain behaviour as terrorist acts and extend their jurisdiction in order to enable them to prosecute these acts (or extradite the individuals concerned to another State for prosecution) [19]. The Framework Decisions are quite detailed in many respects. Despite, or rather because of the regulations, two basic questions however remain: (1) Which acts are actually punishable as acts of terrorism? (2) How should EU Member States react to terrorism – given their commitment to "*Rechtsstaatlichkeit*", human rights, and the principle of proportionality [20]?

3. Definition of terrorism – a critical approach

A. Terrorism according to EU-law

One core issue in the legal fight against terrorism is settling on a valid definition of terrorism itself, since a common definition is a prerequisite for harmonization as well as for the effective cooperation between States to combat the various aspects of terrorism.

1. The context

The EU definition of terrorism is established in Art. 1(1) of the 2002 FD, and is basically three-fold: consisting of the *aim* of the *action*, the intention of the actor and the specific *act* being committed.

The 2002 FD defines aim, or rather context and intent, matter-of-factly as being: "to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation". There is (1) neither reference to the promotion of core values, like democracy, liberty, equality ruling that system nor (2) to the cross-border or international element. Both aspects can cause trouble to the Member States national criminal justice systems, which may in fact wish to react to certain political movements – like animal rights activists – not with the range of instruments provided by terrorist legislation. The question thus arose: Is it conceivable that EU legislation sets the national agenda, for instance asking for incrimination of social movements? Or does it lack the democratic legitimation to do so in principle [21]?

In response to the Member States' concern that the broad definition of terrorism would eventually infringe on the right to legitimate protest, a declaration was attached to the Draft 2002 FD, asserting that EU law should not criminalise persons who exercise their legitimate right to manifest their opinions, for instance defending democratic values, even if they commit criminal offences [22].

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[19] A. Klip, *European Criminal Law: an Integrative Approach*, Antwerp/Oxford/Portland, Intersentia, 2009, p. 200; V. Mitsilegas, "The Third Wave", p. 524-527; J. Monar, "Anti-Terrorism law and policy: the case of the European Union", *in* V.V. Ramraj, M. Hor, K. Roach (eds.), *op. cit.,* p. 425-452, at p. 433.

[20] M. den Boer, C. Hillebrand and A. Nölke, *op. cit.*, p. 103-105.

[21] E. Guild, *op. cit*., p. 175.

[22] See during the preparatory process Council Document 14845/01 of 6 December 2001.

The declaration however is not part of the 2002 FD and thus has no clear-cut legal impact, the latter being questionable anyway due to the vagueness of the phrasing.

For the EU Member States in any case the principle question remains, whether the EU has a mandate or rather a democratic legitimation for such legislation [23].

This demur appears at first sight to be a rather technical aspect: according to EU law, namely.

According to Art. 83 TFEU, the EU is only competent to "establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particular serious crime with a *cross-border dimension*..." [24]. But the establishment of an EU parameter for terrorism, which will hereafter encompass all forms of alleged terrorist activities, might go beyond the scope of Art. 83 TFEU, because it obliges all EU Member States to fight internal national activism according to the EU standards, and thus impinges of a State's sovereign right to solve internal conflict issues according to its own agenda. The importance of this aspect becomes clear when looking at the first mentioned gap in the definition of terrorism, *i.e.* the lack of a reference to the long term intentions of an actor: Is it the same in the eyes of the law whether a liberal democracy shall be destabilized or a dictatorship? Must all violent acts be labelled terrorism?

2. Achievement of a politically neutral definition

What appears as a shortcoming at first glance might, however, turns out to be a big achievement. There has been a lively debate since the 1950s, especially within the United Nations, as to whether national liberation movements should be excluded from the definition of terrorism [25]. In 1977 the Council of Europe agreed on a common European definition of terrorism, which did not take into account the long-term projects violent actors might have. This was because distinguishing a terrorist from a freedom fighter is very difficult, as the often quoted phrase "One man's terrorist is another man's freedom fighter" demonstrates.

It has thus often been deemed unwise to put a criminal court, responsible for handing down a verdict of personal guilt in a certain case, in the position of having to pass judgment on a political situation at the same time.

Unostentatious definitions of terrorism may eventually jeopardize the important boundary between terrorism and other politically motivated violent acts, which might be considered legitimate freedom-fighting or activism for a good political cause, albeit aggressive. From a criminal lawyer's point of view, the blurring of distinction between these two areas might become a problem, especially when, as is the case in EU Member States, States have an obligation to incriminate membership in a terrorist group or glorifying a terrorist group, etc.

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[23] For further discussion on standards of democratic, legal and social legitimacy see M. DEN BOER, C. HILLEBRAND and A. NÖLKE, *op. cit.*, p. 103-109.

[24] Consolidated version of the treaty on the functioning of the European Union, *OJ*, no. C 83, 30 March 2010, p. 47.

[25] C. GREENWOOD, "War, Terrorism and International Law", in C. GREENWOOD (ed.), *Essays on War in International Law*, London, 2006, p. 409-432, at p. 409-410.

In practice there have been cases in which prosecutions on terrorist charges were received by the public with disbelief or rather discontent.

In Austria law enforcement authorities brought charges against animal activists for being part of a criminal conspiracy, arguing that both mainstream and militant groups were part of a criminal conspiracy – not because of their actions, but because of their beliefs in support of animal rights– and that they should therefore be held responsible for a wide range of crimes committed in the name of animal rights. Although the activists were acquitted eventually, doubts about the feasibility and adequacy of such legislation prevail – and were recently fuelled after law enforcement authorities prosecuted a member of an association of fathers fighting for changes in family law.

This blurring distinction between terrorists and activists has also been the subject of discussion in Great Britain, where courts were faced with the question of whether planning terrorism against undemocratic and tyrannical regimes can be excused as a noble cause. In *R v. F*, a Libyan national, whose family was allegedly murdered by or on behalf of Gaddafi's regime, was granted asylum in the UK in 2003. In 2006, he was arrested and charged under the UK Terrorism Act (2000) for being in possession of two documents that could be used to further terrorist activities. He denied ever having seen one of the documents but said that the other one was given to him by the leader of a resistance movement in Libya opposed to Gaddafi. His argument was that he was a freedom fighter against a tyrannical government and he therefore had a 'reasonable excuse' as set out in Section 58(3) of the Terrorism Act (2000). The judges held that being a 'freedom fighter' is not a defense stating, "… the terrorist legislation applies to countries which are governed by tyrants and dictators. There is no exemption from criminal liability for terrorist activities which are motivated or said to be morally justified by the alleged nobility of the terrorist cause" [26]. The recent wave of revolutions in the Arab world has led to the fall of tyrant regimes, paving the way for these countries to enjoy the freedoms enjoyed by others in democratic regimes such as that of the UK. Therefore, one cannot help by wonder if the courts in Great Britain will still uphold this judgment in light of the Arab spring.

A definition detached from any reference to values (like democracy or *Rechtsstaat*) or reasons for committing the terrorist act (like freedom fighting) leads to problems if a State wishes – maybe for good reasons – not to condemn certain violent acts as terrorist acts. This problem gets worse as a trigger mechanism for a duty to criminalize "terrorism" is set by superior law, like in the EU. This means that States cannot react individually to the particular challenges that they as individual States may face, such as the existence of a national political movement which has members who may resort to violence in an attempt to achieve their ends.

Some examples, drawn from the list of Nobel peace laureates, illustrate the problem of individuals perceived by some States to be pursuing an illegal cause, and who could even be defined as "terrorists". They include *i.e.* Menachem Begin (head of Irgun Tzwai Le'umi, recipient of the Nobel Peace Prize in 1978); Yassir Arafat (for belonging to the PLO, and a Nobel Peace Prize winner in 1994); Nelson Mandela (for belonging to the ANC, equally a Nobel Peace Prize winner).

[26] [2007] 2 All ER 193, [2007] EWCA Crim 243, [2007] 3 WLR 164.

Today however, the discussion about drawing the line between legitimate freedom fighters and terrorists is replaced by the functional approach of looking at the actions as such [27].

3. Terrorist acts

In Article 1(1) of the 2002 FD, specified acts which are criminal are defined first. These include attacks upon persons' lives or their physical integrity, kidnapping or hostage taking, or interfering with or disrupting the supply of water, power or any other fundamental resource the effect of which is to endanger human life, etc.

Whereas the 2002 FD only obliged Member States to punish a rather limited number of acts linked to terrorist activities in its Art. 3, such as aggravated theft committed with a view to facilitate terrorist acts, extortion committed with a view to the perpetration of terrorist acts, the drawing up of false administrative documents with a view to committing terrorist acts the 2008 FD broadened the obligation to include several more acts linked to terrorist activities or rather to prepare, organise or supporting terrorism, such as:

a. "public provocation to commit a terrorist offence" – meaning distributing, or otherwise making available, a message to the public, with the intent to incite the commission of a terrorist act;
b. "recruitment for terrorism" – meaning to solicit another person to commit a terrorist act;
c. "training for terrorism" – meaning to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or instructing individuals in other specific methods or techniques, for the purpose of committing a terrorist act.

Since the crime of terrorism itself is not defined in the EU framework, the 2008 FD effectively bases broadly phrased subsidiary offences for which terrorism remain inchoate [28]. During the legislative procedure several members of the European Parliament as well as members of national parliaments of EU Member States criticised the vagueness of the elements of the new offences [29].

The amendment of the former Framework Decision was made, especially to include incitement to terrorism on the Internet [30]. The World Wide Web however brings together people (and jurisdictions) with quite diverging concepts of "public provocation to commit a terrorist offence" or "incitement to terrorism". Thus, a legal obligation to prosecute such behaviour must be well reflected in terms of legitimate jurisdiction. A possible solution would be the supply of specific definitions of the

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[27] S. Kirsch and A. Oehmichen, "Judges gone astray: The fabrication of terrorism as an international crime by the Special Tribunal for Lebanon", *Durham Law Review Online*, 2011, p. 1-20, at p. 11-13.

[28] Report of Amnesty International, *op. cit*., p. 2.

[29] L. Mellinger, "Illusion of Security: Why the Amended EU Framework Decision Criminalizing 'Incitement to Terrorism' on the Internet Fails to Defend Europe from Terrorism", *Syracuse Journal of International Law and Commerce*, 2010, p. 339-368, at p. 354.

[30] *Ibid*., p. 340-341.

outlawed behaviour. Otherwise the burden of defining the concepts will be on the national criminal courts and balancing the need for criminal prosecution with the right of free speech and other democratic freedoms [31].

Moreover, the obligation to prosecute exists even if a terrorist offence was never actually committed in the end. This is provided for in Art. 3(3) of the 2008 FD. Art. 4 obliges Member States to punish the aiding or abetting, inciting or the attempt to commit terrorist acts.

Thus Member States' obligation to punish is quite broad and rather vague, and it appears unclear how national legislators will implement the EU parameters into national law.

B. Terrorism in (customary) international law – and the "just war" argument

Did the EU lawmaker fall short in his duty to provide a comprehensive definition – or is the task of defining punishable terrorism (as opposed to justified freedom fighting) an unanswerable dilemma?

The definition of terrorism has been in law journal's headlines recently [32] following the decision handed down by the Special Tribunal for Lebanon which – among other things – defined terrorism as a crime according to customary international law [33], and thus in principle binding for all States, including EU Member States [34].

According to the Special Tribunal for Lebanon rules of international law define terrorism as follows: the commission of a criminal act causing harm to life, limb and property, including a concrete threat or an attempt [35] to commit such an act, as the only objective element of the offence [36]. Many academics still hold the view that currently no universal definition of terrorism exists [37]. This position is

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[31] *Ibid*., p. 360-363.

[32] K. Ambos, "Judicial creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?", *Leiden Journal of International Law*, 2011, p. 655-675, at p. 655; S. Kirsch and A. Oehmichen, *op. cit*., p. 1.

[33] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176*bis*, 16 February 2011 ('Decision'), nos. 85 and 102.

[34] Whether the tribunal's judges were right to press ahead with a definition in the case before them, may be left open here. For a critique see K. Ambos, *op. cit.*, p. 665-666; S. Kirsch and A. Oehmichen, *op. cit*., p. 6-7.

[35] Art. 2(2) International Convention for the Suppression of Terrorist Bombings, A/RES/52/164 of 15 Dec. 1997, 2149 U.N.T.S 256; Art. 2(3) International Convention for the Suppression of the Financing of Terrorism, A/Res/54/109 of 9 Dec. 1999, 39 I.L.M. 270; Art. 1(a) Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970, 860 U.N.T.S. 106; Art. 2(1)(d) Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 14 Dec. 1973, 1035 U.N.T.S. 168; all conventions can be found at [www.un.org/terrorism/instruments.shtml].

[36] Interlocutory Decision, no. 188.

[37] *E.g.* K. Ambos, *op. cit.*, p. 666; E. Stubbins Bates *et al.*, *Terrorism and International Law: Accountability, Remedies, and Reform: a Report of the IBA Task Force on Terrorism*, Oxford, Oxford University Press, 2011, p. 1; M. Ch. Bassiouni, "Terrorism: the Persistent

exemplified by Schmid and Jongman [38] who have analysed 109 different definitions of terrorism and isolated 22 different elements characterising terrorism. Later, in a report, Schmid suggested a definition of terrorism, which has latterly become famous due to its simplicity: acts of terrorism are defined as 'peacetime equivalents of war crimes' [39]. This definition blurs again however the legal parameters of such crimes, some of which are to be prosecuted as crimes in a national criminal justice systems and some of which, the more serious ones, which shall be taken care of by the nascent international criminal justice systems, or even outside of the criminal justice system altogether by triggering a reaction based on international humanitarian law.

Part of the dilemma terrorism poses to legal systems is that of drawing lines between criminal law measures and responses that may be labeled either as military or humanitarian interventions. Both of these forms of intervention lie beyond the scope of national criminal justice systems, and carry the risk of being viewed as acts of terrorism themselves.

The 2002 FD on combating terrorism deals with this paradox also, albeit only marginally: Recital 11 of the preamble asserts, that "Actions by armed forces during periods of armed conflicts, which are governed by international humanitarian law within the meaning of these terms under that law … cannot be viewed as terrorism". Ultimately, this exemption clause is based on a "just war" argument, too. The law makes the assumption that certain circumstances may exempt violence from the legal range of terrorism. Violence which could under different circumstances be considered to be an act of terrorism is defined into a certain act of freedom fighting [40].

References to the "just war" argument have dominated political discussions mainly regarding the fight against terrorism, especially in the US, with regard to Al-Qaeda [41]. A reference to the "just war" argument in legal documents governing the States' reactions to terrorism provoke however a series of questions, including: May such a principle be applied to (politically motivated) violence at all? If this is answered in the affirmative, certain justifications could be invoked to transform violence from an evil to a non-evil-action. Not only States themselves are provided with some protections in this way insofar as State intervention is exempted from any terrorism charge without further question, but also other groups or individuals as well.

Dilemma of Legitimacy", *Case Western Reserve Journal of International Law*, 2004, p. 299-306, at p. 305; S. Kirsch and A. Oehmichen, *op. cit*., p. 7-8.

[38] A.P. Schmid and A.J. Jongman, *Political Terrorism – a New Guide to Actors, Authors, Concepts, Data Bases, Theories and Literature*, Amsterdam/New Brunswick, 2nd ed., 1988, p. 5-8.

[39] United Nations Office on Drugs and Crime: Definitions of Terrorism, at http://web.archive.org/web/20070527145632/http://www.unodc.org/unodc/terrorism_definitions.html, last visited on 27 April 2011.

[40] S. Peers, "EU Responses to Terrorism", *International & Comparative Law Quarterly*, 2003, p. 227-243, at p. 236-238.

[41] See also A. Oehmichen, *Terrorism and Anti-Terror Legislation: The Terrorised Legislator? A Comparison of Counter-Terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France*, Antwerp, Intersentia, 2009, p. 389 and f.

How these exemption clauses can be accommodated within the wider fight against terrorism and whether they simply open a Pandora's box of difficulties remain moot questions.

4. Fighting terrorism by means of criminal law

It would nevertheless be unfair to judge efforts designed to fight terrorism by means of the criminal law, like those foreseen in the EU-Framework Decisions, solely on the fact that they do not solve the historically difficult distinction between terrorism and freedom fighting. Criticism should rather focus on the special use of criminal law in a certain system, like that established by the Framework Decisions or in the national criminal justice systems of the Member States [42].

The EU act basically does two things: (a) compel Member States to punish certain acts, and (b) force Member States to claim wide jurisdiction in order to ensure prosecution. These obligations correspond in general with the demands of the Special Tribunal for Lebanon, which deduced from rules of international law two obligations on States and non-State actors: (1) the obligation to refrain from engaging in acts of terrorism, and (2) the obligation to prevent and repress terrorism, and in particular to prosecute and try alleged perpetrators [43].

A. Obligation to punish

The Framework Decisions – as explained above – oblige Member States to punish certain behaviour as terrorist acts. This fact can be interpreted quite differently: It could be viewed as progress towards a united fight against terrorism *or* as an EU infringement on State sovereignty and a violation of a democratically legitimized law.

The duty to criminalize, established by the Framework Decisions, is quite broad – as illustrated previously – especially if one bends the rather imprecise language to encompass all its possible meanings, for instance when criminalizing acts of preparation and/or conspiracy to commit acts of terrorism [44].

The EU obligation is thus problematic, taking into account the basic question of a European competence to define criminal terrorist acts in the first place and the Framework Decision's failure to frame punishable terrorist activities in a precise language [45]. Nonetheless, in attempting to come up with definitions it is important to keep in mind – as the German Bundesverfassungsgericht phrased it in its 2009 Lisbon Judgement – that: "decisions on substantive and formal criminal law are

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[42] For a comparative overview see: A. Oehmichen, *Terrorism and Anti-Terror Legislation*, *op. cit.*; E.J. Husabø/I.Bruce, *op. cit*., p. 171-192.

[43] Interlocutory Decision, no. 102.

[44] For critical views see *e.g.* S. Melander, "The Use of Criminal Law in Combating Terrorism – a Nordic Perspective", in K. Ligeti (ed.), *Homage to Imre A. Wiener*, Toulouse, Eres, 2010, p. 119-135, p. 121-123.

[45] A. Klip, *op. cit.*, p. 200; S. Peers, *op. cit*., p. 230-232.

particularly important to the ability of a constitutional State to democratically shape its laws" [46].

However, seven years earlier, the 2002 FD set out to compel Member States to punish certain acts of "terrorism" on the grounds of EU parameters laid out in the Framework Decision. And, this Framework Decision does not meet in all aspects the requirements of precise language and coherent concepts that govern most of the different Member States' criminal justice systems.

One must furthermore always keep in mind the fact that, in practice, the importance of anti-terrorist legislation is often not the elements of crime that it defines, but the special investigative methods or other measure provided to deal with it [47]. Neither of these aspects are however laid down in the EU-Framework Decisions.

B. Expansion of jurisdiction

The EU-Framework Decisions also oblige the Member States to expand their criminal jurisdiction. According to Art. 9 of the 2002 FD on combating terrorism, each Member State shall take the necessary measures to establish

- territorial jurisdiction (extending the concept to vessels flying its flag and aircraft registered there),
- jurisdiction based on a broad concept of the active personality principle (including acts committed by "residents" and legal persons as well as citizens) and
- jurisdiction based on a broad concept of the protective principle, where acts are committed "against the institutions or people" of that Member State or an EU institution or body based there.

Given that EU-Member states have not yet settled on a legal act which allocates clear-cut jurisdiction to one EU-state in cases of a positive competence conflict, the obligation to expand jurisdiction and potentially intensify the problem of multiple jurisdictions is striking [48].

C. Infringements of human rights?

In addition, anti-terrorist legislation always raises concerns about the adequate protection of human rights and civil liberties [49]; this is especially true in an atmosphere of "war against terrorism" [50].

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[46] BVerfG, 30 June 2009, 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, no. 252 at http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[47] A. Oehmichen, "Incommunicado Detention in Germany: An Example of Reactive Anti-terror Legislation and Long-term Consequences", *German Law Journal*, 2008, p. 855-887; S. Peers, *op. cit*., p. 237-243.

[48] See E.J. Husabø/I.Bruce, *op. cit*., p. 315-357.

[49] A. Oehmichen, *Terrorism and Anti-Terror Legislation, op. cit*., p. 343 and f.; E. Guild, *op. cit*., p. 174-175.

[50] See *e.g.* F.D. Ní Aoláin, "Looking Ahead: Strategic Priorities and Challenges for the United Nations High Commissioner for Human Rights", *Columbia Human Rights Law Review*, 2004, p. 469-491, at p. 487-491.

The European authorities have however realised by now that respect for human rights adds to the legitimacy of the fight against terrorism, and thus strive for compliance with human rights as well as spreading respect of human rights in order to ensure that there is a sound basis for cooperation with third countries.

On the face of it, such concern seems unnecessary anyway, since Art. 2 of the 2008 FD explicitly declares that: "[The] Framework Decision shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability."

The legal effect and impact of Art. 2 of the 2008 FD in a particular case remains nonetheless somewhat unclear. Could a defendant raise an objection based on an infringement of Art. 2 of the 2008 FD? Or could a Member State raise, for instance, a reservation of national freedom of expression if its national criminal laws were to be screened before the ECJ because the penal statutes against terrorism were judged too lenient from a Brussels point of view?

Before the 2008 amendment, the 2002 FD on combating terrorism only stated in its preamble that the Union is "based on the principle of democracy and the principle of the rule of law" and that the Framework Decision "respects fundamental rights" as guaranteed by the European Convention on Human Rights (ECHR) and Member States" constitutions and observes the principle recognised by the EU Charter of Fundamental Rights, agreed in December 2000 [51].

The European Court of Human Rights (Eur. Court HR) has however rejected the invoking of human rights protections to justify *violent* political acts committed in the territory of signatory States to the European Convention on Human Rights in general: Given that all of them are considered to be democratic countries, and have made a commitment to human rights protection, political violence may be treated like any other serious criminal offence [52]. However in recent judgements the European Court of Human Rights has been firm in Human Rights protection as regards of certain consequences like preventive detention as well as deportation or expulsion of terrorist suspects, if they cannot be convicted in a criminal trial [53]. Thus the FD's parameters for substantive criminal law should only raise concern with regard to the incrimination of non-violent actions, such as alleged recruitment for terrorism in certain situations, which touch upon the freedom of association, the freedom of speech and expression

[51] The preamble further asserts that the Framework Decision could not be interpreted to "reduce or restrict fundamental rights or freedom such as the right to strike, freedom of assembly, of association and of expression, including the right of everyone to form and join trade unions… and the related right to demonstrate".

[52] See furthermore Eur. Court HR, 18 January 1978, *Ireland v. UK*, no. 5310/71; Eur. Court HR, 27 September 1995, *McCann and Others v. UK*, no. 18984/91.

[53] See *e.g.* Eur. Court HR, 19 February 2009, *A. and Others v. UK* , no. 3455/05; or Eur. Court HR, 28 February 2008, *Saadi v. Italy*, no. 37201/06; or Eur. Court HR, 24 March 2009, *Ben Salah v. Italy*, no. 38128/06.

as well as on the principle of legal certainty [54]. But there is still little relevant case law up to now.

Counter terrorism legislation often collides with the right to freedom of speech because it often seeks to suppress certain politically motivated acts [55]. Furthermore, terrorism, or rather the fear of terrorism, is also often used to justify the use of special police and prosecution powers that reduce the usual protection of fair trial guarantees relating to investigations, detention, and criminal proceedings [56]. Both are highly problematic from a human rights perspective.

European countries basically have abstained from the "war on terrorism"-terminology. The common understanding is that societies have to balance the need for criminal prosecution and democratic entitlements, especially the right of free speech [57]. These privileges are legally grounded in the Art. 10 ECHR as well as in Art. 19 ICCPR and Art. 20 ICCPR (International Convenant on Civil and Political Rights). Both grant the right of freedom of thought and expression, giving the individual the right to have an opinion and voice it without government intrusion [58]. The exercise of these rights, however, may be subject to such limitations as are lawful in a democratic society in order to protect national society and public safety.

5. Conclusion

The EU-Framework Decisions provide the grounds on which Member States have, at least partly, built their national criminal sanctions against terrorism. In doing so, legislators – at the European and the State level – have had to create systems which allow them to fight violent attacks effectively, avoiding unwanted consequences on other levels.

Basically the criminal justice systems face two problems: (a) Criminal prosecution and warfare instruments must be kept separately, *i.e.* as long as terrorism is regarded a crime, all alleged terrorists must be treated like alleged criminals and have the basic rights of criminal suspects; (b) criminal justice systems must draw an adequate line between those groups advancing legitimate political goals with controversial means

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[54] Eur. Court HR, 26 April 1979, *Sunday Times v. United Kingdom*, no. 6538/74; Eur. Court HR, 30 January 1998, *United Communist Party v. Turkey*, 133/1996/752/951; Eur. Court HR, 13 February 2003, *Welfare Party v. Turkey*, nos. 41340/98, 41342/98, 41343/98, 41344/98.

[55] See *e.g.* F.D. Ní Aoláin, *op. cit*, p. 489-491; S. Douglas-Scott, "The Rule of Law in the European Union – putting the security into the EU's Area of Freedom, Security and Justice", *European Law Review*, 2004, p. 219-242, at p. 221-224.

[56] See judgments regarding infiltration of undercover agents in terrorist organisation – Eur. Court HR, 5 February 2008, *Ramanauskas v. Lithuania*, no. 74420/01; or Eur. Court HR, 10 March 2009, *Bykov v. Russia*, no. 4378/02 – which are only legitimate if there is an adequate legal base and a guarantee of supervision of independent authority as well as a clear distinction between identifying perpetrators and inciting an innocent person; regarding collection and automatic procession of data (data mining), see Eur. Court HR, 4 May 2000, *Rotaru v. Romania*, no. 28341/95; and Eur. Court HR, 4 December 2008, *S. and Marper v. UK* (DNA storage), nos. 30562/04, 30566/04.

[57] L. Mellinger, *op. cit*., at p. 360-365.

[58] C. Brants and S. Franken, "The protection of fundamental human rights in criminal process General report", *Utrecht Law Review*, 2009, p. 7-65, at p. 28-29.

and those which have crossed the line, not only propagating illegitimate political goals, but using punishable means.

Addressing the problem, the European legislator has different possibilities:

To solve the first problem, requirements for phrasing the statutes incriminating terrorism could be modified in a way that "freedom activists" could be exempted, for instance by way of a negative definition entered. § 278(c)(3) of the Austrian Criminal Code provides an example for such exemption: According to that statute a violent act is not judged as terrorist act, if the aim is to establish or reconstitute democratic or constitutional power or to protect human rights [59].

Another way out of a terrorist verdict could be the acknowledgement of "good cause" as an exceptional justification or excuse. The result is very similar as if the statute would itself carry an exemption clause. For reasons of criminal doctrine however it is different, whether there is no "legal wrong" ("*Unrecht*") committed or if a "legal wrong" is by way of exception justified or excused.

A third potential way to avoid unwanted terrorist charges could be a mechanism to drop charges if the prosecuting authorities or the courts realize that terrorist laws are applied in a case of legitimate freedom fighting or political activism of the "good sort".

The need for an outlet is obvious in the 2002 FD itself, namely in the exemption clause based on a "just war" argument: The assumption that certain circumstances may in fact transform violence from what may otherwise be considered to be an act of terrorism into an act of freedom fighting [60]. References to the "just war"-argument have dominated political discussions, especially in the US, with regard to Al-Qaeda. But Europe hopefully will not follow the example and construe criminal prosecution as warfare.

[59] § 278(c)(3) StGB: "(3) *Die Tat gilt nicht als terroristische Straftat, wenn sie auf die Herstellung oder Wiederherstellung demokratischer und rechtsstaatlicher Verhältnisse oder die Ausübung oder Wahrung von Menschenrechten ausgerichtet ist*" at http://www.internet4jurists.at/gesetze/bg_stgb01.htm#%C2%A7_170.

[60] S. Peers, *op. cit.*, p. 236.

Part II

The interplay between counter-terrorism European instruments and domestic provisions

Les infractions terroristes en droit pénal français
Quel impact des décisions-cadres de 2002 et 2008 ?

Henri Labayle

1. Introduction

Apprécier la conformité d'une législation nationale à une décision-cadre devrait être chose simple, normalement. Tel n'est pas nécessairement le cas lorsque l'on se penche sur la décision-cadre 2002/475 relative à la lutte contre le terrorisme. Son caractère essentiellement réactif, au lendemain des évènements dramatiques du 11 septembre, la présence d'un arsenal juridique international particulièrement impressionnant en la matière, la variété des manifestations terroristes visées rendent en effet à son propos l'exercice de l'évaluation délicat.

Un premier point de vue, technocratique, consiste à lister méthodiquement dans un tableau de correspondance les dispositions respectives du droit interne et de la décision-cadre. Indispensable, cette démarche n'est cependant pas suffisante car elle ne permet pas de rendre compte exactement de l'effet utile de la règle de l'Union.

Une mise en perspective plus politique de la situation nationale est en effet indispensable pour comprendre à quel point l'impact de cette règle conditionne ou pas la réponse pénale nationale. A cet égard, la situation du droit français est particulièrement significative tant cet effet est relatif.

2. Le contexte de la lutte anti-terroriste en France

La position de la France au regard de la lutte contre le terrorisme est assez simple à analyser du point de vue juridique comme politique. Très tôt, la France a été confrontée aux attentats terroristes sur son territoire ou à travers ses ressortissants et ses biens. Elle a donc adapté son comportement à ce type de menace et développé une législation et une politique répressive spécifique à ce type de criminalité.

D'un point de vue politique, il est bon de rappeler que la France a eu à affronter différentes vagues de terrorisme d'origine et de signification diverses, de façon grave

et ancienne. Du terrorisme interne à base séparatiste comme en Corse ou au Pays basque jusqu'au terrorisme interne radical comme Action directe en passant par le terrorisme lié à sa politique étrangère au Proche-Orient [1] ou en Algérie [2], la France a eu à subir toutes les formes de violence liées au terrorisme : enlèvements et prises d'otages, assassinats de hauts fonctionnaires ou de dirigeants, détournements d'avion, attentats à l'explosif sur son territoire et à l'étranger jalonnent l'histoire des trente dernières années de manière grave et importante. Cette actualité ne se dément pas puisque s'achève en ce moment à Paris le procès de l'assassinat en Corse du préfet Erignac tandis qu'un certain nombre de ressortissants français sont encore aujourd'hui pris en otage à l'étranger.

Tout en développant sa propre réponse interne, la République française s'est donc associée immédiatement aux premiers procédés de collaboration européenne en matière de lutte contre le terrorisme, tels ceux entamés dans le cadre des groupes Trevi notamment. Cette attitude explique également qu'à partir des années quatre-vingt, sa politique extraditionnelle ait contribué systématiquement à la répression du terrorisme, en particulier dans ses relations avec les autres Etats européens dans leur lutte contre le terrorisme. Le virage de cette politique dans sa relation bilatérale avec l'Espagne a été déterminant de ce point de vue, à compter du moment où les juridictions françaises ont refusé de considérer que le terrorisme pouvait bénéficier de la règle de non-extradition en matière politique en raison de sa gravité.

Du point de vue juridique, le positionnement de la France est tout aussi clair, notamment en ce qui concerne sa participation aux différents instruments internationaux de lutte contre le terrorisme et aux différentes enceintes où ce droit s'élabore. La France est donc de ce fait partie aujourd'hui à la quasi-totalité des grandes conventions internationales en la matière [3].

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[1] Avec une série d'attentats dans les rues de Paris, de fin 1985 à l'automne 1986, en liaison avec des tensions avec l'Iran.

[2] De juillet à octobre 1995 avec des attentats à Paris liés à des mouvements islamistes algériens.

[3] Par exemple, voir : convention relative aux infractions et à certains actes survenus à bord des aéronefs, adoptée à Tokyo le 14 septembre 1963 ; convention pour la répression de la capture illicite d'aéronefs, signée à La Haye le 16 décembre 1970 ; convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, adoptée à Montréal le 23 septembre 1971 ; convention internationale contre la prise d'otages, adoptée par l'AG des NU le 17 décembre 1979 ; convention sur la protection physique des matières nucléaires, adoptée à Vienne le 3 mars 1980 ; protocole pour la répression des actes illicites de violence dans les aéroports servant à l'aviation civile internationale, complémentaire à la convention pour la répression des actes illicites dirigés contre la sécurité de l'aviation civile, adopté à Montréal le 24 février 1988 ; convention pour la répression des actes illicites dirigés contre la sécurité de la navigation maritime, adoptée à Rome le 10 mars 1988 ; protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental, adopté à Rome le 10 mars 1988 ; convention sur le marquage des explosifs plastiques aux fins de détection, adoptée à Montréal le 1er mars 1991 ; convention pour la répression des attentats terroristes à l'explosif, adoptée par l'AG des NU le 15 décembre 1997 ; convention internationale pour la répression du financement du terrorisme, adoptée par l'AG des NU le 9 décembre 1999. Pour le texte le plus récent, voir la loi 2007-1474 du 17 octobre 2007 autorisant la ratification du protocole

Historiquement comme techniquement, la période charnière du droit français en matière de lutte contre le terrorisme se situe au milieu des années quatre-vingt, à la suite et en réaction à la campagne d'attentats précités à Paris. La loi 86-1020 du 9 septembre 1986, plus de quinze ans avant la décision-cadre 2002/475 du 13 juin 2002 fixe l'état du droit français. Les choix de politique criminelle effectués à l'époque constituent effectivement une « étape essentielle dans la prise en compte du terrorisme par le droit français » [4]. Ils n'ont pas été infirmés depuis, bien au contraire.

Les options de la législation française sont donc relativement simples à résumer. Le droit français fait tout d'abord le choix de privilégier un régime juridique spécifique applicable au terrorisme, celui de l'aggravation de la criminalité ordinaire et celui d'un régime procédural particulier. Au plan technique, il mise sur la centralisation et la spécialisation des acteurs de la répression, y compris judiciaires, avec pour option de mettre la règle de droit au service d'une démarche collective d'anticipation et de prévention de l'infraction terroriste.

3. La législation anti-terroriste française

La législation française est composée à titre principal de deux grands textes, la loi 86-1020 du 9 septembre 1986 précitée et la loi 2006-64 du 23 janvier 2006 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers, adoptée au lendemain des attentats de Londres.

A diverses reprises, le législateur est également intervenu en matière anti-terroriste, hors de ces deux grandes lois, souvent d'ailleurs en liaison avec l'actualité criminelle. Il s'agit de la loi du 22 juillet 1996 adoptée à la suite des attentats terroristes commis sur le sol français pendant l'été 1995, de la loi 2001-1062 du 15 novembre 2001 relative à la sécurité quotidienne, de la loi 2003-329 du 18 mars 2003 pour la sécurité intérieure, de la loi 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité, de la loi 2008-1245 et, plus récemment, de la loi 2011-267 du 14 mars 2011 d'orientation et de programmation pour la performance de la sécurité intérieure dite LOPSI 2. Cette inflation législative complète les dispositifs en vigueur, principalement à des fins de prévention et de surveillance. On notera que, comme son homologue européen, cette législation est essentiellement « réactive », c'est-à-dire adoptée en faisant suite à des agressions terroristes préalables.

De ce catalogue particulièrement fourni, se dégage donc un constat paradoxal : il n'existe pas formellement de texte de transposition de la décision-cadre 2002/475 en droit pénal français alors que l'inflation législative de ce droit applicable au terrorisme (près d'une dizaine de textes législatifs) couvre largement la matière (et au-delà) et aurait permis, au moins, une référence au droit de l'Union, référence que l'on est bien en peine de trouver. Quoi qu'il en soit, le caractère particulièrement fourni de la législation française rendait inutile une telle transposition dès 2004, époque du premier rapport d'évaluation de la Commission [5]. La Commission l'avait d'ailleurs

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portant amendement à la convention européenne pour la répression du terrorisme du Conseil de l'Europe.

[4] M.E. Cartier, « Le terrorisme dans le nouveau code pénal français », *RSC*, 1995 p. 225.

[5] COM (2004) 409 du 8 juin 2004.

noté, la France étant avec l'Espagne les deux seuls Etats à ne pas avoir adopté une législation spécifique à cet égard [6].

Enfin, il n'est pas inintéressant de noter que la législation pénale française, faite de deux textes centraux et d'apports successifs ou de prorogations dans le temps de dispositions temporaires, est accompagnée d'un mécanisme de suivi parlementaire. Classique quand il est le fait du gouvernement, lequel respecte d'ailleurs rarement l'obligation législative de remettre annuellement un rapport sur l'application de la loi [7], ce mécanisme est plus intéressant quand il est le fait du législateur lui-même. La Commission des Lois de l'Assemblée nationale a ainsi adopté un rapport d'évaluation et de suivi des textes, en 2008, faisant le bilan de l'application de la législation anti-terroriste [8]. Il n'est pas indifférent de voir le législateur noter que bon nombre de dispositions exceptionnelles qu'il a votées n'ont, en fait, jamais fait l'objet d'une application concrète, relativisant ainsi l'intérêt de tels dispositifs d'exception. Là encore, et ces schémas ne sont pas nouveaux, le droit de la lutte anti-terroriste se distingue par la volonté politique d'associer un discours sécuritaire fort, au besoin déconnecté des besoins réels, à la nécessité technique d'une réponse pénale.

4. Contenu de la législation française

Le Code pénal français répond en tous points à la volonté exprimée par le droit de l'Union européenne. Il procède ainsi à une individualisation claire de la criminalité terroriste en droit pénal.

Pour ce faire, son livre quatrième, intitulé *Des crimes et délits contre la Nation, l'Etat et la paix publique*, contient un titre II intitulé *Du terrorisme*, décomposé en deux chapitres distincts relatifs aux « actes de terrorisme » (chapitre 1, articles 421-1 à 421-6) et à des « dispositions particulières » (chapitre 2, articles 422-1 à 422-7).

A. L'infraction terroriste

Vérifier la compatibilité du droit pénal français avec les prescriptions de la décision-cadre 2002/475 n'est guère compliqué. Le Code pénal français utilise deux techniques pour incriminer l'infraction terroriste [9], qui se révèlent en conformité avec les articles 1 et 2 de la décision-cadre. Dans un premier temps, il s'appuie sur des infractions de droit commun dont la finalité « terroriste » justifie un traitement particulier. Dans un second temps, il érige certaines infractions terroristes en infractions « autonomes ».

A la première catégorie correspond l'alinéa 1 de l'article 421-1 du Code pénal qui incrimine le terrorisme par sa finalité puisqu'un certain nombre d'infractions « constituent des actes de terrorisme, lorsqu'elles sont intentionnellement en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur ».

Une énumération de sept catégories d'infractions est ensuite listée, c'est-à-dire :

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[6] SEC (2004) 288, p. 3.

[7] Voir l'article 32 de la loi du 23 janvier 2006.

[8] Assemblée nationale, Rapport E. Diard et J. Dray, 5 février 2008, n° 683.

[9] Sur le thème, voir J. Alix, *Terrorisme et droit pénal, étude critique des incriminations terroristes*, Paris, Dalloz, 2010.

« 1° Les atteintes volontaires à la vie, les atteintes volontaires à l'intégrité de la personne, l'enlèvement et la séquestration ainsi que le détournement d'aéronef, de navire ou de tout autre moyen de transport, définis par le livre II du présent code ;
2° Les vols, les extorsions, les destructions, dégradations et détériorations, ainsi que les infractions en matière informatique définis par le livre III du présent code ;
3° Les infractions en matière de groupes de combat et de mouvements dissous définies par les articles 431-13 à 431-17 et les infractions définies par les articles 434-6 et 441-2 à 441-5 ;
4° Les infractions en matière d'armes, de produits explosifs ou de matières nucléaires définies par le I de l'article L. 1333-9, les articles L. 1333-11 et L. 1333-13-2, le II des articles L. 1333-13-3 et L. 1333-13-4, les articles L. 1333-13-6, L. 2339-2, L. 2339-5, L. 2339-8 et L. 2339-9 à l'exception des armes de la 6e catégorie, L. 2339-14, L. 2339-16, L. 2341-1, L. 2341-4, L. 2341-5, L. 2342-57 à L. 2342-62, L. 2353-4, le 1° de l'article L. 2353-5 et l' article L. 2353-13 du Code de la défense ;
5° Le recel du produit de l'une des infractions prévues aux 1° à 4° ci-dessus ;
6° Les infractions de blanchiment prévues au chapitre IV du titre II du livre III du présent code ;
7° Les délits d'initié prévus à l'article L. 465-1 du Code monétaire et financier ».

Ce dispositif appelle plusieurs remarques. En premier lieu, la notion « d'entreprise terroriste » pose évidemment problème, au même titre que « l'association structurée » visée par la décision-cadre avait nourri les interrogations. En droit interne, ce concept a fait l'objet de nombre de critiques auxquelles le Conseil constitutionnel a mis fin dans sa décision n° 86-213 DC du 3 septembre 1986 en estimant qu'elle satisfaisait aux conditions de précision et de clarté exigées de la loi pénale. Elle correspond à une variété de « l'association de malfaiteurs » connue du droit pénal et visée par l'article 2 de la décision-cadre et, quoi que l'on en dise, son indétermination ajoutée à celle de la notion de « terrorisme » en fait une notion particulièrement élastique.

En second lieu, la technique législative de l'énumération retenue par le droit français pose effectivement des questions de principe. Le législateur peut évidemment être tenté d'allonger indéfiniment les éléments de cette liste, déjà passablement large puisqu'elle renvoie à des infractions de droit commun basiques telles par exemple que le vol ou le délit d'initié. La loi de 1994 établissant le nouveau Code pénal n'ayant pas été déférée au juge constitutionnel, ce procédé n'a pu être validé par ce dernier. En 1996, le Conseil constitutionnel a cependant censuré une disposition législative classant le délit d'aide à l'entrée ou au séjour irrégulier des étrangers parmi les infractions susceptibles d'être qualifiées d'acte de terrorisme [10]. Le Conseil a jugé que le législateur avait « entaché son appréciation d'une disproportion manifeste », dans la mesure où les agissements visés n'étaient pas des actes matériels directement attentatoires à la sécurité des biens ou des personnes mais constituaient un simple comportement d'aide à des personnes en situation irrégulière, n'étant pas en relation immédiate avec la commission de l'acte terroriste. Il a d'ailleurs souligné qu'au cas où un lien avec une entreprise terroriste apparaîtrait, les faits pourraient être poursuivis

[10] Décision n° 96-377 DC du 16 juillet 1996.

sous d'autres qualifications, comme le recel de criminel ou la participation à une association de malfaiteurs.

A la seconde technique d'incrimination du terrorisme correspond l'individualisation de certains actes autonomes par le Code pénal dans ses articles 421-2, 421-2-1, 421-2-2, 421-2-3. Il s'agit en premier lieu, depuis 2004, d'un terrorisme que l'on pourrait qualifier « d'écologique » puisque, sur la base de l'article 421-2, le législateur va au delà des dispositions de l'article 1 h) de la décision-cadre :

> « Constitue également un acte de terrorisme, lorsqu'il est intentionnellement en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur, le fait d'introduire dans l'atmosphère, sur le sol, dans le sous-sol, dans les aliments ou les composants alimentaires ou dans les eaux, y compris celles de la mer territoriale, une substance de nature à mettre en péril la santé de l'homme ou des animaux ou le milieu naturel ».

En second lieu, conformément à l'article 2 de la décision-cadre 2002/475, l'article 421-2-1 incrimine :

> « le fait de participer à un groupement formé ou à une entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un des actes de terrorisme mentionnés aux articles précédents ».

En troisième lieu, l'article 421-2-2 incrimine en tant qu'acte de terrorisme :

> « le fait de financer une entreprise terroriste en fournissant, en réunissant ou en gérant des fonds, des valeurs ou des biens quelconques ou en donnant des conseils à cette fin, dans l'intention de voir ces fonds, valeurs ou biens utilisés ou en sachant qu'ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l'un quelconque des actes de terrorisme prévus au présent chapitre, indépendamment de la survenance éventuelle d'un tel acte ».

Enfin, dans la logique de la répression de certains faits criminels tels que le trafic de stupéfiants ou le proxénétisme, le législateur punit dans l'article 421-2-3 :

> « Le fait de ne pouvoir justifier de ressources correspondant à son train de vie, tout en étant en relations habituelles avec une ou plusieurs personnes se livrant à l'un ou plusieurs des actes visés aux articles 421-1 à 421-2-2, est puni de sept ans d'emprisonnement et de 100 000 euros d'amende ».

En l'état, se pose alors la question de la compatibilité du droit français avec les prescriptions de la décision-cadre modifiée en 2008. Est en cause principalement l'article 3 de la décision-cadre et plus particulièrement la question de la « provocation publique » et dans une moindre mesure celle de l'entraînement et du recrutement de terroristes, les autorités françaises semblant penser que les dispositions concernant l'association de malfaiteurs suffiraient à y répondre [11]. Pour ce qui est de la « provocation », la loi française de 1881 sur la liberté de la presse semblerait y répondre également, sous réserve qu'elle soit « directe » [12] et publique quand bien même on serait en droit de douter de la lisibilité de ce renvoi à un texte vieux de plus

[11] En ce sens, voir les réponses apportées par la France lors de l'examen thématique de mise en œuvre des conventions du Conseil de l'Europe, octobre 2006.

[12] Ce que ne précise pas la décision-cadre.

d'un siècle, en droit comme en fait. Elle est punie de cinq ans d'emprisonnement et de 45 000 € d'amende mais connaît un contentieux extrêmement limité. Au vu des modalités contemporaines de la provocation en question, sur Internet ou certains réseaux sociaux, on peut néanmoins douter raisonnablement qu'un texte adopté pour de tout autres raisons puisse être adapté…

B. Les sanctions des infractions terroristes

Sur la base de l'article 5 de la décision-cadre 2002/475, les Etats membres prennent les mesures « nécessaires » pour punir les infractions terroristes de sanctions pénales effectives, proportionnées et dissuasives obéissant à un certain nombre de seuils liés à la gravité de l'infraction. A l'évidence, le droit pénal français s'y conforme en les dépassant largement. Il effectue une distinction selon que les infractions terroristes sont autonomes ou pas.

La condition fixée par l'article 5 de la décision-cadre 2002/475 relative à une sévérité accrue en raison de « l'intention spéciale » animant son auteur est manifestement satisfaite.

Pour ce qui est des infractions ordinaires qui sont qualifiées de terroristes par la finalité animant leur auteur, la peine de droit commun est ici aggravée du fait de cette finalité.

L'article 421-3 du Code pénal dispose ainsi que :

> « Le maximum de la peine privative de liberté encourue pour les infractions mentionnées à l'article 421-1 est relevé ainsi qu'il suit lorsque ces infractions constituent des actes de terrorisme :
>
> 1° Il est porté à la réclusion criminelle à perpétuité lorsque l'infraction est punie de trente ans de réclusion criminelle ;
>
> 2° Il est porté à trente ans de réclusion criminelle lorsque l'infraction est punie de vingt ans de réclusion criminelle ;
>
> 3° Il est porté à vingt ans de réclusion criminelle lorsque l'infraction est punie de quinze ans de réclusion criminelle ;
>
> 4° Il est porté à quinze ans de réclusion criminelle lorsque l'infraction est punie de dix ans d'emprisonnement ;
>
> 5° Il est porté à dix ans d'emprisonnement lorsque l'infraction est punie de sept ans d'emprisonnement ;
>
> 6° Il est porté à sept ans d'emprisonnement lorsque l'infraction est punie de cinq ans d'emprisonnement ;
>
> 7° Il est porté au double lorsque l'infraction est punie d'un emprisonnement de trois ans au plus ».

A cela, le même article ajoute que les dispositions du Code relatives à la période de sûreté [13] sont applicables aux crimes et aux délits punis de dix ans d'emprisonnement prévus par le présent article.

Un constat est facile à tirer de l'observation de ce régime : lorsque l'infraction est punie de trois ans au plus, la sanction est doublée. Au delà, l'aggravation de la peine retenue est d'un degré (de 5 à 7, de 7 à 10, de 10 à 15, de 15 à 20, de 20 à 30, de 30 à la réclusion criminelle à perpétuité). D'où le passage de certaines infractions

[13] Article 132-23.

du régime délictuel au régime criminel, de l'alinéa 5 à 4 de l'article 421-1, du fait de leur mobile terroriste [14].

Pour ce qui est des actes de terrorisme « autonomes », le Code pénal manifeste la même sévérité.

L'article 421-4 relatif au terrorisme « écologique » dispose ainsi que :

> « L'acte de terrorisme défini à l'article 421-2 est puni de vingt ans de réclusion criminelle et de 350 000 euros d'amende.
> Lorsque cet acte a entraîné la mort d'une ou plusieurs personnes, il est puni de la réclusion criminelle à perpétuité et de 750 000 euros d'amende.
> Les deux premiers alinéas de l'article 132-23 relatif à la période de sûreté sont applicables au crime prévu par le présent article ».

L'article 421-5 relatif au financement du terrorisme prévoit que :

> « Les actes de terrorisme définis aux articles 421-2-1 et 421-2-2 sont punis de dix ans d'emprisonnement et de 225 000 euros d'amende.
> Le fait de diriger ou d'organiser le groupement ou l'entente défini à l'article 421-2-1 est puni de vingt ans de réclusion criminelle et de 500 000 euros d'amende.
> La tentative du délit défini à l'article 421-2-2 est punie des mêmes peines.
> Le régime des peines de sûreté est également applicable ».

L'article 421-6 aggrave les peines encourues lorsque l'entreprise terroriste est susceptible d'entraîner mort d'homme :

> « Les peines sont portées à vingt ans de réclusion criminelle et 350 000 euros d'amende lorsque le groupement ou l'entente définie à l'article 421-2-1 a pour objet la préparation :
> 1° Soit d'un ou plusieurs crimes d'atteintes aux personnes visés au 1° de l'article 421-1 ;
> 2° Soit d'une ou plusieurs destructions par substances explosives ou incendiaires visées au 2° de l'article 421-1 et devant être réalisées dans des circonstances de temps ou de lieu susceptibles d'entraîner la mort d'une ou plusieurs personnes ;
> 3° Soit de l'acte de terrorisme défini à l'article 421-2 lorsqu'il est susceptible d'entraîner la mort d'une ou plusieurs personnes.
> Le fait de diriger ou d'organiser un tel groupement ou une telle entente est puni de trente ans de réclusion criminelle et 500 000 euros d'amende ».

Le régime des périodes de sûreté est applicable en la matière.

A cet ensemble, le Code pénal, dans un chapitre deuxième, ouvre la possibilité de prononcer des peines dites « complémentaires », généralement plus importantes que dans le droit commun.

L'article 422-3 dispose ainsi que :

> « Les personnes physiques coupables de l'une des infractions prévues par le présent titre encourent également les peines complémentaires suivantes :

[14] On peut citer à cet égard l'article 322-6 du Code pénal visant « la destruction, la dégradation ou la détérioration d'un bien appartenant à autrui par l'effet d'une substance explosive, d'un incendie ou de tout autre moyen de nature à créer un danger pour les personnes » qui sont sanctionnées d'une peine de dix ans et de 150 000 euros. Qualifiée de terroriste, elle est sanctionnée d'une peine de quinze ans de réclusion criminelle.

1° L'interdiction des droits civiques, civils et de famille, suivant les modalités prévues par l'article 131-26. Toutefois, le maximum de la durée de l'interdiction est porté à quinze ans en cas de crime et à dix ans en cas de délit ;
2° L'interdiction, suivant les modalités prévues par l'article 131-27, soit d'exercer une fonction publique ou d'exercer l'activité professionnelle ou sociale dans l'exercice ou à l'occasion de l'exercice de laquelle l'infraction a été commise, le maximum de la durée de l'interdiction temporaire étant porté à dix ans, soit, pour les crimes prévus par les 1° à 4° de l'article 421-3, l'article 421-4, le deuxième alinéa de l'article 421-5 et l'article 421-6, d'exercer une profession commerciale ou industrielle, de diriger, d'administrer, de gérer ou de contrôler à un titre quelconque, directement ou indirectement, pour son propre compte ou pour le compte d'autrui, une entreprise commerciale ou industrielle ou une société commerciale. Ces interdictions d'exercice peuvent être prononcées cumulativement ;
3° L'interdiction de séjour, suivant les modalités prévues par l'article 131-31. Toutefois, le maximum de la durée de l'interdiction est porté à quinze ans en cas de crime et à dix ans en cas de délit ».

L'article 422-4 précise que :

« L'interdiction du territoire français peut être prononcée dans les conditions prévues par l'article 131-30, soit à titre définitif, soit pour une durée de dix ans au plus, à l'encontre de tout étranger coupable de l'une des infractions définies au présent titre ».

L'article 422-6 ajoute que :

« Les personnes physiques ou morales reconnues coupables d'actes de terrorisme encourent également la peine complémentaire de confiscation de tout ou partie de leurs biens quelle qu'en soit la nature, meubles ou immeubles, divis ou indivis ».

Enfin, le même chapitre deuxième apporte un certain nombre de précisions qui sont de nature à satisfaire aux prescriptions de la décision-cadre 2002/475.

Il en va ainsi de la responsabilité des personnes morales mentionnée aux articles 7 et 8 de la décision-cadre.

L'article 422-5 indique ainsi que le droit commun s'applique ici en disposant que :

« Les personnes morales déclarées responsables pénalement, dans les conditions prévues par l'article 121-2, des infractions définies au présent titre encourent, outre l'amende suivant les modalités prévues par l'article 131-38, les peines prévues par l'article 131-39.
L'interdiction mentionnée au 2° de l'article 131-39 porte sur l'activité dans l'exercice ou à l'occasion de l'exercice de laquelle l'infraction a été commise ».

Par ailleurs, les « circonstances particulières » de l'article 6 de la décision-cadre sont prises en compte par le Code pénal français.

L'article 422-1 prévoit que :

« Toute personne qui a tenté de commettre un acte de terrorisme est exempte de peine si, ayant averti l'autorité administrative ou judiciaire, elle a permis d'éviter la réalisation de l'infraction et d'identifier, le cas échéant, les autres coupables ».

L'article 422-2 précise que :

> « La peine privative de liberté encourue par l'auteur ou le complice d'un acte de terrorisme est réduite de moitié si, ayant averti les autorités administratives ou judiciaires, il a permis de faire cesser les agissements incriminés ou d'éviter que l'infraction n'entraîne mort d'homme ou infirmité permanente et d'identifier, le cas échéant, les autres coupables. Lorsque la peine encourue est la réclusion criminelle à perpétuité, celle-ci est ramenée à vingt ans de réclusion criminelle ».

Enfin, la situation des victimes mentionnée par l'article 10 est réglée par l'article 422-7 qui dispose que :

> « Le produit des sanctions financières ou patrimoniales prononcées à l'encontre des personnes reconnues coupables d'actes de terrorisme est affecté au fonds de garantie des victimes des actes de terrorisme et d'autres infractions ».

C. Compétences et poursuites

La Commission le note elle-même dans son rapport d'évaluation de 2004, la question n'est guère problématique. Outre sa compétence territoriale, la loi française établit la compétence des juridictions françaises pour une série d'infractions commises à l'étranger, sur la base des articles 689 et suivants du Code de procédure pénale.

L'article 689 dispose ainsi que :

> « Les auteurs ou complices d'infractions commises hors du territoire de la République peuvent être poursuivis et jugés par les juridictions françaises soit lorsque, conformément aux dispositions du livre I^er^ du Code pénal ou d'un autre texte législatif, la loi française est applicable, soit lorsqu'une convention internationale ou un acte pris en application du traité instituant les Communautés européennes donne compétence aux juridictions françaises pour connaître de l'infraction ».

Il est précisé par l'article 689-1 que :

> « En application des conventions internationales visées aux articles suivants, peut être poursuivie et jugée par les juridictions françaises, si elle se trouve en France, toute personne qui s'est rendue coupable hors du territoire de la République de l'une des infractions énumérées par ces articles. Les dispositions du présent article sont applicables à la tentative de ces infractions, chaque fois que celle-ci est punissable ».

A cela, une série d'articles du CPP établis à la suite de la ratification d'un ensemble de conventions internationales réprimant le terrorisme établissent la compétence des juridictions françaises. Il s'agit de l'article 689-3 pour la convention européenne de 1977 [15], l'article 689-4 pour la convention sur la protection physique des matières

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[15] « Pour l'application de la convention européenne pour la répression du terrorisme, signée à Strasbourg le 27 janvier 1977, et de l'accord entre les Etats membres des Communautés européennes concernant l'application de la convention européenne pour la répression du terrorisme, fait à Dublin le 4 décembre 1979, peut être poursuivie et jugée dans les conditions prévues à l'article 689-1 toute personne coupable de l'une des infractions suivantes : 1° Atteinte volontaire à la vie, tortures et actes de barbarie, violences ayant entraîné la mort, une mutilation ou une infirmité permanente ou, si la victime est mineure, une incapacité totale de travail supérieure à huit jours, enlèvement et séquestration réprimés par le livre II du Code pénal ainsi que les menaces définies aux articles 222-17, alinéa 2, et 222-18 de ce code, lorsque l'infraction est commise contre une personne ayant droit à une protection internationale, y compris les agents diplomatiques ; 2° Atteintes à la liberté d'aller et venir définies à l'article 421-1 du Code

nucléaires de 1980 [16], l'article 689-5 pour la convention pour la répression d'actes illicites contre la sécurité de la navigation maritime et pour l'application du protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental, faits à Rome le 10 mars 1988 [17], l'article 689-6 pour la convention sur la répression de la capture illicite d'aéronefs, signée à La Haye le 16 décembre 1970, et la convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, signée à Montréal le 23 septembre 1971 [18], l'article 689-7 pour le protocole pour la répression des actes illicites de violence dans les aéroports

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pénal ou tout autre crime ou délit comportant l'utilisation de bombes, de grenades, de fusées, d'armes à feu automatiques, de lettres ou de colis piégés, dans la mesure où cette utilisation présente un danger pour les personnes, lorsque ce crime ou délit est en relation avec une entreprise individuelle ou collective ayant pour but de troubler gravement l'ordre public par l'intimidation ou la terreur ».

[16] « Pour l'application de la convention sur la protection physique des matières nucléaires, ouverte à la signature à Vienne et New York le 3 mars 1980, peut être poursuivie et jugée dans les conditions prévues à l'article 689-1 toute personne coupable de l'une des infractions suivantes : 1° Délit prévu à l'article L1333-11 du Code de la défense ; 2° Délit d'appropriation indue prévue par l'article L1333-9 du code précité, atteinte volontaire à la vie ou à l'intégrité de la personne, vol, extorsion, chantage, escroquerie, abus de confiance, recel, destruction, dégradation ou détérioration ou menace d'une atteinte aux personnes ou aux biens définis par les livres II et III du Code pénal, dès lors que l'infraction a été commise au moyen des matières nucléaires entrant dans le champ d'application des articles 1er et 2 de la convention ou qu'elle a porté sur ces dernières ».

[17] « Pour l'application de la convention pour la répression d'actes illicites contre la sécurité de la navigation maritime et pour l'application du protocole pour la répression d'actes illicites contre la sécurité des plates-formes fixes situées sur le plateau continental, faits à Rome le 10 mars 1988, peut être poursuivie et jugée dans les conditions prévues à l'article 689-1 toute personne coupable de l'une des infractions suivantes : 1° Crime défini aux articles 224-6 et 224-7 du Code pénal ; 2° Atteinte volontaire à la vie ou à l'intégrité physique, destruction, dégradation ou détérioration, menace d'une atteinte aux personnes ou aux biens réprimées par les livres II et III du Code pénal ou délits définis par l'article 224-8 de ce code et par l'article L. 331-2 du Code des ports maritimes, si l'infraction compromet ou est de nature à compromettre la sécurité de la navigation maritime ou d'une plate-forme fixe située sur le plateau continental ; 3° Atteinte volontaire à la vie, tortures et actes de barbarie ou violences réprimés par le livre II du Code pénal, si l'infraction est connexe soit à l'infraction définie au 1°, soit à une ou plusieurs infractions de nature à compromettre la sécurité de la navigation maritime ou d'une plate-forme visées au 2° ».

[18] « Pour l'application de la convention sur la répression de la capture illicite d'aéronefs, signée à La Haye le 16 décembre 1970, et de la convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, signée à Montréal le 23 septembre 1971, peut être poursuivie et jugée dans les conditions prévues à l'article 689-1 toute personne coupable de l'une des infractions suivantes : 1° Détournement d'un aéronef non immatriculé en France et tout autre acte de violence dirigé contre les passagers ou l'équipage et commis par l'auteur présumé du détournement, en relation directe avec cette infraction ; 2° Toute infraction concernant un aéronef non immatriculé en France et figurant parmi celles énumérées aux a, b et c du 1° de l'article 1er de la convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile précitée ».

servant à l'aviation civile internationale de Montréal du 24 février 1988 [19], et l'article 689-9 pour la convention internationale pour la répression du terrorisme de 1998 [20] ainsi que l'article 689-10 pour la convention de New York sur la répression du financement du terrorisme [21].

D. Jugement

Le régime procédural applicable au terrorisme est caractérisé en France par un système largement dérogatoire au droit commun, tant sur le plan de la centralisation des poursuites et de l'instruction que sur celui de la spécialisation des juridictions chargées d'en connaître. En traiter ne relève pas du présent rapport mais constitue un révélateur de la logique qui préside depuis les années quatre-vingt au droit français de la lutte contre le terrorisme.

Dès la loi du 9 septembre 1986, le principe de la centralisation des affaires de terrorisme à Paris a été posé. En vertu de l'article 706-17 du Code de procédure pénale, le procureur de la République, le juge d'instruction et les juridictions de jugement de

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[19] « Pour l'application du protocole pour la répression des actes illicites de violence dans les aéroports servant à l'aviation civile internationale, fait à Montréal le 24 février 1988, complémentaire à la convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile, faite à Montréal le 23 septembre 1971, peut être poursuivie et jugée dans les conditions prévues à l'article 689-1 toute personne qui s'est rendue coupable, à l'aide d'un dispositif matériel, d'une substance ou d'une arme : 1° De l'une des infractions suivantes si cette infraction porte atteinte ou est de nature à porter atteinte à la sécurité dans un aérodrome affecté à l'aviation civile internationale : a) Atteintes volontaires à la vie, tortures et actes de barbarie, violences ayant entraîné la mort, une mutilation ou une infirmité permanente ou, si la victime est mineure, une incapacité totale de travail pendant plus de huit jours, réprimés par le livre II du Code pénal, lorsque l'infraction a été commise dans un aérodrome affecté à l'aviation civile internationale ; b) Destructions, dégradations et détériorations réprimées par le livre III du Code pénal, lorsque l'infraction a été commise à l'encontre des installations d'un aérodrome affecté à l'aviation civile internationale ou d'un aéronef stationné dans l'aérodrome et qui n'est pas en service ; c) Délit prévu au quatrième alinéa (3°) de l'article L. 282-1 du Code de l'aviation civile, lorsque l'infraction a été commise à l'encontre des installations d'un aérodrome affecté à l'aviation civile internationale ou d'un aéronef dans l'aérodrome et qui n'est pas en service ; 2° De l'infraction définie au sixième alinéa (5°) de l'article L. 282-1 du Code de l'aviation civile, lorsqu'elle a été commise à l'encontre des services d'un aérodrome affecté à l'aviation civile internationale ».

[20] « Pour l'application de la convention internationale pour la répression des attentats terroristes, ouverte à la signature à New York le 12 janvier 1998, peut être poursuivie et jugée dans les conditions prévues à l'article 689-1 toute personne coupable d'un crime ou d'un délit d'acte de terrorisme défini par les articles 421-1 et 421-2 du Code pénal ou du délit d'association terroriste prévu par l'article 421-2-1 du même code lorsque l'infraction a été commise en employant un engin explosif ou un autre engin meurtrier défini à l'article 1er de ladite convention ».

[21] « Pour l'application de la convention internationale pour la répression du financement du terrorisme, ouverte à la signature à New York le 10 janvier 2000, peut être poursuivie et jugée dans les conditions prévues à l'article 689-1 toute personne coupable d'un crime ou d'un délit défini par les articles 421-1 à 421-2-2 du Code pénal lorsque cette infraction constitue un financement d'actes de terrorisme au sens de l'article 2 de ladite convention ».

Paris disposent d'une compétence concurrente de celle résultant des règles de droit commun. En cas d'infraction terroriste, le procureur de la République d'un tribunal autre que celui de Paris invitera le juge d'instruction à le dessaisir au profit du juge parisien. Après avoir avisé les parties et les avoir invitées à fournir leurs observations, le juge d'instruction prendra sa décision dans un délai compris entre huit jours et un mois [22]. Cette centralisation vaut également pour l'application des peines.

De même, le principe de spécialisation s'applique à la poursuite et au jugement des infractions terroristes. Les magistrats du parquet comme ceux de l'instruction sont spécialisés dans des contentieux particuliers (terrorisme basque, corse, islamique radical), le service central de la lutte anti-terroriste s'avérant être la « 14e section du parquet ». Une Cour d'assises composée uniquement de magistrats professionnels (un président et six assesseurs ou, en appel, huit assesseurs) en connaît, aucun citoyen ordinaire n'y siège. Le Conseil constitutionnel a estimé à ce propos dans sa décision 86-213 DC du 3 septembre 1986, que ce procédé était admissible « pourvu que ces différences ne procèdent pas de discriminations injustifiées et que soient assurées aux justiciables des garanties égales, notamment quant au respect du principe des droits de la défense ». Il a ajouté qu'une telle différence de traitement tendait, « selon l'intention du législateur, à déjouer l'effet des pressions ou des menaces pouvant altérer la sérénité de la juridiction de jugement [23] ; que cette différence de traitement ne procède donc pas d'une discrimination injustifiée ; qu'en outre, par sa composition, la Cour d'assises instituée par l'article 698-6 du Code de procédure pénale présente les garanties requises d'indépendance et d'impartialité ; que devant cette juridiction les droits de la défense sont sauvegardés », d'où le respect du principe d'égalité devant la justice.

Cette spécialisation est généralement présentée comme un gage de succès, permettant à ses acteurs judiciaires d'acquérir une technicité particulière et une connaissance approfondie de la criminalité terroriste, y compris en relation avec les autres systèmes répressifs européens. Elle est également présentée comme une garantie de la connaissance et de la confiance mutuelle avec les autres secteurs spécialisés en charge de la lutte contre le terrorisme.

Au plan procédural, enfin, des règles dérogatoires au droit commun, notamment en matière de garde à vue [24], de perquisition [25] et de prescription [26], posent évidemment problème au regard des droits fondamentaux.

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[22] L'ordonnance par laquelle un juge d'instruction statue sur son dessaisissement peut faire l'objet d'un recours dans un délai de cinq jours devant la Cour de cassation. Dans les huit jours suivant la réception du dossier, celle-ci désignera le juge d'instruction chargé de poursuivre l'information (article 706-22 du Code de procédure pénale). Les actes et formalités accomplis avant le dessaisissement demeurent valables.

[23] Ce qui fut le cas lors du procès d'Action directe en décembre 1986, antérieurement à l'applicabilité de la loi de septembre 1986.

[24] Près de six jours, en vertu de l'article 706-88 du CPP.

[25] Articles 706-89 et suivants du Code de procédure pénale.

[26] L'article 706-25-1 du Code de procédure pénale fixe un délai de trente ans pour les crimes mentionnés à l'article 706-16 du Code de procédure pénale et de vingt ans pour les délits mentionnés à l'article 706-16 du Code de procédure pénale.

De ce point de vue et sous cet angle, les critiques adressées au dispositif du droit français ne sauraient être sous-estimées [27], quand bien même l'essentiel aurait été soumis au contrôle du juge constitutionnel.

5. L'impact de la décision-cadre 2002/475

Si le droit français de la lutte anti-terroriste s'avère en phase avec la décision-cadre 2002/475, paradoxalement, il l'ignore largement. On ne trouve trace de celle-ci ni dans le Code pénal, ni dans le Code de procédure pénale et l'on serait bien en peine d'en trouver un écho dans la jurisprudence interne rendue en matière de terrorisme qui s'appuie logiquement et systématiquement sur les seules dispositions de droit interne. Plusieurs explications peuvent être trouvées à ce phénomène.

Une raison chronologique l'explique largement d'abord, dans la mesure où le texte central du droit français de la lutte contre le terrorisme précède de près de quinze années le texte européen. Autrement dit, la quasi-totalité des dispositions de la décision-cadre faisaient déjà partie du droit positif français bien avant leur adoption et elles n'ont de ce fait apporté aucune valeur ajoutée au droit interne, si ce n'est ici ou là à titre de précision complémentaire.

Une raison politique s'y ajoute ensuite. Là où le droit de l'Union est un instrument de rapprochement des législations pénales en soi, l'inspiration qui anime la législation française est tout autre. Plus que tout autre pays européen sans doute, la France a mis en place une réponse pénale flexible, qu'elle veut adaptée aux caractères de la lutte contre le terrorisme. L'approche préventive associant l'ensemble des acteurs de la répression pénale, et en particulier le juge, domine cette construction. Le juge comme la règle de droit sont mis ici au service d'une stratégie d'anticipation visant avant toute autre chose à prévenir la commission de l'infraction et le démantèlement des réseaux, en coordination avec les services de police chargés du renseignement, eux aussi spécialisés. Cette coopération entre services de police et appareil judiciaire est apparemment de grande qualité, l'utilisation du renseignement pour l'enquête judiciaire étant facilitée par la confiance des acteurs en présence. Dans ce schéma, la phase répressive ne tient pas une fonction prioritaire, quand bien même elle serait particulièrement rigoureuse. En d'autres termes, la mobilisation dérogatoire de l'ensemble de l'arsenal répressif est mise au service d'une politique précise : éviter la commission de l'infraction. En atteste sans aucun doute l'article 421-2-1 du Code pénal précité qui prévoit que constitue également un acte terroriste le fait de participer à une entente établie ou un groupement formé en vue de préparer des actes terroristes, disposition adoptée dès la loi du 22 juillet 1996 et reprise par la décision-cadre 2002/475.

D'où la volonté de systématiser cet objectif préventif par une utilisation des règles de procédure pénale telles que la garde à vue et par une action forte de surveillance des milieux à risque tant du point de vue des moyens de communication et des données de connexion, de la vidéosurveillance.

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[27] Voir par exemple Human Rights Watch, *La justice court-circuitée, Les lois et procédures anti-terroristes en France*, 2008.

Cette originalité de la réponse française est souvent présentée par ses acteurs comme un exemple au regard d'autres expériences nationales et elle structure l'ensemble de la lutte anti-terroriste. D'où les ajustements incessants de la législation française afin d'accroître l'efficacité de la police administrative et de la surveillance. D'où le sentiment revendiqué ouvertement par les autorités françaises de ne pas avoir besoin de passer (comme ailleurs) par des dispositifs d'exception ou des mesures extrajudiciaires, comme en témoigne l'unanimité des parlementaires sur ce point.

A cet égard, la notion « d'association de malfaiteurs en relation avec une entreprise terroriste », introduite en droit interne depuis 1996, joue un rôle déterminant comme l'a bien compris le législateur européen qui en reprend la logique dans l'article 2 de la décision-cadre. Elle permet par son indétermination et son adaptabilité à des situations très différentes d'attirer dans son orbite des cas de figures extrêmement variés et de les placer sous l'emprise de contraintes juridiques particulièrement sévères comme on l'a vu plus haut [28]. Le caractère très lâche de ses éléments constitutifs est un élément décisif dans le démantèlement de réseaux plus ou moins structurés, permettant des arrestations de masse avec plus ou moins de crédibilité comme l'affaire des Moudjahidines iraniens l'a récemment démontré en France après des années de procédures vaines. Associé à la garde à vue et à un régime de détention provisoire rigoureux, cet usage du droit par le juge explique l'efficacité de l'action anti-terroriste, du point de vue des pouvoirs publics.

Le bilan chiffré d'Europol pour l'année 2010 continue à attester de cette efficacité [29], quand bien même on pourrait discuter de ses modalités d'établissement. De manière très significative, le taux d'acquittement en matière de poursuites témoigne lui aussi de l'efficacité judiciaire de cette stratégie : il est égal en France à 0%

Est-on bien certain, si la sécurité publique y trouve son compte, que ce soit aussi le cas des principes d'une Communauté de droit et notamment de celui d'un procès équitable ?

[28] L'affaire récente des sabotages de lignes TGV illustre bien la puissance de cette attraction.

[29] La France compte à elle seule près du tiers (219) des arrestations effectuées en matière de terrorisme dans l'Union européenne (611), principalement pour un terrorisme qualifié de « séparatiste » (123).

The impact of the Framework Decisions on combating terrorism on counterterrorism legislation and case law in Germany

Martin Böse

1. Introduction

The origins of German counterterrorism legislation date back to the 19th century. That was a period when the government used criminal law as an instrument to deal with political movements that emerged in the aftermath of the French Revolution and as a consequence of the industrial revolution (*e.g.* liberal and socialist movements) [1]. The German Penal Code of 1871 made it a criminal offence to take part in a secret / anti-State association [2], as the Prussian Penal Code had done before in 1851. After 1945, these provisions were amended several times so that it became a criminal offence to take part in a criminal organisation [3]. In the 1970s, a series of terrorist attacks by the Marxist-Leninist Red Army Faction (Rote Armee Fraktion or RAF for short) sparked a new wave of counterterrorism legislation. In particular, a new offence of participating in a terrorist organisation was adopted [4]. After the RAF was broken up in 1998 and, especially in the aftermath of 9/11, terrorism has mainly been regarded as being an international threat posed by radical Islamic movements and organisations. The debate about legislative action in the last decade or so has therefore been particularly shaped by the bombings in Madrid and London and by similar bomb plots in Germany. Fortunately, the terrorist attacks in Germany failed or the terrorists

[1] For details of the history of German counterterrorism legislation, see M. Nehring, *Kriminelle und terroristische Vereinigungen im Ausland*, Frankfurt am Main, Peter Lang, 2007, p. 32 and f.

[2] Sections 128 and 129 Penal Code of 1871.

[3] Section 129 Penal Code.

[4] Section 129a Penal Code. Act of 18 August 1976 ("*Anti-Terror-Gesetz*"), *Bundesgesetzblatt*, part I, p. 2181.

were arrested before they could carry out their plans [5]. In April and September 2011, the police arrested the members of two terrorist groups in Düsseldorf and Berlin for planning a terrorist attack. The ringleader of one group had allegedly attended an Al-Qaeda terror camp in Pakistan before [6]. According to the German Federal Criminal Police Office (Bundeskriminalamt), there are more than 100 potential terrorists (*Gefährder*) in Germany who have attended a terrorist camp abroad [7].

2. National legislation

Since 2001, substantive German criminal law on terrorism has been subject to several amendments in 2002/2003 and 2009. In the first phase, the German legislator explicitly adopted amendments to the Penal Code in order to implement the Joint Action of 1998 [8] and the Framework Decision of 2002 (FD 2002) [9]. By contrast, legislative action was not considered necessary with regard to the Framework Decision of 2008 (FD 2008) [10] because, at that time, government and parliament had already initiated the legislative process to introduce new criminal law provisions on combating terrorism. The draft German laws were influenced by the European Convention on the Prevention of Terrorism of 2005 [11] and were thus deemed to comply with the corresponding requirements of the FD 2008.

A. Offences and sanctions

1. Terrorist offences

Article 1(1) FD 2002 defines what kind of offences "shall be deemed as terrorist offences". Since the crimes listed in Art. 1(1)(a) to (i) FD 2002 are covered by the corresponding offences under German criminal law, the legislator did not see any need for implementation in that regard (*e.g.* by making terrorist offences crimes via a

[5] In 2006, two suitcases filled with bombs were placed in regional trains, but, due to faulty construction, the bombs did not go off. In 2007, a group of three men (the so-called "Sauerland-group"), which had been trained in a terrorist camp in Pakistan, were arrested when preparing to carry out car bombings on a US airbase and other public locations, see M. A. Zöller, "Willkommen in Absurdistan – Neue Straftatbestände zur Bekämpfung des Terrorismus", *Goltdammer's Archiv für Strafrecht*, 2010, p. 607, at p. 608-609.

[6] *Spiegel* online, 1 May 2011 at http://www.spiegel.de/politik/deutschland/0,1518,759943,00.html (last visit: 18 May 2012); *Tagesspiegel*, 8 September 2011 at http://www.tagesspiegel. de/berlin/schlag-gegen-mutmassliche-terror-zelle-in-berlin/4587766.html (last visit: 18 May 2012).

[7] *Welt am Sonntag*, 8 May 2011 at http://www.welt.de/print/wams/politik/article 13359110/Alle-Sensoren-sind-aktiv.html (last visit: 18 May 2012).

[8] Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union, *OJ*, no. L 351, 29 December 1998, p. 1.

[9] Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ*, no. L 164, 22 June 2002, p. 3.

[10] Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ*, no. L 330, 9 December 2008, p. 1.

[11] Council of Europe Convention on the Prevention of Terrorism of 16 May 2005 (ETS no. 196); see the German ratification Act of 15 March 2011, *Bundesgesetzblatt*, part II, p. 300.

separate category of crimes) [12]. The Commission considered the absence of specific provisions on terrorist offences as not being in line with the requirements of the FD 2002 [13]. German scholars have rejected this criticism, arguing that the FD 2002 does not oblige the Member States to create a separate category of crimes, but to make these offences subject to certain legal consequences with regard to sentencing, jurisdiction etc. [14] [15].

2. Participation in a terrorist group

One of the core elements of the FD 2002 is the offence of participating in a terrorist group. In this regard, the Joint Action of 1998 already provided for a similar obligation. As has been mentioned before [16], the corresponding provision in the German Penal Code was enacted in 1976 [17]. Since the offence was only applicable to domestic organisations [18], the German legislator had to extend the scope of application to *terrorist organisations abroad* [19] when implementing the Joint Action of 1998 [20]. The new provision even goes beyond the requirements of EU law because it is not limited to organisations in the Member States, but also applies to organisations outside the European Union. However, in this case, specific jurisdictional requirements have to be met ("genuine link", *e.g.* German nationality of the perpetrator or the (potential) victim) and an authorisation from the Federal Ministry of Justice is required [21].

Unlike the Joint Action of 1998, Art. 2 FD 2002 specifies a detailed concept of participating in a terrorist group. The German legislator did not transpose this concept into national law, but maintained the traditional offence of participating in a *terrorist organisation* [22] and adopted several amendments to the (existing) provision [23] [24].

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[12] See the explanatory report, *Bundestags-Drucksache*, no. 15/813, pp. 5-6.

[13] See the Commission's reports on the implementation of the FD of 2002, COM (2004) 409 final, 8 June 2004, p. 6; COM (2007) 681 final, 6 November 2007, p. 7.

[14] See *infra* 2 "Participation in a terrorist group", 3 "Offences linked to terrorist activities" and E "Jurisdiction".

[15] C. Kress and N. Gazeas, "§ 19 Terrorismus", in U. Sieber, F.-H. Brüner, H. Satzger and B. von Heintschel-Heinegg (eds.), *Europäisches Strafrecht*, Baden-Baden, Nomos, 2011, paras. 16 and 20.

[16] See *supra* 1 "Introduction".

[17] Section 129a Penal Code.

[18] See, in this regard, German Federal Court of Justice (Bundesgerichtshof), judgment of 5 January 1982, Case StB 53/81, official Court reports in criminal matters (BGHSt) vol. 30, p. 328, at p. 329-330.

[19] Section 129b Penal Code.

[20] Act of 22 August 2002 ("34. *Strafrechtsänderungsgesetz*"), *Bundesgesetzblatt*, part I, p. 3390.

[21] Section 129b(2) Penal Code.

[22] See *infra* 3 "Offences linked to terrorist activities".

[23] Section 129a Penal Code.

[24] Act on the implementation of FD 2002/475/JHA ("*Gesetz zur Umsetzung des Rahmenbeschlusses des Rates vom 13. Juni 2002 zur Terrorismusbekämpfung und zur Änderung anderer Gesetze*") of 22 December 2003, *Bundesgesetzblatt*, part I, p. 2836.

Since the catalogue of terrorist offences [25] did not cover the crimes mentioned in Art. 1(1)(b), (d), (f) and (g) FD 2002, the legislator inserted the missing offences (and the other elements of the notion of terrorist offence) in Section 129a(2) Penal Code. Accordingly, the scope of the offence has been extended to include even threatening to commit one of the listed offences [26]. However, German law distinguishes between two kinds of terrorist offences: Whereas in Section 129a(2), the additional requirements of Art. 1(1) (seriously intimidating the population etc.) must be met, in Section 129a(1) the legislator does not refer to these criteria, thereby going beyond its obligations under EU law.

Having regard to Art. 5(3) and Art. 2(2)(b) FD 2002, the legislator changed the maximum sentence for (mere) participation in the organisation from five to ten years imprisonment (Section 129a(1) and (2) Penal Code). If the aims or activities of the organisation are limited to threatening to commit a terrorist offence, the maximum sentence will be ten years for the leader of the organisation and five years imprisonment for mere participation [27].

Summing up, Germany can be said to have properly implemented Art. 2 FD 2002 into national law [28].

3. Offences linked to terrorist activities

By contrast, the German legislator did not adopt any legislation as far as offences linked to terrorist activities (Art. 3(2)(d) to (f) FD 2002) and specific terrorist intent as an *aggravating factor* (Art. 5(2) FD 2002) are concerned because the general provisions on sentencing were considered to be a sufficient basis for taking the relevant circumstances in due consideration [29]. Although the Commission criticised the German legislation for not complying with EU law [30], some authors have raised doubts about whether the FD 2002 obliges Member States to provide for specific sentencing rules for terrorist offences [31].

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[25] Section 129a(1) Penal Code.

[26] Section 129a(3) Penal Code; see Art. 1(1)(i) FD 2002. See the explanatory report, *op. cit.*, p. 6-7.

[27] Section 129a(3), (4) Penal Code; see Art. 5(3) FD 2002.

[28] B. Hecker, *Europäisches Strafrecht*, 3rd ed. Berlin, Springer, 2010, p. 378; C. Kress and N. Gazeas, *op. cit.*, paras. 27-28 and 46; see also the reports on the implementation of the FD of 2002, COM (2004) 409 final, p. 6; COM (2007) 681 final, p. 7; see however, with regard to the different concepts of terrorist group and terrorist organisation, *infra* 3 "Case law".

[29] Section 46(2) Penal Code; see also with regard to Art. 3 FD 2002: Section 243(1), 253(4), 267(3) Penal Code. See the explanatory report, *op. cit.*, p. 6. For instance, the killing of a person with terrorist intent qualifies as murder because the specific intent is considered to be a base (*i.e.* particularly worthy of condemnation) motive (Section 211(2)(4) Penal Code), see Federal Court of Justice, judgment of 24 June 2004, Case 5 StR 306/03, *Neue Juristische Wochenschrift*, 2004, p. 3051 (3054); *Neue Zeitschrift für Strafrecht*, 2007, p. 230, at p. 233; M. A. Zöller, *Terrorismusstrafrecht*, Heidelberg, C.F. Müller, 2009, p. 483 and f.

[30] See the Commission's reports on the implementation of the FD of 2002, COM (2004) 409 final, 8 June 2004, p. 6; COM (2007) 681 final, 6 November 2007, p. 7.

[31] C. Kress and N. Gazeas, *op. cit.*, paras. 20 and 47.

4. Public provocation, recruitment and training for terrorism

The FD of 2008 has not been implemented *stricto sensu* in Art. 3(1)(a) to (c), (2)(a) to (c) FD 2008. Instead, national legislation [32] has its origins in a mainly autonomous national debate on legislative measures to combat terrorism. As a result of this debate, parliament has adopted three new offences:

– *Preparation of a serious violent offence endangering the State* [33]. Preparatory acts are defined by an exhaustive catalogue that covers instructing another person or receiving instruction in special facilities necessary for committing a terrorist offence, producing or storing weapons or explosives and collecting not insubstantial assets for the purpose of committing a terrorist offence.
– *Establishing contacts for the purpose of committing a serious violent offence endangering the State* [34]. Through this provision, the legislator criminalises the mere establishment of or maintaining contacts with a terrorist organisation with the intention of receiving instruction for the purpose of committing a terrorist offence.
– *Encouraging the commission of a serious violent offence endangering the State* [35]. The provision is not limited to encouraging the commission of a terrorist offence by supplying or displaying instructions but covers the very fact of obtaining these instructions as well.

Although these offences are quite different from the definitions of public provocation to commit a terrorist offence (Art. 3(1)(a) FD 2008), recruitment for terrorism (Art. 3(1)(b) FD 2008) and training for terrorism (Art. 3(1)(c) FD 2008), the concept of the German law goes far beyond the requirements of EU law. Accordingly, the legislator considered the new provisions compatible with Art. 3 FD 2008 and the corresponding provisions in Arts. 5 to 7 of the European Convention on the prevention of terrorism [36]. Nonetheless, the notion of *terrorist offence* [37] is different from the definition of a *serious violent offence endangering the State* [38]. As the wording of the provision and its position in the third title of the first chapter of the "Special Part" of the Penal Code (offences endangering the democratic State under the rule of law) [39] suggest, the German concept focuses on terrorist attacks against the State and its institutions rather than on attacks on the population. A serious violent offence endangering the State therefore means an offence which, under the circumstances,

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[32] Act on prosecution of the preparation of serious violent offences endangering the State ("*Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten*") of 30 July 2009, *Bundesgesetzblatt*, part I, p. 2437.

[33] Section 89a Penal Code.

[34] Section 89b Penal Code.

[35] Section 91 Penal Code.

[36] See the explanatory report, *Bundestags-Drucksache*, no. 16/12428, p. 12-13; see the explanatory memorandum to the European Convention on the Prevention of Terrorism, *Bundestags-Drucksache*, no. 17/3801, p. 30-31.

[37] Art. 1(1) FD 2002; see also Section 129a Penal Code.

[38] Section 89a(1)(1) Penal Code.

[39] Strafgesetzbuch – Besonderer Teil, Erster Abschnitt, Dritter Titel (Gefährdung des demokratischen Rechtsstaates).

is intended to impair and is capable of impairing the existence or security of a State or of an international organisation, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany [40]. However, the term "impairing the security of a State" is considered to be very broad and to cover terrorist acts intimidating the population too [41]. Thus, another restriction of the German concept seems to be more important. In contrast to Art. 1 FD 2002, the definition of a serious violent offence [42] requires an offence against life [43] or personal freedom, *i.e.* taking hostages [44].

Similar differences reveal themselves in the criminal conduct because the offences were not drafted on the basis of the European concept of public provocation, recruitment and training for terrorism. Nevertheless, the correspondent acts are punishable under German law.

Public provocation (Art. 3(1)(a) FD 2008) will be mainly covered by Section 91 Penal Code [45]. However, this provision only applies to serious violent offences endangering the State (see *supra*). Furthermore, although Section 91 Penal Code does not even require a public statement, its scope is limited to the dissemination of written material (instructions) [46]. The same restriction applies to Section 130a Penal Code (instruction to commit offences) and Section 130(2) Penal Code (agitation). There is, however, a general provision on public incitement to crime. This offence even applies if the crime has not been committed [47]. In this case, the maximum sentence is imprisonment of five years. Nevertheless, the notion of 'incitement' means that the perpetrator must call on another person to commit a crime [48]. So, Section 111 Penal Code does not cover the "*provocateur*" who is merely disseminating information on how to commit a terrorist offence [49].

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[40] Section 89a(1)(2) Penal Code

[41] See the explanatory report, *op. cit.*, p. 12; for a more restrictive approach N. Gazeas, T. Grosse-Wilde and A. Kiessling, "Die neuen Tatbestände im Staatsschutzstrafrecht – Versuch einer ersten Auslegung der §§ 89a, 89b und 91 StGB", *Neue Zeitschrift für Strafrecht*, 2009, p. 593, at p. 594-595.

[42] Section 89a(1)(2) Penal Code

[43] Sections 211 and 212 Penal Code

[44] Sections 239a and 239b Penal Code

[45] See the explanatory memorandum to the European Convention, *op. cit.*, at p. 30 (with regard to Art. 5 of the Convention).

[46] C. Kress and N. Gazeas, *op. cit.*, para. 34.

[47] Cf. Art. 3(3) FD 2008; see Section 111(2) Penal Code; see also Section 130(1) Penal Code See also with regard to felonies (minimum sentence of one year imprisonment, Section 12(1) Penal Code) the general provision on attempted incitement (Section 30(1) Penal Code); if the crime has been committed, the general provisions on participation (Sections 26 and 27 Penal Code) will apply, see the explanatory memorandum to the European Convention, *op. cit.*, at p. 30 (with regard to Art. 5 of the Convention).

[48] Higher Regional Court Berlin (*Kammergericht*), judgment of 29 June 2001, Case (3) 1 Ss 410/00 (35/01), *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 2002, p. 10.

[49] See also the objections to an interpretation in conformity with the FD 2008: C. Kress and N. Gazeas, *op. cit.*, para. 34.

Recruitment for terrorism, *i.e.* soliciting another person to commit a terrorist offence (Art. 3(1)(b) FD 2008), will be mainly covered by the general provision on conspiracy, the attempt to induce another person to commit a crime in particular (Section 30(1) Penal Code) [50]. The recruiting person will be punished according to the applicable offence (murder, assault etc.), but the sentence has to be mitigated (Section 30(1)(1) Penal Code). Admittedly, this provision does not apply to all offences listed in Art. 1(1) FD 2002 (Section 129a(1) to (3) Penal Code), but only to felonies [51]. Nevertheless, Section 129a(5) Penal Code criminalises the recruitment of members or supporters of a terrorist organisation [52]. The sentence is imprisonment from six months to five years. In summary, German law does not cover the recruitment of persons for committing a terrorist offence if the offence to be committed does not qualify as a felony (*e.g.* Sections 316b and 317 Penal Code) and the perpetrator does not end up participating in a terrorist organisation. Taking the minor gravity of the relevant offences into consideration, imposing a criminal sentence might result in a breach of the principle of proportionality [53].

Section 89a(2)(1) Penal Code expressly criminalises *training for terrorism purposes* (receiving instruction in the production or the use of firearms, explosives, explosive or incendiary devices, nuclear fission material or other radioactive substances, substances that contain or can generate poison, other substances detrimental to health, special facilities necessary for committing a terrorist offence). The dissemination of written instructions is covered as well by Section 91 and Section 130a Penal Code. Furthermore, the general provision on incitement, aiding and abetting will apply to the "trainer" [54]. Training for terrorism has therefore been criminalised under German law [55].

B. Participation and attempt

Criminal liability for incitement, aiding and abetting (Art. 4(1), (2) FD 2008) follows from the general rules [56]. According to the relevant criminal offences [57], attempt is punishable under German law [58]. However, the German legislator

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[50] See the explanatory memorandum to the European Convention, *op. cit.*, p. 31 (with regard to Art. 6 of the Convention); C. Kress and N. Gazeas, *op. cit.*, para. 36.

[51] Minimum sentence of one year imprisonment, see Section 12(1) Penal Code. C. Kress and N. Gazeas, *op. cit.*, para. 36.

[52] See the explanatory memorandum to the European Convention, *op. cit.*, p. 31 (with regard to Art. 6 of the Convention); C. Kress and N. Gazeas, *op. cit.*, para. 36.

[53] Cf. Art. 3(1)(2) FD 2008; see *infra* 4 "Perception in legal practice and doctrine". C. Kress and N. Gazeas, *op. cit.*, para. 36.

[54] Sections 26, 27, 30 Penal Code.

[55] See the explanatory memorandum to the European Convention, *op. cit.*, p. 31 (with regard to Art. 7 of the Convention); C. Kress and N. Gazeas, *op. cit.*, para. 39.

[56] Sections 26 and 27 Penal Code. See the explanatory memorandum to the European Convention, *op. cit.*, p. 31 (with regard to Art. 9 of the Convention); C. Kress and N. Gazeas, *op. cit.*, paras. 42-43.

[57] Art. 1(1) and Art. 3(2)(d) to (f) FD 2008.

[58] Cf. Art. 4(3) FD 2008. C. Kress and N. Gazeas, *op. cit.*, para. 44.

refrained from criminalising the attempt to recruit and train for terrorism [59], probably because this would result in criminalising the attempt to carry out merely preparatory acts [60].

C. Mitigation

With regard to the mitigation of a sentence (Art. 6 FD 2002), German law allows for a minimum sentence to be reduced or even for dispensing with punishment if the perpetrator contributes to the discovery or prevention of a terrorist offence [61]. The same applies if the degree of guilt is minor [62]. Since Art. 6 FD 2002 does not provide for an exemption from punishment, the German provisions are considered to be incompatible with EU law [63]. In order to avoid a breach with EU law, a suggestion has been made to interpret the German provisions in line with Art. 6 FD 2002, thereby restricting the national judge's margin of appreciation. However, such an interpretation would contradict the wording of the provisions and thus appear to be *contra legem* [64].

D. Criminal liability of legal persons

German law provides for sanctions against legal persons (Arts. 7 and 8 FD 2002). Thus, by imposing an (administrative) fine (Section 30 Regulatory Offences Act – *Ordnungswidrigkeitengesetz*), forfeiture or confiscation [65], legal persons can be held liable for committing the offences mentioned above [66].

E. Jurisdiction

Matters of jurisdiction are regulated in the general part of the Penal Code. German criminal law applies to terrorist offences on the basis of the *territoriality* principle [67], the flag principle [68], *active personality* [69] and *passive personality* [70] and the *aut dedere aut iudicare* principle [71]. Though jurisdiction based upon active or passive personality and the principle *aut dedere aut iudicare* is subject to the

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[59] See Art. 4(4) FD 2008.

[60] Sections 89a, 89b and 91 Penal Code; see also Sections 111, 130a Penal Code.

[61] Sections 129a(7), 129(6) Penal Code; Section 89a(7) Penal Code.

[62] Sections 89b(5), 91(3), 129a(6) Penal Code.

[63] C. Kress and N. Gazeas, *op. cit.*, para. 48. This might apply as well to other grounds of impunity of a person cooperating with law enforcement agencies (*e.g.* necessity – Section 34 Penal Code: Federal Court of Justice, decision of 16 September 2010, Case AK 12/10, *Neue Zeitschrift für Strafrecht – Rechtsprechungsreport*, 2010, p. 369).

[64] C. Kress and N. Gazeas, *op. cit.*, para. 48.

[65] Sections 73 and f. Penal Code.

[66] See the explanatory memorandum to the European Convention, *op. cit.*, p. 31 (with regard to Art. 10 of the Convention).

[67] Sections 3 and 9 Penal Code; see Art. 9(1)(a) FD 2002.

[68] Section 4 Penal Code; see Art. 9(1)(b) FD 2002.

[69] Section 7(2)(1) Penal Code (German nationality of the perpetrator); see Art. 9(1)(c) FD 2002.

[70] Section 7(1) Penal Code (German nationality of the victim); see Art. 9(1)(e) FD 2002.

[71] Sections 6(9) and 7(2)(2) Penal Code; see Art. 9(3) FD 2002.

double criminality requirement [72], the general rules seem to comply with EU law because the corresponding provision of the European Convention on the prevention of terrorism does not prevent the States Parties from applying the double criminality requirement [73].

With regard to particular *terrorist offences*, the legislator has adopted *specific provisions* on jurisdictional matters. According to Section 89a(3)(1) Penal Code, this Section applies to offences committed abroad. However, Section 89a(3)(2) Penal Code states that, if the offence is committed outside the European Union, jurisdiction has to be based upon the principle of active personality, passive personality or the protective principle (the serious violent offence is meant to be committed domestically) [74]. Furthermore, the exercise of jurisdiction requires an authorisation of the Federal Ministry of Justice (Section 89a(4) Penal Code). Similar rules are laid down in Section 89b(3), (4) and Section 129b(1) Penal Code [75]. Furthermore, German criminal law applies to terrorist organisations abroad [76].

Nevertheless, German law does not fully comply with the jurisdictional rules in Art. 9 FD 2002. There is no general provision based upon the *domicile principle* [77], the active personality principle relating to *legal persons* [78] and the *protective principle*, especially with regard to the institutions of the European Union (Art. 9(1)(e) FD 2002) [79].

3. Case law

A. Participation in a terrorist group/organisation

As has been mentioned above, the German legislator did not implement the definition of a terrorist group (Art. 2(1) 1 FD 2002). The traditional *concept of a terrorist organisation* (Section 129a Penal Code) requires a developed structure of the organisation and a common objective of its members who thereby submit to the decisions that have been taken by the organisation [80]. According to this concept, it is the structure of the organisation and the influence on its members that creates the

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[72] Section 7(1), (2) Penal Code.

[73] See the explanatory memorandum to the European Convention, *op. cit.*, p. 32-33 (with regard to Art. 14 of the Convention), referring to para. 161 of the explanatory report to the Convention; C. Kress and N. Gazeas, *op. cit.*, para. 55, raise doubts with regard to Art. 9(3) (*aut dedere aut iudicare*); however, jurisdiction can be based upon Section 6(9) Penal Code (see C. Kress and N. Gazeas, *ibid*., with further references).

[74] See in this regard the explanatory report, *Bundestags-Drucksache*, no. 16/12428, p. 15-16.

[75] See *infra* 3 "Case law".

[76] Section 129b Penal Code; see Art. 9(4) FD 2002.

[77] Art. 9(1)(c) FD 2002.

[78] Art. 9(1)(d) FD 2002.

[79] See also C. Kress and N. Gazeas, *op. cit.*, paras. 53-54.

[80] See Federal Court of Justice, judgment of 7 November 1956, Case 6 StR 137/55, official Court reports in criminal matters (BGHSt), vol. 10, p. 16, at p. 17; judgment of 11 October 1978, Case 3 StR 105/78, official Court reports in criminal matters (BGHSt), vol. 28, p. 147, at p. 148-149; judgment of 30 March 2001, Case StB 4/01, official Court reports in criminal matters, vol. 46, p. 349, at p. 354; M. A. Zöller, *op. cit.*, p. 518 and f. with further references.

specific risk of a terrorist offence being committed and that must be considered to be an indispensable condition for criminalising mere participation in such a terrorist group.

Obviously, this understanding does not comply with the definition in Art. 2(1) FD 2002. As a consequence, it has been suggested that Section 129a Penal Code must be interpreted in line with the FD 2002 according to the ECJ's ruling in the *Pupino* case [81] [82]. In a recent judgment on participation in a criminal organisation, the Federal Court of Justice (Bundesgerichtshof) rejected this approach and adhered to the traditional concept although it realised that this is not compatible with the EU law (*in casu* the FD on combating organised crime [83]). In the eyes of the Federal Court of Justice, the offence does not allow for an interpretation in line with the FD because this would give the concept of criminal (and terrorist) organisation the same meaning as the notion of a criminal group (or gang) that is used in a number of offences relating to organised crime. Whereas participation in a criminal organisation has been criminalised *per se*, acting as a member in a gang is merely an aggravating factor that can only be applied if a crime has been committed. Thus, the concept of membership of a terrorist group is not compatible with the German system, which distinguishes between the organisation and the group. According to the Federal Court of Justice, it is up to the legislator to assimilate these two notions [84]. In 2010, the Federal Court of Justice explicitly refused to interpret Section 129a Penal Code in line with Art. 2 FD 2002 and, thereby, to overcome the legislator's failure to fulfil its obligations under EU law [85]. Some scholars, however, have criticised the approach of the Federal Court of Justice, arguing that an interpretation in line with EU law will not totally eliminate the differences between group and organisation [86].

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[81] ECJ, 16 June 2005, judgment C-105/03, *Maria Pupino*, para. 43.

[82] C. Kress, "Das Strafrecht in der Europäischen Union vor der Herausforderung durch organisierte Kriminalität und Terrorismus", *Juristische Ausbildung*, 2005, p. 220, at p. 224; M. Krauss, in H.W. Laufhütte, R. Rissing-van Saan and K. Tiedemann (eds.), *Strafgesetzbuch – Leipziger Kommentar*, vol. 5, 12th edition, Berlin, de Gruyter, 2009, Section 129a Penal Code, para. 26.

[83] Framework Decision 2008/841/JHA of 24 October 2008 on combating organised crime, *OJ*, no. L 300, 11 November 2008, p. 42.

[84] Judgment of 3 December 2009, Case 3 StR 277/09, official Court reports in criminal matters (BGHSt), vol. 54, p. 216, at p. 223.

[85] Judgment of 28 October 2010, Case 3 StR 179/10, *Neue Juristische Wochenschrift*, 2011, p. 542, at p. 544; see also judgment of 14 August 2009, Case 3 StR 552/08, official Court reports in criminal matters (BGHSt), vol. 54, p. 69, at p. 110; judgment of 14 April 2010, Case StB 5/10, *Neue Juristische Wochenschrift*, 2010, p. 3042, at p. 3043.

[86] C. Kress and N. Gazeas, "Europäisierung des Vereinigungsbegriffs in den §§ 129 ff. StGB? Einige Gedanken zur neueren Rechtsprechung des BGH", in H.U. Paeffgen, M. Böse, U. Kindhäuser, S. Stübinger, T. Verrel and R. Zaczyk (eds.), *Strafrechtswissenschaft als Analyse und Konstruktion – Festschrift für Ingeborg Puppe zum 70. Geburtstag*, Berlin, Duncker & Humblot, 2011, p. 1487, p. 1499-1500, referring to Higher Regional Court (Oberlandesgericht) Düsseldorf, judgment of 5 December 2007, Case III-VI 10/05, p. 350; M. A. Zöller, *Juristen-Zeitung*, 2010, p. 908, at p. 911-912.

B. Jurisdictional matters

In another judgment, the Federal Court of Justice referred to the FD 2002 when interpreting the rules on jurisdictional matters in Sections 89a and 129b Penal Code. The Federal Court of Justice held that the limitations set out in specific jurisdictional rules in Section 129b Penal Code may not be circumvented by applying the provisions of the general part (*e.g.* Section 7 Penal Code). As a consequence, the corresponding provision in Section 89a Penal Code has to be interpreted accordingly because the FD's provisions on jurisdiction apply to all kind of terrorist offences without distinction [87].

4. Perception in legal practice and doctrine

Up to now, precious few cases have been investigated on the basis of the new legislation [88]. Nevertheless, the new provisions have been welcomed by practitioners of judicial and law enforcement authorities because the legislation that existed beforehand did not allow for effective measures against terrorist networks and lone operators [89]. On this basis, constitutional concerns were rejected [90]. By contrast, defence counsels criticised the new offences for being superfluous and in breach of constitutional principles [91].

In legal doctrine, the new law on terrorism has been subject to a considerable amount of criticism. In summary, the following objections have been raised.

The new provisions criminalise conduct in the preparatory stage. Preparatory acts do not put the protected interest (life, personal freedom, public security) at risk but require further action by the (single) perpetrator whereas a member of a terrorist group is permanently exposed to group pressure and encouragement and thus more

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[87] Judgment of 15 December 2009, Case StB 52/09, official Court reports in criminal matters (BGHSt), vol. 54, p. 264, at p. 268.

[88] According to the government (March 2011), 35 cases concerning Section 89a Penal Code, 10 cases concerning Section 89b Penal Code and no case concerning Section 91 Penal Code have been reported, see *Bundestags-Drucksache*, no. 17/4988, p. 2, 7 and 11.

[89] *E.g.* the Frankfurt airport shooting in March 2001: two American soldiers were killed by a 21-year-old Kosovo-Albanian who was radicalised by jihadist propaganda videos, see *Welt* online, 3 March 2011, at http://www.welt.de/politik/deutschland/article 12685755/Das-Doppelleben-des-Attentaeters-Arid-U.html (last visit: 18 May 2012).

[90] See the opinions of the practitioners J.P. Graf (Federal Court of Justice), R. Griesbaum (Public Prosecutor General of the Federal Court of Justice – Generalbundesanwaltschaft), K.M. Rogner (Federal Office for the Protection of the Constitution – Bundesamt für Verfassungsschutz) and J. Ziercke (President of the Federal Criminal Police Office – Bundeskriminalamt) in the hearing before the legal committee of the Parliament (Rechtsausschuss des Deutschen Bundestages), available at http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1251&id=1134; see also M. Bader, "Das Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten", *Neue Juristische Wochenschrift*, 2009, p. 2853, at p. 2854-2856 (last visit: 18 May 2012).

[91] See the opinion of the Federal Bar Association (Bundesrechtsanwaltskammer) in the hearing before the legal committee of the Parliament (Rechtsausschuss des Deutschen Bundestages), available at http://webarchiv.bundestag.de/cgi/show.php?fileToLoad=1251&id=1134 (last visit: 18 May 2012).

likely to commit a terrorist offence [92]. 'Neutral' or socially acceptable conduct (*e.g.* flight or language courses, military service) is criminalised by referring only to the criminal attitude of the (potential) perpetrator [93]. This applies in particular to the "preparation of the preparation" [94]. The provisions do not criminalise dangerous acts – insofar as they are superfluous because specific offences will apply (*e.g.* on the handling of weapons and explosives) [95] – but do criminalise a person considered to be a (potential) terrorist [96]. This is held to be incompatible with the principle of proportionality and the principle of personal guilt (*nulla poena sine culpa*).

Constitutional concerns arise as well as far as the scales of the penalties are concerned. Imprisonment from six months to ten years for the mere preparation of a terrorist offence (training) does not reflect the gravity of personal guilt [97]. By creating a kind of preventive detention, the new offences are in breach of the principle of personal guilt (*nulla poena sine culpa*) [98]. Some scholars therefore argue that the new offences have the sole and illegitimate purpose of extending the investigative powers of the law enforcement authorities [99].

Further objections have been based upon the legality principle *(nulla poena, nullum crimen sine lege certa*). For instance, the instruction in "other skills that can be of use" or "collecting not insubstantial assets" for the commission of a serious violent offence (Section 89a(2)(1), (4) Penal Code) or the definition of serious violent

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[92] O. Backes, "Der Kampf des Strafrechts gegen nicht organisierte Terroristen", *Strafverteidiger*, 2008, p. 654, at p. 655 and 659; R. Deckers and J. Heusel, "Strafbarkeit terroristischer Vorbereitungshandlungen – rechtsstaatlich nicht tragbar", *Zeitschrift für Rechtspolitik*, 2008, p. 169, at p. 171; K. Gierhake, "Zur geplanten Einführung neuer Straftatbestände wegen der Vorbereitung terroristischer Straftaten", *Zeitschrift für Internationale Strafrechtsdogmatik*, 2008, p. 397, at p. 402; M.A. Zöller, *op. cit.*, at p. 617-618 and 619.

[93] O. Backes, *op. cit.*, p. 659; R. Deckers and J. Heusel, *op. cit.*, p. 171; N. Gazeas, T. Grosse-Wilde and A. Kiessling, *op. cit.*, p. 597; H. Radtke and M. Steinsiek, "Bekämpfung des internationalen Terrorismus durch Kriminalisierung von Vorbereitungshandlungen – Zum Entwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren Gewalttaten (Referentenentwurf des BMJ vom 21.4.2008)", *Zeitschrift für Internationale Strafrechtsdogmatik*, 2008, p. 383, at p. 389-390; U. Sieber, "Legitimation und Grenzen von Gefährdungsdelikten im Vorfeld terroristischer Gewalt", *Neue Zeitschrift für Strafrecht*, 2009, p. 353, at p. 360 and 362; M.A. Zöller, *op. cit.*, p. 616.

[94] Sections 89b, 91(1)(2) Penal Code. O. Backes, *op. cit.*, p. 658; N. Gazeas, T. Grosse-Wilde and A. Kiessling, *op. cit.*, p. 601; M. A. Zöller, *op. cit.*, p. 616.

[95] O. Backes, *op. cit.*, p. 657-658.

[96] B. Heinrich, "Die Grenzen des Strafrechts bei der Gefahrprävention", *Zeitschrift für die gesamte Strafrechtswissenschaft*, vol. 121 (2009), p. 94, at p. 120 and 122; H. Radtke and M. Steinsiek, *op. cit.*, p. 393-394; see also with regard to obtaining instructions for committing a terrorist offence (Section 91(1)(2) Penal Code): N. Gazeas, T. Grosse-Wilde and A. Kiessling, *op. cit.*, p. 602.

[97] O. Backes, *op. cit.*, p. 656-657; H. Radtke and M. Steinsiek, *op. cit.*, p. 391-392.

[98] H.-U. Paeffgen, in U. Kindhäuser, U. Neumann and H.-U. Paeffgen (ed.), *Nomos Kommentar zum Strafgesetzbuch*, vol. 1, 3rd ed., Baden-Baden 2010, § 89a.

[99] O. Backes, *op. cit.*, p. 660; H. Radtke and M. Steinsiek, *op. cit.*, p. 394; M.A. Zöller, *op. cit.*, p. 620.

offence endangering the State (Section 89a(1)(2) Penal Code) are rather vague and thus cannot be regarded as a proper legal basis for criminal sentencing [100].

Finally, the provisions on extraterritorial jurisdiction have raised concerns in terms of their compatibility with international law (principle of non-intervention in the internal affairs of another State) [101]. Furthermore, the new offences not only protect the Federal Republic of Germany, the Union and the other Member States but any State, irrespective of whether it complies with international standards on human rights or democracy [102].

5. Conclusion

The FDs have had a rather limited impact on German counterterrorism legislation. Recent changes in criminal law have been made after a domestic debate and an autonomous legislative process at the national level. As a consequence, German law does not fully comply with the requirements of the FDs. Major shortcomings relate to the traditional concept of terrorist organisation and the notion of serious violent offence, which do not comply with the European concepts of terrorist group and terrorist offence. On the other hand, by criminalising preparatory acts in general, the German approach goes far beyond the requirements of the FD 2008. Despite these differences, both approaches raise similar constitutional concerns relating to the principle of proportionality, the principle of personal guilt and the legality principle [103]. The current situation is – at least in part – driven by the argument that criminal law and criminal proceedings provide for legal guarantees and procedural safeguards that are not considered to be available in the context of police action [104]. On the other hand, a criminal justice system cannot tolerate preventive measures being taken as a form of criminal punishment [105]. Sentencing a person to several years of imprisonment for "training for terrorism" will be tantamount to preventive detention because the "trainee" is not detained for crimes he has already committed but rather for crimes he is expected to commit in the future [106]. Whether preventive detention is a legitimate instrument in the fight against terrorism or not has to be left open and requires further discussion. In any case, the legislator will have to provide for adequate guarantees and procedural safeguards [107]. However, a clear-cut distinction between prosecution and prevention and the different functions of criminal justice and police action should

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[100] O. Backes, *op. cit.*, p. 657-659; N. Gazeas, T. Grosse-Wilde and A. Kiessling, *op. cit.*, p. 597 and 599; H. Radtke and M. Steinsiek, *op. cit.*, p. 388.

[101] R. Deckers and J. Heusel, *op. cit.*, p. 172; N. Gazeas, T. Grosse-Wilde and A. Kiessling, *op. cit.,* p. 600.

[102] N. Gazeas, T. Grosse-Wilde and A. Kiessling, *op. cit.*, p. 595.

[103] See with regard to the FD 2008: P. Asp and *al.*, "A Manifesto to European Criminal Policy", *Zeitschrift für Internationale Strafrechtsdogmatik*, 2009, p. 707, at p. 710-711 and 712.

[104] B. Weisser, "Der Kampf gegen den Terrorismus – Prävention durch Strafrecht?", *Juristenzeitung*, 2008, p. 388, at p. 394; M.A. Zöller, *op. cit.*, p. 617.

[105] U. Sieber, *op. cit.*, p. 357.

[106] M. Pawlik, *Der Terrorist und sein Recht*, München, C.H. Beck, 2008, p. 35-36.

[107] See in this regard M. Pawlik, *op. cit.*, p. 42 and f.; for the contrary view see H. Radtke and M. Steinsiek, *op. cit.*, p. 388; U. Sieber, *op. cit.*, p. 355.

be regarded as an indispensable basis for an in-depth discussion of the instruments available for combating terrorism [108]. Building the security architecture for Europe, the Union and the Member States should keep in mind one of the basic architectural rules: "form follows function" [109].

[108] B. Heinrich, *op. cit.*, p. 127-128.

[109] "It is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things super-human, of all true manifestations of the head, of the heart, of the soul, that the life is recognisable in its expression that form ever follows function. This is the law" (L. Sullivan, *The Tall Building Artistically Considered*, 1896).

Annex – Sections 89a, 89b, 91, 129, 129a and 129b of the German Penal Code [110]

Section 89a
Preparation of a serious violent offence endangering the State

(1) Whosoever prepares a serious offence endangering the State shall be liable to imprisonment from six months to ten years. A serious violent offence endangering the State shall mean an offence against life under Sections 211 or 212 or against personal freedom under Sections 239a or 239b, which under the circumstances is intended to impair and capable of impairing the existence or security of a State or of an international organisation, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany.

(2) Subsection (1) above shall only be applicable if the offender prepares a serious violent offence endangering the State by

1. instructing another person or receiving instruction in the production or the use of firearms, explosives, explosive or incendiary devices, nuclear fission material or other radioactive substances, substances that contain or can generate poison, other substances detrimental to health, special facilities necessary for the commission of the offence or other skills that can be of use for the commission of an offence under Subsection (1) above,
2. producing, obtaining for himself or another, storing or supplying to another weapons, substances or devices and facilities mentioned under no. 1 above,
3. obtaining or storing objects or substances essential for the production of weapons, substances or devices and facilities mentioned under no. 1 above, or
4. collecting, accepting or providing not unsubstantial assets for the purpose of its commission.

(3) Subsection (1) above shall also apply if the preparation occurs abroad. If the preparation occurs outside the territory of the Member States of the European Union, the aforesaid shall apply only if the preparation is performed by a German citizen or a foreign citizen whose existence is based within the territory of the Federal Republic of Germany or if the serious violent offence endangering the State so prepared is meant to be committed within the territory of the Federal Republic of Germany or against a German citizen.

(4) In the cases of Subsection (3) 2nd sentence above the prosecution shall require the authorisation by the Federal Ministry of Justice. If the preparation occurred on the territory of another Member State of the European Union, the prosecution shall require the authorisation by the Federal Ministry of Justice if the preparation was neither performed by a German citizen nor the serious violent offence endangering the State so prepared to be committed within the territory of the Federal Republic of Germany or by or against a German citizen.

(5) In less serious cases the penalty shall be imprisonment from three months to five years.

(6) The court may make an order for supervision (Section 68(1)); Section 73 shall apply.

(7) The court in its discretion may mitigate the sentence (Section 49(2)) or order a discharge for the offence under this provision, if the offender voluntarily gives up the further preparation of the serious violent offence endangering the State, or averts or substantially reduces a danger caused and recognised by him that others will further prepare or commit the offence, or if he voluntarily prevents the completion of the offence. If the danger is averted or substantially reduced regardless of the contribution of the offender or the completion of the serious violent offence endangering the State prevented, his voluntary and earnest efforts to achieve that object shall suffice.

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[110] English translation provided by Michael Bohlander (http://www.gesetze-im-internet.de/englisch_stgb/index.html#Section90) (last visit: 18 May 2012).

Section 89b
Establishing contacts for the purpose of committing a serious violent offence endangering the State

(1) Whosoever, with the intention of receiving instruction for the purpose of the commission of a serious violent offence endangering the State under Section 89a(2) no. 1, establishes or maintains contacts to an organisation within the meaning of Section 129a, also in conjunction with Section 129b, shall be liable to imprisonment not exceeding three years or a fine.

(2) Subsection (1) above shall not apply if the act exclusively serves the fulfilment of lawful professional or official duties.

(3) Subsection (1) above shall also apply if the act of establishing or maintaining contact occurs abroad. Outside the territory of the Member States of the European Union this shall apply only if the act of establishing or maintaining contact is committed by a German citizen or a foreign citizen whose existence is based within the territory of the Federal Republic of Germany.

(4) The prosecution shall require the authorisation by the Federal Ministry of Justice

1. in the cases of Subsection (3) 2nd sentence above or
2. if the act of establishing or maintaining contacts occurs on the territory of another Member State of the European Union.

(5) If the degree of guilt is of a minor nature, the court may order a discharge for the offence under this provision.

Section 91
Encouraging the commission of a serious violent offence endangering the State

(1) Whosoever

1. displays or supplies to another written material (Section 11(3)) which by its content is capable of serving as an instruction to the commission of a serious violent offence endangering the State (Section 89a(1)), if the circumstances of its dissemination are conducive to awakening or encouraging the preparedness of others to commit a serious violent offence endangering the State,
2. obtains written material within the meaning of no. 1 above for the purpose of committing a serious violent offence endangering the State

shall be liable to imprisonment not exceeding three years or a fine.

(2) Subsection (1) no. 1 above shall not apply if

1. the act serves the purpose of citizenship education, the defence against anti-constitutional movements, arts and sciences, research or teaching, reporting about current or historical events or similar purposes or
2. if the act exclusively serves the fulfilment of lawful professional or official duties.

(3) If the degree of guilt is of a minor nature, the court may order a discharge for the offence under this provision.

Section 129
Forming criminal organisations

(1) Whosoever forms an organisation the aims or activities of which are directed at the commission of offences or whosoever participates in such an organisation as a member, recruits members or supporters for it or supports it, shall be liable to imprisonment of not more than five years or a fine.

(2) Subsection (1) above shall not apply

1. if the organisation is a political party which the Federal Constitutional Court has not declared to be unconstitutional;
2. if the commission of offences is of merely minor significance for the objectives or activities or
3. to the extent that the objectives or activities of the organisation relate to offences under Sections 84 to 87.

(3) The attempt to form an organisation as indicated in Subsection (1) above shall be punishable.

(4) If the offender is one of the ringleaders or hintermen or the case is otherwise especially serious the penalty shall be imprisonment from six months to five years; the penalty shall be imprisonment from six months to ten years if the aim or the activity of the criminal organisation is directed at the commission of an offence set out in Section 100c (2) no. 1 (a), (c), (d), (e), and (g) with the exception of offences pursuant to Section 239a or Section 239b, (h) to (m) nos. 2 to 5 and 7 of the Code of Criminal Procedure.

(5) The court may order a discharge under Subsections (1) and (3) above in the case of accomplices whose guilt is of a minor nature or whose contribution is of minor significance.

(6) The court may in its discretion mitigate the sentence (Section 49 (2)) or order a discharge under these provisions if the offender

1. voluntarily and earnestly makes efforts to prevent the continued existence of the organisation or the commission of an offence consistent with its aims; or
2. voluntarily discloses his knowledge to a government authority in time so that offences the planning of which he is aware of may be prevented;

if the offender succeeds in preventing the continued existence of the organisation or if this is achieved without his efforts he shall not incur criminal liability.

Section 129a

Forming terrorist organisations

(1) Whosoever forms an organisation whose aims or activities are directed at the commission of

1. murder under specific aggravating circumstances (Section 211), murder (Section 212) or genocide (Section 6 of the Code of International Criminal Law) or a crime against humanity (Section 7 of the Code of International Criminal Law) or a war crime (Section 8, Section 9, Section 10, Section 11 or Section 12 of the Code of International Criminal Law); or
2. crimes against personal liberty under Section 239a or Section 239b,
3. *(repealed)*

or whosoever participates in such a group as a member shall be liable to imprisonment from one to ten years.

(2) The same penalty shall be incurred by any person who forms an organisation whose aims or activities are directed at

1. causing serious physical or mental harm to another person, namely within the ambit of Section 226,
2. committing offences under Section 303b, Section 305, Section 305a or offences endangering the general public under sections 306 to 306c or Section 307(1) to (3), Section 308(1) to (4), Section 309(1) to (5), Section 313, Section 314 or Section 315(1), (3) or (4), Section 316b(1) or (3) or Section 316c(1) to (3) or Section 317(1),
3. committing offences against the environment under Section 330a(1) to (3),

4. committing offences under the following provisions of the Weapons of War (Control) Act: Section 19(1) to (3), Section 20(1) or (2), Section 20a(1) to (3), Section 19(2) no. 2 or (3) no. 2, Section 20(1) or (2), or Section 20a(1) to (3), in each case also in conjunction with Section 21, or under Section 22a(1) to (3) or
5. committing offences under Section 51(1) to (3) of the Weapons Act;

or by any person who participates in such a group as a member, if one of the offences stipulated in nos. 1 to 5 is intended to seriously intimidate the population, to unlawfully coerce a public authority or an international organisation through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a State or an international organisation, and which, given the nature or consequences of such offences, may seriously damage a State or an international organisation.

(3) If the aims or activities of the group are directed at threatening the commission of one of the offences listed in Subsections (1) or (2) above, the penalty shall be imprisonment from six months to five years.
(4) If the offender is one of the ringleaders or hintermen the penalty shall be imprisonment of not less than three years in cases under Subsections (1) and (2) above, and imprisonment from one to ten years in cases under Subsection (3) above.
(5) Whosoever supports a group as described in Subsections (1), (2) or (3) above shall be liable to imprisonment from six months to ten years in cases under Subsections (1) and (2), and to imprisonment of not more than five years or a fine in cases under Subsection (3). Whosoever recruits members or supporters for a group as described in Subsection (1) or Subsection (2) above shall be liable to imprisonment from six months to five years.
(6) In the cases of accomplices whose guilt is of a minor nature and whose contribution is of minor significance, the court may, in cases under Subsections (1), (2), (3) and (5) above, mitigate the sentence in its discretion (Section 49(2)).
(7) Section 129(6) shall apply *mutatis mutandis*.
(8) In addition to a sentence of imprisonment of not less than six months, the court may order the loss of the ability to hold public office, to vote and be elected in public elections (Section 45(2) and (5)).
(9) In cases under Subsections (1), (2) and (4) above the court may make a supervision order (Section 68(1)).

Section 129b

Criminal and terrorist organisations abroad; extended confiscation and deprivation

(1) Section 129 and Section 129a shall apply to organisations abroad. If the offence relates to an organisation outside the Member States of the European Union, this shall not apply unless the offence was committed by way of an activity exercised within the Federal Republic of Germany or if the offender or the victim is a German or is found within Germany. In cases which fall under the 2nd sentence above the offence shall only be prosecuted on authorisation by the Federal Ministry of Justice. Authorisation may be granted for an individual case or in general for the prosecution of future offences relating to a specific organisation. When deciding whether to give authorisation, the Federal Ministry of Justice shall take into account whether the aims of the organisation are directed against the fundamental values of a State order which respects human dignity or against the peaceful coexistence of nations and which appear reprehensible when weighing all the circumstances of the case.
(2) Section 73d and Section 74a shall apply to cases under Section 129 and Section 129a, in each case also in conjunction with Subsection (1) above.

Italian counter-terrorism legislation
The development of a parallel track ("*doppio binario*")

Francesca GALLI [1]

1. Introduction

Many provisions first introduced in Italy before 11 September 2011 to cope with the threat of domestic terrorism were then re-introduced at a later stage in an attempt to deal with international terrorism.

Italian legal writers have used the expression "*doppio binario*" (parallel track) to describe the development since the early 1990s of special procedures to deal with organised crime offences.

In fact, in Italy the normalisation process results from the reciprocal influence of anti-terrorism and anti-organised crime legislation passed in the last thirty years and the subsequent re-enactment of provisions that had been repealed following a new outbreak of terrorism or organised crime. Since 1975 (Law 152/1975) [2], special measures adopted to deal with the threat of domestic terrorism have been gradually introduced as derogations to the ordinary principles of criminal law [3]. With the enactment of the new *Codice di Procedura Penale* (CPP) in 1988, Italian criminal procedure was redesigned in a more accusatorial fashion with an emphasis on the rights of the defence, cross-examination and on gathering evidence during the trial

[1] I would like to express my appreciation to the Fonds de la Recherche Scientifique (FNRS) for its generous financial support over the years of my post-doctoral research at the Institut d'Etudes Européennes (ULB), focusing on "L'Union européenne et la prévention du terrorisme : impact sur le droit pénal et redéfinition de la relation entre le droit pénal européen et les droits pénaux nationaux".

[2] Law 152/1975 (*Disposizioni a tutela dell'ordine pubblico, detta Legge Reale*).

[3] G. ILLUMINATI, "Reati 'speciali' e procedure 'speciali' nella legislazione d'emergenza", *Giustizia Penale*, 1981, p. 106.

rather than beforehand during the investigation phase. The new code was also meant to redress the balance in terms of the numerous derogations set out in emergency legislation in the previous decade.

However, as soon as the level of the threat from organised crime increased again in the early 1990s, the tools provided by the 1988 CPP began to seem inadequate and the legislator had to resort to old methods once again despite their inquisitorial flavour [4]. Major changes in the law were made via the introduction of layer upon layer of new principles, rules and exceptions and not as a coherent legislative design [5].

With the enactment of Law 438/2001 and Law 155/2005, the scope of many of these provisions has been extended to cope with the emergence of an international terrorist threat [6]. Thus, temporary measures adopted in the 1970s to investigate and bring to trial acts of domestic terrorism – although temporarily repealed by the 1988 *CPP* – are still part of the counter-terrorism framework and have since been applied to a broader range of offences.

2. Political and criminological context

A. From a domestic to an international terrorist threat

Between the 1960s and 1980s, Italy's democracy was threatened by right-wing and left-wing extremism and to a lesser extent by minor separatist movements [7].

Right-wing terrorism dominated a period (1969-75) [8] of apparently mindless, gratuitous and indiscriminate bombings in public places [9]. In Italy, it is widely believed that the secret services, and possibly even the government, were indirectly involved in these attacks [10], which were part of a wider strategy, the so-called

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[4] P.L. Vigna, "Il processo accusatorio nell'impatto con le esigenze di lotta alla criminalità organizzata", *Giustizia Penale*, 1991, p. 462.

[5] These include: special investigative judges, prosecutors and police (*Direzioni Distrettuali Antimafia and Direzione Investigativa Antimafia*), relaxed requirements for the interception of communications (and the development of preventive interceptions) and searches, a potential extension of pre-trial detention and preliminary investigations, etc. In addition, Law 203/1991 (*Conversione in legge, con modificazioni, del decreto-legge 13 maggio 1991, n. 152, recante provvedimenti urgenti in tema di lotta alla criminalità organizzata e di trasparenza e buon andamento dell'attività amministrativa*) re-introduced the mandatory use of pre-trial detention with regard to a large number of offences, a measure that the new *Codice di Procedura Penale* (1988) had conceived as an *extrema ratio*.

[6] Interestingly some provisions (such as derogations on cross-examination requirements *ex* Article 190*bis* CPP) had already been applied to sexual offences and paedophilia by Law 268/1998.

[7] See D. Della Porta, *Terrorismi in Italia*, Bologna, Il Mulino, 1984.

[8] Judicial investigations and historical studies both attribute these events to right-wing terrorism groups.

[9] *Milano, Piazza Fontana* (12 December 1969); *Brescia, Piazza della Loggia* (28 May 1974); *Bologna, treno Italicus* (18 December 1986).

[10] Auditions of the Joint Parliamentary Committee of Inquiry. One of the major problems in the state response to domestic terrorism was the fact that political elites never engaged in a common reflection over the phenomenon and its roots. The establishment of a Joint Parliamentary Committee of Inquiry on terrorism in Italy (1988) allowed the in-depth analysis

"strategy of tension" [11]. This political instrumentalisation of violent "opposed extremisms" was meant to induce public demand for "law and order" and to contain any possible expansion of communism on the peninsula. The so-called "theory of opposed extremisms" accused Christian Democrat (DC) governments of exploiting political violence to deny the Communist Party (PCI) the right to legitimately participate in the democratic debate. This alleged strategy was carried out together with attempted *coups d'Etat*, linked to the existence of *Gladio*, the Italian branch of the NATO Stay Behind network [12].

Left-wing terrorism, by contrast, developed as a reaction to the complete stasis of the political system, in the name of a wider anti-imperialist coalition. It shared ideological roots, historical background and references with the Communist Party. However, the latter – though not part of the government – was regarded as having betrayed its revolutionary responsibilities (and the anti-fascist resistance movement) and as having sold its soul by making unacceptable compromises against the interests of the working class that it claimed to represent. The development of these underground groups was the natural result of widespread discontent and disaffection as conveyed by Marxist terminology. Their aim was a wider revolutionary armed struggle with the eventual support of the masses against what they considered a corrupted government [13].

In parallel with this, during the 1960s, the Alto Adige German-speaking separatists launched terrorist campaigns aiming at reuniting Alto Adige with Austria or at achieving Alto Adige's independence within Italy. In 1972, the Senate gave effect to constitutional provisions according a special status of self-government to five regions where large linguistic and ethnic minorities existed. This prevented any further political violence there and also in Sicily. On the island of Sicily, terrorism was closely connected with other forms of organised crime and a major rebellion had been militarily repressed after the war [14].

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of a large quantity of judicial documents and intelligence material as well as the auditioning of political leaders.

[11] See the film "Il Divo" (2008) by P. Sorrentino; N. Tranfaglia, "La strategia della tensione", *in* C. Venturoli (ed.), *Come studiare il terrorismo e le stragi*, Venezia, Marsilio, 2002.

[12] During the Cold War, "Stay behind" was a secret military unit training local (right-wing) resistance movements in Western European countries against a possible uprising of domestic communist parties supported by the USSR. Its existence is known from the accounts given to Parliamentary committees by domestic political figures.

[13] On left wing terrorism and its ideology, see C. Marletti, "Immagini Pubbliche e ideologia del terrorismo", *in* L. Bonanate, *Dimensioni del terrorismo politico*, Milano, Franco Angeli, 1979.

[14] The bandit Giuliano, member of the separatist movement for the independence of Sicily after the Second World War, is held responsible for the *Strage di Portella della Ginestra* (1 May 1947), when he fired with his gang on leftist workers, who were demonstrating against the existence of large estates and for agrarian reform. Although the truth is still unknown, reactionary local elites and the Mafia are suspected of being instigators. Others attribute the responsibility to neo-fascist movements and to the CIA, concerned by the spread of communism in the peninsula.

During the late 1980s and early 1990s no significant terrorist activity was recorded. The situation changed abruptly at the end of the 1990s. Right-wing radical groups engaged in expressions of racism and anti-immigration demonstrations and represented a threat to public order on several occasions because of their association with football hooligans. As for left wing terrorism, the murder of two labour consultants [15] made Italy aware of the possible re-emergence of revolutionary left-wing groups. As things stand, domestic terrorism does not seem to present any imminent danger.

Intelligence and investigative agencies' reports have explicitly referred to possible terrorist attacks from Islamic groups [16]. Organised on an ethnic basis since the late 1980s and early 1990s, Islamic terrorists active in Italy are mainly Maghrebi [17] and Egyptian nationals [18]. With regards to Jihadist activities, Italy has historically been used as a logistical base in order to acquire false documents, obtain weapons and military hardware, raise funds and convert people to Islam. They specialise in counterfeiting identity cards and passports; importing weapons and military hardware; and money laundering.

A number of complex investigations over the past 20 years have uncovered Jihadist networks throughout the peninsula and extensive links with networks in other European countries and the Middle East. However there seemed to be no indications of networks planning serious attacks in Italy or from Italy against other countries [19].

B. The development of home grown terrorism

The latest investigations have shown some changes to previous patterns of Jihadist activities and revealed the emergence of the phenomenon of homegrown terrorism [20].

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[15] Professors Massimo D'Antona (1999) and Marco Biagi (2002).

[16] Among the events that occurred in the last few years: the kidnapping of the imam Abu Omar and the various incidents connected with the Italian involvement in the war in Iraq.

[17] Originally most terrorists were Algerians. In the last few years they have been mostly Tunisians, opponents of the regime of Ben Ali. They are well rooted and strong in Milan, where they are active as '*Gruppo salafita per la predicazione ed il combattimento*'.

[18] Among the events that occurred in the last few years: the kidnapping of the imam Abu Omar and the various incidents connected with Italy's involvement in the war in Iraq.

[19] A. Spataro (ed.), "Dati sulle sentenze di condanna", *La Magistratura*, 2, 2008.

[20] The recent rise of this phenomenon seems to be caused by a mixture of violent ideological influences (radical propaganda shared via the internet), group dynamics and more structural problems in Western societies. Its most important characteristics are a deep religious faith, often newly discovered, hatred of the West and a sense of alienation from their societies. Homegrown terrorists are part loosely knit and fluid networks (sometimes simply individuals) with varying, or no, international links. They are primarily young Muslim men, second or third generation immigrants who have met by hazard within the community and share a common grief. See K.L. Thachuk *et al*., *Homegrown Terrorism. The threat within*, Center for Technology and National Security Policy. National Defense University, May 2008, available at http://www.ndu.edu/CTNSP/docUploaded/DTP%2048%20Home%20Grown%20Terrorism.pdf (last visit: 30 May 2012); T. Precht, Home grown terrorism and Islamist radicalisation in Europe. From conversion to terrorism, Danish Ministry of Justice, December 2007, available at http://www.justitsministeriet.dk/fileadmin/downloads/Forskning_og_dokumentation/Home_grown_terrorism_and_Islamist_radicalisation_in_Europe_-_an_assessment_of_influencing_factors__2_.pdf. (last visit: 30 May 2012).

Militants, the so-called "lone wolves", are now based and operating within the country. By providing access to broad and constant terrorist-related propaganda, the internet has a major role in facilitating violent radicalisation [21]. An interesting example of this process is the attempted attack by a legal immigrant from Libya, Mohammad Game, on 12 October 2009 in Milan [22]. The subsequent investigations revealed that Game and his accomplices, an Egyptian and a Libyan, had not acted under the direction of, or even in remote cooperation with, any organised group. Self-recruited and self-trained via the internet, their sudden radicalisation and unsophisticated techniques resemble those of similar homegrown terrorist networks in other European countries such as the United Kingdom and Spain.

3. The legislation in detail

Italy is one of those jurisdictions that have experienced serious and lengthy periods of political violence and terrorism, and thus developed specific terrorist legislation well before the drafting of the Framework Decisions of 2002 and 2008. In fact, as a result of the threat represented by domestic political violence, a series of laws were enacted from 1974 onwards.

These laws gradually modified specific provisions of the *Codice Penale* (CP, 1930) and the *Codice di Procedura Penale* (CPP, 1930). The new provisions were scattered about in the codes and never grouped together in a specific section devoted to terrorist offences and related applicable procedures. Adopted with wide parliamentary support to respond to the most urgent problems, they eroded the improvements in individual rights introduced by late 1960s and early 1970s legislation, which was considered the period of maximum development of individual safeguards in the Italian criminal justice system. Although controversial, these repressive measures were never declared unconstitutional by the Constitutional Court. Most of the legislation was adopted via law-decree, a quicker procedure, dictated by urgency [23]. The emergency situation made long and comprehensive debates impossible and reduced parliamentary scrutiny. The Interior Ministry obtained more freedom of manœuvre and thus adopted policies oriented towards "law and order".

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[21] P. Brunst, "Terrorism and the Internet: new threats posed by cyber-terrorism and terrorist use of the internet", in M. Wade and A. Maljevic (eds.), *A War on Terror? The European Stance on a new threat, changing laws and human rights*, New York, Springer, 2009, p. 51.

[22] Game detonated an explosive device hidden on his person at the gates of the Santa Barbara military base in Milan, injuring himself and a *carabiniere* who tried to stop him. Game and his accomplices used to attend Milan's Islamic Cultural Institute (the Mosque of *Viale Jenner*), well-known by law enforcement authorities, having been the focus of terrorism investigations for almost 20 years. At trial, Game stressed that the attack was his religious duty as a Muslim and was meant as a protest against Italy's involvement in Afghanistan. The Libyan terrorist was sentenced to 14 years of imprisonment with a charge of making and possessing explosives for terrorist purposes.

[23] Under Article 77 of the Constitution, the government can adopt a law-decree in emergency situations. Parliament must convert (totally or partially) the decree in law in the sixty days following its enactment. Governments have over time abused this extraordinary power to overcome parliamentary scrutiny.

Of particular interest for the purpose of this contribution is Law-decree 625/1979 (which later became Law 15/1980) [24], which established the 'association with the aims of terrorism and subversion of democratic order' (Article 270 *bis* CP) and the offence of 'attack with terrorist or subversive aims' (Article 280 CP). The aggravating circumstances of these new offences provided for: an increase in the sentence of up to 50%; exclusion from mitigating circumstances and parole; and an extension of up to a third of the maximum time of pre-trial detention (reaching – in some circumstances – more than ten years). Pre-trial detention could sometimes last longer than the maximum penalty provided for the offence. Once again, public opinion favoured the adoption of harsh anti-terrorist measures. The referendum held in 1981 for the repeal of Law 15/1980 had a negative outcome (only 14.5% voted in favour of abrogation).

Many of the anti-terrorism provisions previously enacted had been repealed by the coming into force of the new *Codice di Procedura Penale* in 1989. However, after the attacks of 11 September 2001, new anti-terrorism legislation was considered necessary. In addition, there was allegedly a need to fill gaps and address weaknesses in the existing legislation because of the changing nature of the phenomenon from a domestic to an international threat.

The first and most relevant piece of new legislation was Law 438/2001 [25], which amended Article 270 *bis* CP and introduced the new charge of 'international terrorism' and the newly defined category of 'association for the purpose of international terrorism' (through the amendment of Article 270*bis* CP). This law then inspired the guidelines of criminal policy adopted by Law 155/2005 [26], which most importantly introduced in the code Article 270*sexies*, attempting to define for the first time a "terrorism act" and a "terrorist intent". Although they touch upon very complex and delicate issues, both laws were adopted with unusual speed due to the need to address the terrorist emergency.

A. The definition of terrorism

No legislation has been specifically adopted to implement the two Framework Decisions, although, as we shall see, the FD of 2002 has certainly had an impact in the shaping of the definition of terrorism introduced in the criminal code in 2005.

Since the late 1970s, the domestic definition has progressively evolved: first in response to the reality of the threat; then to the emotional reaction caused by the attacks; and finally to conform with European and wider international requirements, such as the Framework Decision of 2002.

At the international level, the thirteen successive UN *ad hoc* conventions for the suppression of terrorism (1963-2005) identify a number of specific terrorist acts, including certain types of bombing as well as aircraft and maritime hijacking. They

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[24] Law 15/1980 (*Conversione in legge, con modificazioni, del decreto-legge 15 dicembre 1979, n. 625, concernente misure urgenti per la tutela dell'ordine democratico e della sicurezza pubblica*).

[25] Law 438/2001 (*Conversione in legge, con modificazioni, del decreto-legge 18 ottobre 2001, n. 374, recante disposizioni urgenti per contrastare il terrorismo internazionale*).

[26] Law 155/2005 (*Conversione in legge, con modificazioni, del decreto-legge 27 luglio 2005, n. 144, recante misure urgenti per il contrasto del terrorismo internazionale*).

also require state parties to establish as criminal offences under domestic law the behaviours set forth in the conventions and to make them punishable with severe penalties.

Moreover, there have been attempts at the international level to define terrorism as such. However, these are normally said to be insufficient. First, since the late 1980s, the United Nations has been unsuccessfully trying to draft a 'Comprehensive Convention for the Prevention and Repression of Terrorism' that would encompass an international definition of the offence of terrorism [27]. But such a legal definition is still controversial, not least because of divergent perceptions of political phenomena such as national liberation movements — 'One man's terrorist is another man's freedom fighter!' — and state terrorism. The UN Convention for the Suppression of the Financing of Terrorism (1999) lays down some common characteristics of terrorist offences and thereby marks a step forward towards a consensus:

> "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organisation to do or to abstain from doing any act" [28].

Not only has the UN 1999 Convention proved a useful point of reference for judges hearing terrorism cases, but EU Framework Decision 2002/475/JHA has also had a major impact on courts' decisions, legislators' choices and on the academic debate.

EU Framework Decision 2002/475/JHA [29] on combating terrorism identifies a number of acts that must be qualified as terrorism where committed with a specific purpose. EU Framework Decision 2008/919/JHA [30] amends the latter and introduces the offences of 'public provocation to commit a terrorist offence', 'training for terrorism' and 'recruitment for terrorism', as demanded by the earlier Council of Europe Convention on the Prevention of Terrorism (2005) [31].

The importance of the EU definition is the enumeration of acts (such as physical attacks, kidnapping, seizure of aircraft, manufacture or possession of weapons or explosives, etc.) that should be qualified as terrorism where they are committed with the aim of seriously intimidating a population; of compelling a government or international organisation to perform or abstain from performing any act; or of seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or international organisation.

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[27] "Renewed effort towards completion of the Comprehensive Convention against Terrorism applauded in Legal Committee" (8 October 2008), http://www.un.org/News/Press/docs/2008/gal3340.doc.htm (last visit: 30 May 2012).

[28] Article 2(1)(b) UNGA International Convention for the Suppression of the Financing of Terrorism (1999).

[29] Council Framework Decision (EC) 2002/475/JHA on combating terrorism.

[30] Council Framework Decision (EC) 2008/919/JHA amending Framework Decision 2002/475/JHA on combating terrorism.

[31] Council of Europe Convention on the Prevention of Terrorism (2005).

The first appearance of "terrorism" in Italian law dates back to the late 1970s. There, it arose in connection with domestic terrorist actions [32]. At this stage, the term "terrorism" was never defined. Nor was a definition provided when, under Law 438/2001, the notion of "international terrorism" was introduced in the wording of Article 270 *bis* CP [33] ('association for terrorist purposes').

Prosecutors and judges were left to decide on a case by case basis whether an act fell within the offence of 'association for terrorist purposes', relying on principles of national and international law to define the notion of "terrorist offence" and "terrorist act". As a consequence, the interpretation of the concept of terrorism gave rise to a controversial body of case law and heated academic debate.

Terrorism was formally defined in the Italian *Codice Penale* (CP) only in 2005. The aim of the definition of terrorism was to prompt the use of special procedural measures. In addition, Article 15 Law 155/2005 sought to clarify the meaning of Article 270 *bis* CP ('association for terrorist purposes') and thus added to the *Codice Penale* Article 270 *sexies*, which reads as follows:

> "Are considered offences with a terrorist intent, those activities that, in view of their nature or context, might cause serious harm to a country or international organisation and are intended to intimidate the population or constrain state powers or an international organisation to carry out or to refrain from carrying out any activity, or to destabilise or to destroy fundamental political, constitutional, economic or social structures of a country or of an international organisation; as well as all the activities defined as terrorist or as pursuing a terrorist intent by international convention and instruments binding on Italy".

Article 270 *sexies* CP is divided into two parts: a general definition and a blanket provision.

First, the article defines the specific *mens rea* required for an ordinary offence to be qualified as terrorist. The act must have been one intended to render serious damage to a state or international organisation [34]. The judge has to assess whether the circumstances of the case make such damage more or less likely. Possible difficulties include identifying what was likely to have occurred (if the action had been carried through) and whether the potential damage would have been sufficiently serious for the act to be deemed as terrorist. By contrast to the definition contained in Article 1 of the FD 2002, the provision does not list offences or types of behaviour which are to be considered as terrorist acts under specific circumstances.

Article 270 *sexies* CP also contains a "blanket provision" that brings within the general definition any action deemed as terrorist either under international law or

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[32] *E.g.* Law 191/1978 (*Conversione in Legge, con modificazioni, del Decreto-Legge 21 marzo 1978, n. 59, concernente norme penali e processuali per la prevenzione e la repressione di gravi reati*), Law 15/1980, Law 304/1982 (*Misure per la difesa dell'ordinamento costituzionale*).

[33] See A. Valsecchi, "Il problema della definizione di terrorismo", *Riv. It. Dir. Proc. Pen.*, 4, 2004, p. 1127.

[34] L. Pistorelli, "Punito anche il solo arruolamento", *Guida Dir.*, 33, 2005, p. 55.

under conventions binding on Italy [35]. This cross-reference is open and imprecise as it does not specify which international instruments have to be taken into account. A precise definition of the offence is avoided in order not to exclude by mistake other acts that are recognisably terrorist [36].

B. The development of inchoate offences and the criminalisation of preparatory activities

1. Association for terrorism purposes

In Italy, the shift of criminal liability upstream from the commission of any harm has been firstly achieved by the application of 'association for terrorist purposes' offences which have played a central role in the repression of terrorism since the 1980-90s.

The history of the matter is as follows. From the late 1970s onwards, various far-reaching provisions were introduced which penalised not only participation in terrorism-related activities but also indirect involvement in terrorist groups, irrespective of the actual commission of violent acts. However, the progressive change in the nature of the offences and in the operating modes of terrorist organisations made the existing scheme partially inadequate.

Article 270 *bis* CP criminalises the promotion, establishment, organisation and direction of terrorist groups [37]. As originally drafted in 1980, Article 270 *bis* CP only applied to terrorist groups that were planning operations within Italy [38]. Law 438/2001 amended Article 270 *bis* and thus extended the offence to cover terrorism directed against foreign states and international organisations [39]. In addition, the sentence provided for individuals who participate in associations with terrorist purposes was increased to imprisonment from five to ten years.

Finally, in order to implement the UN Convention for the Suppression of the Financing of Terrorism (1999), Article 270 *bis* has been further amended in 2001 so that it now also punishes terrorism financing with the same sentence as promoting, constituting, organising or directing an association for terrorist purposes.

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[35] For a precise list of the international law sources to which this article supposedly refers see A. Valsecchi, "Brevi osservazioni di diritto penale sostanziale", *Dir. Pen. Pr.*, 10, 2005, p. 1224, at p. 1226.

[36] L. Dati and M. Carrattieri, *Le nuove norme contro il terrorismo internazionale*, Rimini, Maggioli, 2005, p. 192.

[37] In its original wording, in 1980, Article 270 *bis* reads: "Anyone who promotes, constitutes, organises or directs associations aimed at the completion of violent acts with terrorist purposes or for the subversion of the democratic order is punished with imprisonment from seven to 15 years. Anyone who participates in these associations is punished with imprisonment from four to eight years".

[38] In all other circumstances, judges had to rely upon the offence of simple conspiracy (Article 416 CP). See Cass. Pen. 17 April 1996, in *Cass. Pen*., 12, 1997; Cass. Pen. 13 July 1998 in *CED* Cass 212161, 1998; Cass. Pen. 1 June 1999 in *Dir. Pen. Pr*., 4, 2000, p. 487 note A. Piccioli.

[39] The amendment reads as follows: "the terrorist intent subsists also when violent acts are carried out against a foreign State, institution or international organization".

As for the scope of Article 270 *bis* CP, some have argued that Law 438/2001 would have been better had it reorganised all the provisions in the *Codice Penale* concerning political offences. In particular, legal writers said that it would have been desirable to enact a single new provision related to all associations pursuing political ends — whether national or international — with the use of force or military means [40].

2. Providing material assistance to terrorist activities

Law 438/2001 has also introduced a specific offence of 'assisting the members of a terrorist association' (Article 270 *ter* CP). "Assistance" has to be distinguished from the offender's involvement in the group or activity as an accomplice or his/her abetting the criminal association. It may consist of providing terrorists with a safe haven or food, hospitality, means of transportation or communication. For this offence, it is enough that assistance is provided to a single member of the association and does not directly contribute to the perpetration of a specific criminal offence or to the existence of the association. In such cases, the offender's participation in the crime has not yet risen to the level of conspiracy. Individuals guilty of an offence under Art. 270 *ter* are liable to four years' imprisonment. Providing continuous assistance represents an aggravating factor for the purpose of defining the penalty.

3. Glorification of terrorism

In its current version, the Italian *Codice Penale* does not define the glorification of terrorism as a specific criminal offence.

Article 302 CP establishes a general offence of direct incitement to commit intentional offences against the state (such as association for terrorist purposes and assistance to those taking part in the association − Articles 270 *bis* and *ter* CP); punishable with a term of imprisonment of up to eight years. This provision was enacted during the 1920s and was used in Fascist times to punish all forms of dissent, and then used again, less oppressively, during the 1960s and 1970s. Following the enactment of the Republican Constitution in 1948, the *Corte Costituzionale* found these articles incompatible with Article 21 of the Constitution on freedom of expression in certain cases.

More recently, Article 15(1) *bis* Law 155/2005 introduced a new aggravating circumstance to the offence of public incitement to commit an offence (Article 414 CP) for the judge to take into account for sentencing purposes "(...) if the incitement or glorification concerns terrorism offences or crimes against humanity the sentence will be increased by half" [41]. In this context, for example, the judge might have to ascertain on a case by case basis whether certain acts of proselytism within Mosques can concretely result in acts of violence and thus represent a terrorism offence as defined by Article 270*bis* in combination with Article 270 *sexies*.

[40] E. Rosi, "Terrorismo internazionale", *Dir. Pen. Pr.*, 2, 2002, p. 150, at p. 157-159.

[41] Article 414(4) CP ("*Istigazione a delinquere*").

Indirect incitement addressed to unspecified persons was only punishable until 1999 when Law 205/1999 [42] repealed Article 303 CP. This provision formerly punished public incitement and apology of the offences against the state with a term of imprisonment from three to twelve years. This offence was drafted in a very broad way as someone could be prosecuted for the mere fact of having incited.

4. The new offences of recruiting or training for terrorism purposes

As required by the Council of Europe 2005 Convention on the Prevention of Terrorism, in Italy, Law 155/2005 introduced into the *Codice Penale* two new offences, namely recruiting (Article 270 *quater* CP) and training individuals for terrorism purposes (Article 270 *quinquies* CP). In fact, a growing number of cases of enrolling Islamic fighters could not be prosecuted under the existing provisions because there was insufficient evidence to charge suspects with preparatory acts under Article 270 *bis*.

A prosecution for the offence of recruitment and training of potential terrorists does not require proof of a specific association agreement. It is enough that the activities suggest the existence of a terrorist organisation and a terrorist purpose on the basis of the newly formulated Article 270 *sexies*.

Articles 270 *quater* and *quinquies* establish a term of imprisonment of seven to fifteen years for recruiting potential terrorists and of five to ten years for training them. The trainee is sanctioned with the same penalty as the trainer. The mere fact of being recruited is not punishable under Article 270 *quater*.

These offences are at risk of curtailing freedom of association and assembly *ex* Article 11 ECHR, which may only be restrained under the conditions of legality, necessity and proportionality.

Recruitment or training is not criminalised in relation to all the offences listed in Article 1 of the 2002 Framework Decision. It is true that recruitment or training for terrorist purposes could be punished under Article 270 *bis* as a form of participation in an "association for terrorist purposes". However, this provision does not encompass the recruitment or training done by individuals without any connection with a terrorist organisation.

C. Lacunas in the implementation of specific FD provisions

The most recent monitoring of the 2002 Framework Decision done by the European Commission in November 2007 [43] underlines that Italy has not perfectly implemented Article 1 of the European Framework Decision listing terrorist offences. The Italian provision does not list offences or types of behaviour which are to be considered as terrorist acts under specific circumstances.

Although it includes no list of offences as in the case of the French definition, the core Italian provision (Article 270 *sexies* CP) in fact identifies only a limited number

[42] Law 205/1999 (*Delega al governo per la depenalizzazione dei reati minori e modifiche al sistema penale e tributario*).

[43] Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, COM (2007) 681 final, 6 November 2007.

of acts as terrorist offences. Other terrorist offences are only taken into account as aggravating circumstances (*e.g.* 'glorification of terrorism').

With regards to the 2008 Framework Decision, the Italian *Codice Penale* contains no offence of direct and indirect public provocation to commit a terrorist offence. As explained above, the criminalisation of recruitment and training for terrorism purposes is also partially compliant with the European requirements. The domestic provision punishes the recruitment or training in order to commit acts of violence or sabotaging fundamental public services only. Italy considered that its narrower existing criminal provision met the European requirements so that no amendment was needed. The criminalisation within the Italian *Codice Penale* of the recruitment (Article 270 *quater*) and training (Article 270 *quinquies*) for terrorism purposes is also partially compliant with the European requirements.

4. National case law

Before looking at the details of national case law, it is interesting to reflect briefly on principles of statutory interpretation because recent legislation has left courts awkward problems of this sort. It has long been said that penal laws ought to be construed strictly [44]. Where doubt arises, the underlying principle is that any ambiguities have to be resolved in favour of the defendant (*in dubio pro reo*) [45].

In Italy, this principle is laid down in legislation. The Italian criminal code (Article 1 CP) mentions explicitly that the judge may never punish acts that are not expressly defined as offences nor sanction them with a penalty that is not established by law. Under Italian law (*principio di tassatività* – legality principle), criminal law must not be extensively construed to the accused's detriment (*in malam partem*). If, however, such a broad interpretation would mitigate the responsibility of the individual (*in bonam partem*), the limit does not apply [46]. On the other hand, the legality principle requires that the legislator avoids the drafting and enactment of complex and ambiguous offences that might give rise to the courts engaging in perilous teleological interpretation of the legislation.

From September 2001, there have been around 100 convictions for terrorism-related offences. Most cases involve participation in a terrorist association and not the commission of a terrorist act in itself. The average sentence is four years of imprisonment.

As previously underlined, before the amendment of Article 270 *bis*, the 'association for terrorist purposes' was only applicable to terrorist groups that were planning attacks within the national territory. Hence, defendants in proceedings which

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[44] See for instance: "What *nullum crimen* forbids is the analogical extension of penal statutes (...). Strict construction was adopted in the eighteenth and earlier nineteenth centuries to mitigate the ferocity of the penal system". G.L. Williams, *Criminal Law: the general part*, 2nd edn., London, Stevens, 1961, p. 586.

[45] As in Eur. Court HR, 25 May 1993, *Kokkinakis v. Greece*, App. no. 14307/88.

[46] In accordance with the doctrinal interpretation of Article 14 of the general provision on the law (*Disposizioni sulla legge in generale*): "Criminal and exceptional legislation does not apply beyond the cases and circumstances for which it is provided". See G. Marinucci and E. Dolcini, *Manuale di diritto penale. Parte Generale*, Milano, Giuffrè, 2003, p. 43-48.

started before the introduction of the offence of 'association for international terrorism purposes' by Law 438/2001 were charged and convicted of simple '*associazione per delinquere*' *ex* Article 416 CP, aimed at abetting illegal immigration or trafficking false identity documents.

In the most recently reported cases, where the defendants were accused of 'association for international terrorism purposes', sentences ranged between five and ten years of imprisonment [47].

Interestingly, before the 2005 legislative reform in Italy [48] and the introduction in the Penal Code of a definition of terrorism, the *Corte di Cassazione* pointed to the EU Framework Decision of 2002 as the most important term of reference for establishing a technical legal notion of terrorism [49]. This instrument then became the inspiration for national legislation.

The interpretation of Article 270 *bis* CP (association for terrorist purposes) generates difficulties both at the investigation and trial stage.

When investigating into and then bringing an individual to trial, what is required is evidence which tends to prove his association with a terrorist group, rather than evidence of the acts that he has done [50]. Information on different groups is often insufficient. The judge has to assess the concrete dangerousness of individual offenders in relation to an international context with which he is not always familiar. The case law of the *Corte di Cassazione* has consequently been inconsistent.

In some cases, the *Corte di Cassazione* has adopted a relaxed approach to the notion of association and the assessment of individual responsibility [51]. In these cases, the simple ideological adherence to criminal purposes has been considered enough for a charge under Article 270 *bis* [52]. Legal provisions do not identify what makes a criminal group or a violent plot a threat to international security. The role played by each individual within the organisation is also often irrelevant.

In other cases, on the other hand, the *Corte di Cassazione* has ruled that, for criminal liability under this provision, the defendant must take some concrete step towards putting the plan into action and that mere membership of the group is not enough [53]. In these cases the Court was not prepared to allow the provision to be used to punish the mere manifestation of a wish to commit an act [54].

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[47] A. Spataro (ed.), "Dati sulle sentenze di condanna", p. 44.

[48] Law 155/2005.

[49] As in Cass. Pen., 21 June 2005 in *Foro it*., II, 2006, p. 345. For a comment see V. Santoro, "La lettura 'europea' di vecchie norme", *Guida Dir*., 30, 2005, p. 78; G. Frigo, "Per uscire dall'impasse del codice penale", *Guida Dir.*, 6, 2005, p. 88.

[50] A common denominator among most suspects is the fact of belonging to an ideological area of Islamic fundamentalism confirmed by interceptions, seizure of books and various material. Investigations take many different directions touching on historical events, sociological concepts and analyses of international institutions, etc.

[51] As in Cass. Pen., 13 October 2004 in *Foro it.*, II, 2005, p. 218; Cass. Pen., 9 February 2005 in *Dir. Giust*., 20, 2005, p. 77, note R. Oliveri Del Castillo.

[52] As in Cass. Pen., 25 May 2006 in *Foro it.*, II, 2006, p. 541.

[53] As in Cass. Pen., 15 June 2006 in *Guida dir*., 40, 2006, p. 60; Cass. Pen., 11 October 2006 in *Cass. Pen*., 2007, p. 1469 and in *Foro it*., II, 2006, p. 77.

[54] See also Cass. Pen., 21 November 2001 in *Foro it*., II, 2004, p. 29.

A particularly controversial matter has been the tendency to use, as evidence in support of pre-trial measures, the fact of a group's appearance on a list of terrorist groups [55]. The use of such lists has been considered acceptable to encourage further investigations into the activities of a certain group deemed as terrorist. However, as argued by the *Corte di Cassazione*, any further use is inadmissible and, certainly, being included on a banned list cannot constitute evidence of terrorist purposes as required by Article 270 *bis* CP [56]. The risk is that, if it is interpreted too broadly, Article 270 *bis* becomes a blanket provision violating the principle of legality and legal certainty.

Moreover, in recent years the issue in case law has been dominated by the dispute over the legal standing of individuals claiming to be "freedom fighters". This is a long-running issue that is not confined to Italy. A significant example of this dispute is the contrasting interpretation at different stages of the *Andar Al Islam* case in 2005 by the *Tribunale di Milano* (24 January 2005) and by the *Tribunale di Brescia* (31 January 2005) [57].

A first ruling had been given in Milan by a judge for the preliminary hearing (*GUP*) to the effect that violent or *guerrilla* actions carried out during wartime (provided that they comply with humanitarian international law) do not fall within the notion of international terrorism, except where they are intended to terrorise civilians. The *Corte di Cassazione* had also already taken this line in the case of *Maamri Rachid et al* (17 January 2005).

In *Brescia,* the judge for the preliminary investigations (*GIP*) then ruled, however, that acts committed in pursuance of a programme of violence, even where this takes the form of the suicide bombing of a military target in another country, must be considered an offence under Article 270 *bis* CP and not as legitimate *guerrilla* actions.

5. Conclusion

A. The impact of the definition of terrorism on existing legislation

Academic opinion is divided on the impact of Article 270 *sexies* CP on existing legislation and case law. Particularly controversial is the scope and possible impact of the blanket provision that brings any action deemed as terrorist either under international law or under conventions binding on Italy within the general definition.

The general definition of terrorism provided in the first part of Article 270 *sexies* CP is thought, by some writers, to be broad enough by itself to cover any conceivable form of terrorism [58]. This would make a cross-reference to international instruments redundant.

Moreover, some writers consider that the vagueness of the definition leaves judges with too much discretion, calling into question both the principle of legality

[55] Trib. Brescia, 31 January 2005 in *Dir. Giust*., 6, 2005, p. 92.

[56] As in Cass. Pen., 30 September 2005 in *Dir. Giust*., 44, 2005, p. 78 ; Cass. Pen., 11 October 2006.

[57] Trib. Milano, 24 gennaio 2005 and Trib. Brescia, 31 January 2005 in *Dir. Giust*., 6, 2005, p. 92.

[58] A. Valsecchi, "Misure urgenti", p. 1226.

and the *riserva di legge* [59] in criminal matters (*ex* Article 117 of the Constitution as interpreted by the *Corte Costituzionale*) [60].

By contrast, an argument in favour of this blanket provision would be that the clause provides for automatic recognition in Italian domestic law of any future provision under international or European law.

In addition, not only does Article 270 *sexies* CP finally provide a provision that meets the constitutional requirement for precision in the definition of criminal offences (*ex* Article 25(2) of the Constitution) [61], but the open reference to international law also allows judges to give concrete sense to an otherwise vague definition [62]. On this view, the new law rubberstamps what has long been judicial practice. Article 270 *sexies* CP similarly assists judges in interpreting the terms of Articles 270 *quater* and *quinquies* CP but it offers no help in determining whether a group constitutes an "association for terrorist purposes" under Article 270 *bis* CP.

B. The controversial criminalisation of preparatory acts

An important feature of current counter-terrorism legislation is the development of criminal offences in inchoate mode and the criminalisation of all sorts of preparatory acts. Meant for preventive purposes, these offences – combined with a vague and unclear definition of terrorism – have the potential to catch and severely punish individuals irrespective of whether they have yet caused any identifiable harm [63].

Italy has been more hesitant than other countries in this respect. For instance, despite European requirements, Italy has not criminalised alleged terrorist speeches (or the mere public expression of opinions) to the same extent nor has the country criminalised the possession of articles for terrorist purposes.

Moreover, Italian legislation has progressively expanded the notion of conspiracy and relevant provisions on aiding and abetting. The provisions described in this contribution form part of a tradition of criminalisation that dates back many years. Waves of emergency legislation have led to the proliferation of offences of "association for criminal purposes" (*reati associativi*). Historically related to terrorism and organised crime, these forms of conspiracy became more widely applicable following the introduction in 1930 of the standard *associazione per delinquere* — Article 416 CP [64]. Academic commentators have often advocated the abolition of these vaguely

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[59] *I.e.* in criminal matters legal requirements must be prescribed by a statutory text.

[60] L. Dati, "Commento art 15 d.L. 27 luglio 2005 n. 144", in L. Dati and M. Carrattieri, *op. cit.*, p. 192-193.

[61] A. Valsecchi, "Il problema della definizione di terrorismo", p. 1158-59.

[62] *E.g.* referring to the 12 international instruments for the suppression of terrorism, which clearly identify a series of conduct to be prosecuted as terrorist acts.

[63] On this particular issue please see Katja Šugman and Francesca Galli's contribution on inchoate offences within this same publication.

[64] Article 416 CP (as amended) – "When three or more people associate to commit an offence or more, those who promote, constitute or organise the association are punished with a term of imprisonment between three and seven years. The participation in the association is punished with a term of imprisonment between one and five years (…). The penalty is raised if the number of associates is ten or more'. The association for criminal purposes was first introduced in 1859 and then called '*associazione di malfattori*'.

defined offences. For instance, the constitutional legitimacy of Article 270 *bis* has been fiercely challenged [65]. Under new legislation, it is, too, frequently the case that sanctions are more severe than in ordinary cases.

[65] S. Reitano, "Le misure di contrasto al terrorismo internazionale", *Indice penale*, 3, 2004, p. 1173, at p. 1210.

The reform of Spain's antiterrorist criminal law and the 2008 Framework Decision*

Manuel Cancio Meliá

1. Introduction

A. Terrorism in Spain

ETA, the largest terrorist organisation currently operating in Spain, is maintaining a ceasefire that it declared itself. Despite this and the fact that much of the operational capacity it employed in some periods when it was active is no longer at its disposal, it has still not been dissolved and pursuit-type operations continue to be carried out by Spanish and French police forces. The Spanish central government's attitude towards ETA, in particular the assessment of negotiations that have taken place, is a big point of political discussion at the moment and has sparked particularly heated debate. Although Spain suffered the worst attack on European soil to date following the resurgence of religion-based international terrorism (Madrid, 11 March 2004), there is currently much less judicial and political controversy attached to that than there is about ETA. There have been many terrorist incidents and the vast majority have been linked to ETA. In fact, hundreds of individual crimes have been committed in recent years.

What is most striking about the evolution of Spanish anti-terrorist criminal law is probably its *counter-cyclical pattern*. Anti-terrorist legislation managed to contain certain guiding principles in the 1980s despite the fact that ETA was carrying out major attacks throughout the country, including an intense bombing campaign in Madrid and Barcelona. Meanwhile, the so-called 'dirty war' was allegedly being carried out by State police units through the Anti-terrorist Liberation Groups and allegations of torture were commonplace. It was only after the reduced incidence of ETA activity

* Commendation goes to Hannah Crawford (student, University of Cambridge) for her assistance in translating this text into English.

and their waning political influence in the Basque country that criminal law has been bolstered both in terms of its design and application (*e.g.* it has an increasingly extended scope and strength now) [1]. Some of the special rules that were established relating to terrorism have been extended to cover other areas of criminal law which have evolved in the same way [2].

B. The limited impact of EU instruments on Spanish Law

The impact of EU policies on Spanish anti-terrorist legislation has been very limited due to the fact that Spanish laws have already allowed a very broad body of anti-terrorist criminal law to emerge. Therefore, remarkably, neither public debate nor scientific discussions have referred to European efforts made in this area. The contents of the Framework Decision 2008/919/JHA have not been debated in public and have not influenced national legislation, with the exception of the use of the 2008 FD as justification – by the legislature – for the latest expansion of anti-terrorist legislation in 2010. In particular, it was not necessary to implement the Framework Decision 2002/584/JHA, since the extraordinarily extensive and tough Spanish anti-terrorism criminal law that has been in place since 1980 (and during the dictatorship) had just been considerably expanded and deepened through a reform carried out in 2000. Coupled with discussion about the existence of new types of internationally organised terrorist networks and the use of the franchise model by these networks, the FD 2008 has served to encourage further reform and broadly drafted offences have been in force since 23 December 2010 [3].

2. Spanish Legislation before the 2010 reform

A. Terrorist crimes and the legal concept of terrorism

1. Terrorist crimes

The main features of Spanish anti-terrorist criminal law are set out in the new provisions contained in the 1995 PC [4]. The code was dubbed the 'Democratic Penal Code' because, before it was adopted, criminal legislation had been reformed at various points after the end of General Franco's dictatorship but without modifying the Penal Code in its entirety [5]. The new Penal Code made a number of long expected

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[1] See the synthesis in M. Cancio Meliá, "Strafrecht und Terrorismus in Spanien. Anmerkungen zur Entwicklung der Terrorismusgesetzgebung nach der Diktatur", *Journal der Juristischen Zeitgeschichte*, 1/2009, p. 15 and f.

[2] Regarding terrorism see M. Cancio Meliá, "Terrorism and Criminal Law: the Dream of Prevention, the Nightmare of the Rule of Law", *New Criminal Law Review*, 14, 2011, p. 108 and f.

[3] On the subject of reform of organised crime and terrorism see, in detail, M. Cancio Meliá, "Delitos de organización: criminalidad organizada *común* y delitos de terrorismo", in J. Díaz-Maroto Villarejo (ed.), *Estudios sobre las reformas del Código penal (operadas por las LO 5/2010, de 22 de junio, y 3/2011, de 28 de enero)*, Madrid, Civitas, 2011, p. 643 and f.

[4] See the summary in M. Cancio Meliá, *Los delitos de terrorismo. Estructura típica e injusto*, Madrid, Reus, 2010, p. 134 and f.

[5] General Franco's dictatorship had made use of the Penal Code dating back to the nineteenth century and had made only small changes to it.

technical improvements to the existing one. In addition, according to all the experts in the field, it extended the number of activities to be considered criminal and included much tougher punishments than had been in the criminal law that was in force during the dictatorship [6].

With regard to counter-terrorism legislation, it is worth noting that the criminal law in place during Franco's dictatorship – namely the offences contained in Articles 57*bis* and 174*bis* (b) of the 1973 PC [7] – was reworked by the 1995 PC into much more *extensive* and *intensive* legislation and also contained more specifically defined offences.

These were more *extensive*, *i.e.* broader in their application, because a series of offences were established that extended sentences for certain crimes committed when "belonging to, acting as officers of [acting in the service of something means serving the organisation without being a member of it], or collaborating with" organisations of a terrorist nature (Arts. 571, 572, 573 PC), as well as a type of 'catch-all' offence that (potentially) covers any criminal act (Art. 574 PC). In all of these cases, the punishment was increased beyond that of the corresponding crime, that is, in addition to the sentence fixed by law for the "common" offence, as murder, kidnapping, or illicit fire arm possession: the sentence is to be aggravated, so that terrorist murder is to be punished harder as common murder. As far as ascertaining the existence of a criminal organisation is concerned, it was assumed that such a group's purpose is to "subvert the constitutional order or seriously disrupt the public peace", a collective purpose that marks differences to "common" organised crime: in this sense, terrorism can be defined as political organised crime. In addition to the aggravated common offences referred to before, there are several offences which consist in some form of collaboration (without being a member) with a terrorist organisation. Art. 575 PC contains an aggravation circumstance for any economic crime committed with aim to support a terrorist organisation [8]; besides, there exists a specific offence of collaboration with a terrorist organisation, through any means, such as information gathering, transport of organisation members, hiding of weapons, etc. [9]. On the other hand, the so-called crime of "individual terrorism" – not a part of the previous body of legislation – was introduced [10] and was intended to include certain types of behaviour within the scope of the anti-terrorist legislation which take place in street disturbances carried out without violence against other people [11] and by which means the political group closest to ETA staged a "popular movement". According to this offence, those who perform what is considered criminal behaviour in order to subvert the constitutional order or to seriously disrupt the public peace, *without belonging*

[6] The dictatorship had, in any case, also used the military to combat terrorism and certain forms of political dissent.

[7] *I.e.* clauses dealing with aggravating offences, the first being general and the second more specific, and the offence for collaborating with an armed group (Art. 174*bis* (a) PC 1973).

[8] Art. 575 PC: committing economic crimes to raise funds for a terrorist organisation.

[9] Art. 576 PC; current sentence: between five and ten years imprisonment and a fine.

[10] Art. 577 PC; the sentence: aggravation of that of the relevant corresponding offences.

[11] In Basque: *kale borroka,* "street struggle", "fighting in the street": the burning of buses or Automated Telling Machines.

to or acting on behalf of a terrorist organisation, may nevertheless be considered perpetrators of terrorist offences.

Introduced by the Organic Law 7/2000, Art. 578 PC defines two different offences, one consisting of "glorification or justification" of terrorist offences and their perpetrators, and the other dealing with various types of harm to the victims of such crimes or their families [12]. The same reform in 2000 also introduced special rules regarding terrorist offences committed by minors.

Finally, Articles 579 and 580 PC are used to regulate, on the one hand, the preparatory acts [13], a special penalty of disqualification (Art. 579.2 PC), the issue of repentant perpetrators (Art. 579.3 PC) and international recidivism (Art. 580 PC). Moreover, just being a member of one of the organisations was considered to be a separate crime in itself [14].

2. *The concept of terrorism*

The legislation introduced in 1995 was also (much) more *intense*, *i.e.* clearer and deeper in its content as a definition of the special characteristics of terrorist offences, because it includes elements that had not existed before in the previous legal definition of terrorism. The previous legislation simply referred to "armed bands" and "terrorist or rebel elements". The new one chose to reintroduce the term "terrorism" as the section heading. Articles 571 onwards of the PC define terrorism as an act carried out with the "purpose of subverting the constitutional order or seriously disrupting the public peace".

The new law therefore introduced a genuine criminal concept of terrorism that explains the special characteristics of terrorist offences, allows for the interpretation of the scope of terrorism and justifies why the penalties prescribed for such offences are more serious than those for corresponding common offences.

It can be argued that, generally, wrongdoing in all offences related to organisations implies the seizure of the public sphere and a disregard for the State's monopoly of violence [15]. Compared to common criminal organisations, terrorist organisations carry out particularly serious violent acts with political significance which call into question the political system.

Specifically, the concept of terrorism in Spanish law [16] consists of three elements contained within Articles 571 and f. of the Penal Code. Terrorists are defined as armed units that intimidate the masses and whose collective aim is to subvert the

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[12] The sentence: imprisonment from one to two years.

[13] Art. 579.1 PC; punishable only in certain offences, such as conduct of a preparatory nature consisting of acts of communication: the planning, provocation and conspiracy to commit a crime.

[14] Now contained in Art. 571 PC; current sentence: six to twelve years' imprisonment for ordinary members and eight to fourteen years for leaders.

[15] See the expression in M. Cancio Meliá, "Zum Unrecht der kriminellen Vereinigung: Gefahr und Bedeutung", in M. Pawlik *et al.* (eds.), *Festschrift für Günther Jakobs zum 70. Geburtstag am 26. Juli 2007*, Köln, Carl Heymanns, 2007, p. 27 and f.

[16] M. Cancio Meliá, *Los delitos de terrorismo*, p. 154 and f., 167 and f., 176 and f.; Id., "Sentido y límites de los delitos de terrorismo", in C. García Valdes *et al.* (eds.), *Estudios*

constitutional order or to seriously disrupt the public peace. This concept of terrorism should be included in the interpretation of the various terrorist offences.

a. The concept of a terrorist group or organisation

The first feature of the definition of terrorism is the existence of a collective structure, a group as a distinct reality. Only a group with sufficient density can erode the State's monopoly of violence. This requirement gains even more force in terrorist organisations, whose agenda has immediate political significance.

The concept of an organisation [17] is a functional one. In order to determine what constitutes a terrorist organisation, one must first consider what it is that they do. Doctrine has developed various aspects to understand the concept of an organisation. These can be condensed into four elements: participation, a system of membership, the longevity of the organisation and its internal structure.

b. Mass intimidation and aggression

The second aspect of the general notion of terrorism in Spanish law deals with the specific way in which the terrorist organisation acts. The word terrorism implies a certain type of violence. As such, according to the Spanish Royal Academy dictionary, both definitions favour this notion: "rule by terror; a succession of violent acts carried out to instil terror". The legal concept of terrorism also includes a reference to the procedure employed in the perpetration of each offence by a terrorist organisation. As stated by the Spanish Constitutional Court, "inherent in any terrorist activity is the purpose, or in any case the outcome, of igniting a situation of social insecurity or alarm

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Penales en homenaje a Enrique Gimbernat, t. II, Madrid, Edisofer, 2008, p. 1879 and f., with further references.

[17] On the concept of organisation in this context see, for example, C. Lamarca Pérez, *Tratamiento jurídico del terrorismo*, Madrid, Ministerio de Justicia, 1985, p. 91 and f., 93 and f., 228 and f.; J. García San Pedro, *Terrorismo: aspectos criminológicos y legales*, Madrid, Centro de Estudios judiciales, 1993, p. 127 and f.; J.C. Campo Moreno, *Represión penal del terrorismo. Una visión jurisprudencial*, Valencia, Editorial General de Derecho, 1997, p. 32 and f.; on the concept of organisation in unlawful associations generally, see also A. García-Pablos de Molina, *Asociaciones ilícitas en el Código penal*, Barcelona, Bosch, 1977, p. 221 and f., 234 and f., p. 236 and f.; Id., "Asociaciones ilícitas y terroristas", in Cobo del Rosal and Bajo Fernández (eds.) *et al.*, *Comentarios a la Legislación penal*, t. II, *El Derecho penal del Estado democrático*, Madrid, Edersa, 1983, p. 109 and f., 117; Córdoba Roda, "Libertad de asociación y Ley penal", *Anuario de Derecho Penal y Ciencias Penales*, 1977, p. 7 and f.; on the German doctrine in general, see H.-J. Rudolphi, "Verteidigerhandeln als Unterstützung einer kriminellen oder terroristischen Vereinigung i. S. der §§ 129 und 129a StGB", in W. Frisch and W. Schmid (eds.), *Festschrift für Hans-Jürgen Bruns zum 70. Geburtstag*, Köln, Carl Heymanns, 1978, p. 319 and f.; Id., U. Stein, "Commentary on §§ 129 f.", in *Systematischer Kommentar zum Strafgesetzbuch*, 7. ed., München, Luchterhand, 2005, § 129 n. 6-6d; Th. Lenckner, "Commentary on §§ 129 f.. StGB", in Schönke/Schröder, *Kommentar zum Strafgesetzbuch*, 26. ed., München, C.H. Beck, 2001, § 129 n. 4; H. Ostendorf, "Commentary on §§ 123 f.", in U. Kindhäuser *et al.* (eds.), *Nomos-Kommentar Strafgesetzbuch*, vol. 1, 2. ed., Baden-Baden, Nomos, 2005, § 129 n. 12, all of which contain further references.

as a result of systematic, repeated and often indiscriminate criminal behaviour" [18]. This approach may be considered the instrumental definition for terrorism. This term is fitting if one is to take into account that terrorism is essentially a communication strategy. One element of this instrumental strategy is the widespread use of violence in challenging the State and thus provoking certain reactions amongst the public and State institutions. To achieve this, objective mass intimidation is necessary. In order to do this, a particularly effective mechanism is used: collective fear is fostered through selective victimisation via acts of violence. This selection might be more or less stringent [19] or it might be generic (the Spanish; the West; 'infidels'). But it is always random. The attack is not directed against the victims as human beings but against the category of person that they represent. There is a complete disregard for the right of the individual and the victim's identity becomes irrelevant. The act is an instrument of mass intimidation.

The specific acts of terrorism are the basis of considerable discussion regarding the application of the notion of terrorism: What treatment do organisations associated with a terrorist group deserve? Where might terrorism come in relation to an organisation and its social context? In Spain [20] this question arises in connection with the strategy of the terrorist organisation ETA when it staged an entire national movement to define its activities in political and sociological terms: through groups of prisoners or of their families, youth organisations, organisations for the promotion of *Euskara* (Basque language), etc. Many people had the impression that ETA was making a mockery of the law through its diversification into organised spheres of activity in public life: public presence and activities of several political and social organisations that identified themselves by supporting ETA's views on the independence of the Basque Country (and approving of ETA's violent activity) was considered in the rest of Spain to be intolerable.

Regarding the organisation Jarrai/Haika/Segi – the various names of a separatist youth organisation linked to the political arm of the "ETA world", Batasuna, who were devoted, besides legal political activity, to orchestrating serious public disorder – several

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[18] "*Característico de la actividad terrorista resulta el propósito, o en todo caso el efecto, de difundir una situación de alarma o de inseguridad social, como consecuencia del carácter sistemático, reiterado, y muy frecuentemente indiscriminado, de esta actividad delictiva*"; Sentence of the Constitutional Court (STC) 199/1987, legal foundation 4.

[19] For example: by only targeting police officers, members of the army and political representatives.

[20] On the German precedent – related to the so-called extreme left-wing terrorism of the Rote Armee Fraktion in the 1970s and 1980s – the excessive description of behaviour occurred due the aim of establishing a possibility to prosecute subjects unrelated organically to the group being able to undertake typical forms of *propaganda*. So the situation arose that one could be prosecuted for collaborating with a terrorist organisation if one was found painting supportive graffiti ("Long live the RAF!"; or simply drawing the symbol of that organisation). Apart from the disappearance of this terrorism phenomenon it was the legislator in 2002 (*i.e.* after the formal self-dissolution of the organisation) that prevented these excesses by making it clear in the drafting that types of propaganda could only be carried out by members of the organisation as part of their membership; for more information see *NK*²-Ostendorf (*supra* note 7), para. 129(3).

years ago the Audiencia Nacional (AN) [21] decided to term this as a "common" illegal organisation. This ruling was reviewed by the Supreme Court [22], which declared these groups to be terrorist organisations. To qualify as an illegal organisation, the AN argued that even if it has a purpose that coincides with that of the terrorist organisation ETA, the two should not be confused since their respective actions are distinct from one another. Moreover, in the case of *Jarrai* and its successors, "… they were never signatories to the use of weapons in terms recognised by the... law...". In this sense we are dealing with an organisation "peripheral" to another illegal activity involving weapons. The majority of the second chamber of the Supreme Court, however, take a much more flexible reading of the legal framework: "... the aim pursued, determines the terrorist action... the terrorism concept, a terrorist organisation or group, does not always identify with that of an armed gang, as mentioned by the court in an appealed decision, but instead it is the nature of the act and its purpose which determine whether or not it is an act of terrorism" [23].

This position of the Supreme Court is to be considered incorrect: the activities of these organisation do not fit into the definition of terrorism provided by Spanish criminal law. While, on the one hand, it can be agreed that the type of *organisation* required by the legal definition of terrorism concurs, on the other hand, the type of violence they use may *not* fit with that definition. Mass intimidation referred to by the PC needs the use of violence against persons. The violence carried out by certain types of peripheral group to ETA, as the youth organisations mentioned, is not directed specifically against people, so that it cannot be considered "terrorism". Even if the aim of the acting persons is to support ETA, to consider their activities terrorism, they would have to be connected directly to ETA, to the use of terrorist means. In conclusion, antiterrorist criminal law makes no mention of the State of mind of the agent to qualify his conduct as terrorism. It defines his deeds. Treating these other offenders as if they were terrorists seems to be due to distrust in the ordinary mechanisms of the rule of law.

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[21] The Sentence of the Audiencia Nacional (SAN) 27/2005 (sección 4ª) 20.6.2005; see, in full, the extensive and critical consideration of this resolution by A. Fernández Hernández, "JARRAI–HAIKA–SEGI: de asociación ilícita a organización terrorista", *Revista Penal*, 2006, a supporter of considering organisations in question as terrorist organisations, p. 95 and f., 99 and f.; regarding the armed nature of the organisation, see p. 105 and f.

[22] Sentence of the Supreme Court (STS) 50/2007 (19 January 2007), as wisely anticipated by A. Fernández Hernández in the title of his study on the AN resolution: "JARRAI-HAIKA-SEGI...", *op. cit.*, p. 95 and f.

[23] "*... la finalidad perseguida, lo que configurará la acción como terrorista, frente a las acciones aisladas o no permanentes que no alcanzarían tal consideración. Y, que, de cualquier modo, el concepto terrorismo, organización o grupo terrorista, no siempre se identifica con el de banda armada, como hace la sentencia recurrida, sino que es la naturaleza de la acción cometida, la finalidad perseguida con esta actuación, la que determina el carácter terrorista o no de la misma*".

c. Strategic projection

We may now consider the third element of the criminal definition of terrorism: the *strategic projection* which the terrorist organisations use to carry out their activity. This third element in the concept of terrorism deals with the objectives that are pursued.

The aims that we are concerned with are not individual desires or objectives. They are instead a collective programme of action in the sense that the very system of wrongdoing is the terrorist organisation itself: the objectives are the strategic projection of the group beyond the tactical means used for their execution. In the Spanish Penal Code this programme of action is encapsulated by the phrase "to subvert the constitutional order or seriously disrupt the public peace".

Thus, Spanish criminal law [24] explicitly incorporates elements of a political nature in the definition of terrorist offences, which are defined by their "political purpose" [25]. This option is not applied by other criminal justice systems. In those systems, terrorism is characterised only by the means employed.

The definition of the aims that qualify a criminal activity as terrorism came from the provisions in Articles 571 and 572 of the Penal Code: Article 571 mentions "the organisations or groups whose purpose is to subvert the constitutional order or seriously disrupt the public peace". Article 572 says that "terrorist groups or organisations" are those "described in the preceding article". Consequently, all organisations that try to subvert the constitutional order or seriously disrupt the public peace are terrorist (given that they use mass intimidation as a means). The first possibility is subverting the constitutional order. "Subverting", overturning an order means changing its foundations [26]. In the legal system of a democratic State, radically changing the constitutional order at its core cannot be illicit. In this sense, it is better said that it is the methods used in terrorism (*i.e.*, mass intimidation) that make it a crime, not its aims. But then, what means "subverting the constitutional order" exactly? If it is licit to pursue a change of the constitutional order, why should this element of "subverting the constitutional order" be part of the offences of terrorism? Put another

[24] In the current regulation; amongst the political crimes of dictatorship (in a strict sense), which were termed as terrorist conduct, and the 1995 Penal Code there was an intermezzo of "depoliticisation" at the beginning of the political transition after 1977, not using even the word "terrorism"; for an analysis see C. Lamarca Pérez, *op. cit.*, p. 162 and f.

[25] See, for example, STS 17 June 2002.

[26] And in this sense, to destroy: this term is loaded with negative references from the offset; so the dictionary of the Spanish Royal Academy contains the meanings "disturb, stir, destroy" and indicates that it should be used from a moral perspective. It has already been mentioned, before it was included in the regulation, by L. Arroyo Zapatero that the aim of terrorism is to "subvert the constitutional order" ("La reforma de los delitos de rebelión y de terrorismo por la Ley Orgánica 2/1981, de 4 de mayo", *Cuadernos de Política Criminal*, 15, 1981, p. 405); in the same way C. García Valdés, "La legislación antiterrorista: derecho vigente y proyectos continuistas", *Anuario de Derecho Penal y Ciencias Penales*, 1984, p. 290 and f., 295, emphasises the separatist element of targeting the terrorist organisation ETA as a sign of the attack to the constitutional order in the case of offences committed by it J. Gómez Calero, "Delitos de terrorismo", in M. Cobo del Rosal and M. Bajo Fernández (eds.), *Comentarios a la Legislación Penal.* vol. XI. *La reforma penal y procesal sobre los delitos de bandas armadas, terrorismo y rebelión*, Madrid, Edersa, 1990, p. 267 and f., 269 and f.

way: what is the additional wrongdoing that justifies the aggravated penalties and makes a crime specifically terrorist? Affecting the basic elements of the constitutional system – it could be said that it is the additional wrongdoing that justifies a greater penalty and more extensive criminalisation in the definition of terrorist crimes [27]. If the organisation uses especially dangerous conduct and mass fear as a means of political communication, this increases the level of gravity of the wrongdoing relating to the individual crimes committed by the organisation. In this sense, it can be said that the political element peculiar to terrorism implies a specific damage to the State organisation in itself. If we can consider that, in general, any criminal organisation defies the monopoly of violence corresponding to the State, the specific element of terrorist organisations is that they pursue more than that, that the challenge to the State is stronger [28]: they intend to make politics, including changing the foundation (the constitution) of the political organisation of the State. What the terrorist organisation wants is to call into question the decision-making bodies established by the State. That is the constitutional order that the terrorist is trying to subvert and, in this sense, it could be said, as has been pointed out by the Constitutional Court, that "... terrorism... means... a threat to the very system of democracy" [29]. A combination of the two factors mentioned above, *i.e.* on the one hand the organisation and its special danger and on the other hand the use of terror and a communication strategy, coupled with this third factor of political projection, explains the legal and criminal concept of terrorism.

However, the description in the Spanish Penal Code does not end with reference to subversion. Mention is also made of the organisation's agenda including the "serious disturbance to the public peace". Upon first reading, the contrast in terms of different notions about what is *subverting the constitutional order* and what is seriously *disturbing the public peace.* A first impression of what this term means could be that the legal reference to *seriously disturbing the public peace* simply refers to an expression of mere public order without political relevance [30]. However, this approach to the understanding of the notion of "public order" – objective tranquillity, absence of social unrest and public insecurity – is unsatisfactory: it is tautological and therefore unable to define how these offences are wrong [31]. Instead of this police-like

[27] M. García Arán, "De los delitos de terrorismo", in J. Córdoba Roda *et al.* (eds.), *Comentarios al Código penal. Parte Especial*, vol. II, Madrid, Marcial Pons, 2004, p. 2606: "the aim of creating insecurity, alarm or fear as a form of political activism is a criminally relevant objective".

[28] The same term is referred to by the Constitutional Court (STC 89/1993): terrorism is "… a challenge to the very democratic essence of the State".

[29] STC 199/1987.

[30] For example, M. Prats Canut, in G. Quintero Olivares (ed.), *Comentarios a la Parte Especial del Derecho penal*, 5ª ed., Pamplona, Aranzadi, 2005, p. 2093; M. Polaino Navarrete, "Delitos contra el orden público (V). Delitos de terrorismo", in Cobo del Rosal e*t al.* (eds.), *Curso de Derecho penal español. Parte Especial*, II, Madrid, Marcial Pons, 1997, p. 906.

[31] The same line of argument is taken by García Arán, *op. cit*., p. 2607, stating that by limiting the concept to merely "tranquillity in public places" in the sense of the position alluded to previously, refers to an "idea of public order which has since died out".

(factual) understanding of "public peace", the term has to be seen as meaning also a *political* aim, not as profound as the constitutional order, but also on the political level. So, the attacks of the 11 March 2004 in Madrid [32] can be understood to have been designed to change Spanish foreign policy. That is to say, they did not strictly attempt to subvert the judicial and constitutional order of the State and yet it was an overtly political move, disturbing "public peace" in the sense of the legal definition of terrorism. This is how "seriously disturbing the public peace" should be interpreted. Therefore, terrorist violence in penal terms is by definition political even if it does not, strictly speaking, seek a change of regime.

B. Evaluation

The *dual specificity* of the Spanish legislation is clear. On the one hand, it contains not only offences creating new forms of criminal liability (criminal collaboration with a terrorist organisation and membership of a terrorist organisation) but also toughens up all the other "common" offences (inherited from the previous legislation) where there is a connection with a terrorist organisation [33]. It is therefore an extremely tough and wide-ranging set of legislation. Moreover – and this is the particular novelty of the 1995 Penal Code – it contains a very specific description of the distinguishing features of these *terrorist* offences.

If one compares the terrorism offences in the Spanish PC above with the content of the 2002 Framework Decision and the legislation in nearby countries' legal systems, it is clear that none of the latter systems have a range of terrorist offences comparable to those set out in Spanish criminal law. The Spanish system is especially broad in this area of legislation, as has even been recognised in case law:

> "We must begin with a crucially important assumption: Our criminal legislation regarding terrorism is one of the most advanced and comprehensive in the world. There is nothing more to create. All that remains to do is to adequately interpret the legislation that we have" [34].

No adaptation of Spanish legislation was therefore necessary following the adoption of the 2002 FD.

3. The 2010 reform and the FD 2008

A. Introduction

The comprehensive reform of Spanish criminal law following Organic Law 5/2010 – justified in this sphere by the FD 2008 – introduces the following changes.

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[32] On this topic see J. Jordán, "El terrorismo islamista en España", in A. Blanco *et al.* (eds.), *Madrid 11–M. Un análisis del mal y de sus consecuencias*, Madrid, Trotta, 2005, p. 89 and f., 101 and f.

[33] Arts. 571, 572, 577 PC, with the all-encompassing end clause ("any other offence") contained in Art. 574 PC.

[34] SAN 36/2005 (Section 3), 26 September 2005: "*Tenemos que partir de una premisa de crucial importancia: Nuestra legislación penal en materia de terrorismo es una de las más avanzadas y completas del mundo, por lo que aquí no hay nada que crear. Se trata tan solo de interpretar adecuadamente la legislación que tenemos*".

Firstly, now all terrorist offences have been brought together into one chapter. In the previous legislation, belonging to a terrorist organisation was dealt with in conjunction with other forms of "illicit association" (and other "anti-constitutional" crimes) and "instrumental" crimes of terrorism (activities carried out within terrorist organisations, such as murder, injury, collaboration, etc.) were regulated separately.

Secondly, the definition of terrorism has been modified in line with the reform of some new offences of "organised crime". A distinction is now made between a terrorist organisation – a stable group with a specific structure – and a mere terrorist "group", neither structured nor permanent.

Thirdly, the concept of collaboration with a terrorist organisation has been extended, identifying new types of applicable conduct such as "recruitment, indoctrination, training or education" (Art. 576(3) PC).

In fourth place, a new offence of terrorism financing has been set out, including both intentional and reckless conduct and establishing the punishment of legal persons (Art. 576*bis* PC).

In fifth place, a new type of propaganda has been defined, consisting of the public broadcasting of "messages and slogans designed to cause, encourage or facilitate" the commission of terrorist offences (Art. 579(1) II PC).

Together with other minor modifications, probation has also been introduced for terrorist crimes (Arts. 579(3) and 106 PC).

B. Change in location

The profound realignment of organised crime offences brought about by the reform also affects offences relating to terrorism. This, of course, was inevitable since terrorism is the most serious form of organised crime [35].

There is no longer a separation between the crime of belonging to a terrorist organisation and other terrorist offences. Now both segments of the legislation are contained in separate sections in the new Chapter VII (terrorist groups and organisations and terrorist offences) of the section dedicated to crimes against public order. However, for systematic reasons, it would have been better to locate these offences amongst the offences against the Constitution.

C. Concept of "organisation or group"

When defining a terrorist group or organisation, it is necessary to refer to the common definitions of an "organisation" and a "group" in the new offences of organised crime. Until now, the twin description "organisation" and "group" were not defined by law. After the 2010 reform, the offences of common organised crime provide a legal definition of these two forms of collective structure, and this will have to be introduced also in the framework of terrorist criminal organisations. The typical description of the agenda of a terrorist organisation remains unchanged [36], but the

[35] See, for example, also on this topic F. Muñoz Conde, *Derecho penal. Parte Especial*, 18. ed., Valencia, Tirant lo Blanch, 2010, p. 921 and f.; I. Sánchez García de Paz, in M. Gómez Tomillo (ed.), *Comentarios al Código penal*, Valladolid, Lex Nova, 2010, p. 1936 and f.

[36] Subverting the constitutional order or seriously altering the public peace and the unwritten element of instrumental terrorism is not affected (mass intimidation through serious

characterisation of a terrorist organisation itself has changed considerably with respect to its structural definition. Although the previous legislation included the terrorist group and organisation, it merely made mention of them without defining them. In fact, it seems that the new legislation of organised crime distinguishes between a type of criminal organisation in the strict sense (the "criminal organisation" in Art. 570*bis*) and this special type of smaller criminal collective or organisation which Art. 570*ter* defines as a "criminal group".

Apart from the inadequate and vague distinction made between these two collective forms, "organisation", and "group", if the aim for this new model is that it will be an adaptation of the typical description of terrorism, it is ignoring the jurisprudence of the Supreme Court in defining the concepts of a terrorist group and organisation (not what the legislature terms the "penal response") [37]. It has always been defined in these two ways since 1995, emphasising that, in dealing with the same concept, the inclusion of a "group" should only serve to make clear that the size of the organisation does not determine its qualification [38]: it is in fact characterised by, in addition to its programme of political terror, its permanency, division of tasks and functional structure. Furthermore, when the legislature refers to the peculiarities of "certain terrorist groups or cells which have recently developed at an international level" [39] it is looking for a way to justify their occurrence in a way that fits with the latest trend in public opinion. But the truth is that the concept of organisation or group that was established by courts until this reform has been perfectly capable to describe the new types of organisation that are used in the new "wave" of terrorist activity [40]; although new organisations do not have a clear, well-defined top-down structure like European organisations in the last century, they share the need to create the cells aimed to concrete action. These cells *are* already an organisation/group according to the understanding of scholars and courts. Indeed, there are already a certain number of convictions in Spain for belonging to these types of cells. It was not necessary to dilute the unitary concept of a terrorist organisation [41].

Therefore, the new difference between an organisation and a group now governed by Art. 571(3) of the Penal Code, using the new general definition mentioned before, which does not incorporate some of the requisites established in the previous regulation, is due to an interested and expansionist reading of international and EU norms. In their application to terrorism, they scramble and confuse a notion that was perfectly well established in case law, which referred to the structural elements of the concept of an organisation.

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crimes against the public).

[37] Preamble, XXIX, second paragraph.

[38] M. Cancio Meliá, *Los delitos de terrorismo*, p. 157, 158 and f., 161.

[39] Preamble, XXIX, third paragraph.

[40] See, for example, SAN 36/2005 (Chamber 3), 26 September 2005; 6/2007 (Chamber 1), 7 February 2007.

[41] M. Cancio Meliá, *Los delitos de terrorismo*, *op. cit.*, p. 161.

D. Recruitment, indoctrination, training or education (Art. 576.3 PC)

The new legislation aims to redefine the offence of collaboration to include what might be referred to as *incitement, propaganda, indoctrination and training* of terrorist organisations.

This addition is unnecessary, redundant and disruptive. Firstly, the definition is factually unnecessary: the recruitment, training and education of subjects for the inclusion in a terrorist organisation is *typical behaviour of those involved* in such an organisation. Therefore, they already fit perfectly under the crime of belonging to a terrorist organisation. Secondly, if, occasionally, there may be an *outsourcing* of their activities to people who are not members of the organisation, all forms of behaviour are characterised as collaborative from the outset, in the first and second sections of Article 576 PC [42]. Art. 576(2) PC already contains an express reference to "the organisation or attendance of practical training" along with a general clause that includes "any other equivalent form of cooperation, assistance or intervention". It would therefore seem that the definition of this new act is completely unnecessary [43]. Thirdly, the fourth aspect of the new legislation which deals with conduct is disturbing. The offence termed as "indoctrination" paves the way towards the incrimination of mere expressions of opinion. How are we to define indoctrination? By separating it from the freedom of expression? How do we distinguish between it and the offence of "justification" of terrorist crimes, which carries a much more lenient sentence for its perpetrators (Art. 578 PC)? What does it mean to say that the indoctrination is "directed" at the commission of terrorist crimes [44]? The problems with interpretation are endless. The principle of legality – as expressed in the statement of purpose – is severely at risk [45].

Finally, it must be observed that the legislature is out of touch with reality when it refers [46] to the FD 2008/919/JHA to explain the new definition [47]. The Framework Decision makes no mention of "indoctrination" – it refers only to "provocation to commit a terrorist offence" (in addition to the recruitment and training already included, as aforementioned, in Art. 576(1) PC) – and instead stipulates (in para. 14) that "the expression of radical or controversial public opinion with regards to sensitive political issues, including terrorism, falls outside the scope of this Framework Decision, particularly of the definition of public provocation to commit terrorist

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[42] Likewise R. García Albero, "La reforma de los delitos de terrorismo, Arts. 572, 573, 574, 575, 576, 576*bis*, 577, 578, 579 CP", in G. Quintero Olivares (ed.), *La reforma penal de 2010: análisis y comentarios*, Pamplona, Aranzadi, 2010, p. 369 and f., 376; M. Llobet Anglí, "Delitos de terrorismo", in I. Ortiz de Urbina Gimeno (ed.), *Memento Experto Reforma Penal 2010*, Madrid, Lefebvre, n. 6106.

[43] In this sense see M. Llobet Anglí, *op. cit.*, n. 6110 f.

[44] Remember the preparatory acts of encouragement or provocation already contained in Art. 579(1) I PC.

[45] In this sense see F. Muñoz Conde, *Derecho penal. Parte Especial*, p. 929 and f.; T.S. Vives Antón *et al.*, "Terrorismo", in T.S Vives Antón *et al.*, *Derecho penal. Parte Especial*, 3nd ed., Valencia, Tirant lo Blanch, 2010, p. 792 and f.

[46] Preamble, XXIX, fourth paragraph.

[47] Likewise R. García Albero, *op. cit.*, p. 374 and f.

offences". Thus the mysterious ambiguities that have given rise to what the legislature refers to as "legal qualms" [48] either do not exist [49] or just mean that the scope of the new definition is incompatible with the rule of law [50]. The EU is not responsible for this disastrous state of affairs, but it serves – once again – as a spurious pretext for poor legislation.

*E. Financing (Art. 576***bis** *PC)*

The reform introduces a second new development with reference to collaboration: the criminalisation of behaviour related to the financing of terrorist organisations. This new offence does not come into Spanish law in relationship with the FD 2008/919/JHA, but is a consequence of the 1999 International Convention for the Suppression of the Financing of Terrorism [51]; in any case, this quite special matter – which should have been included in the money laundering regulations – is now a part of the reform based, according to the Spanish legislature, on the EU 2008 FD.

In the first paragraph of Article 576 PC, the supply or gathering of funds is declared illegal. In the second paragraph, reckless conduct in connection with malicious financing is declared illegal too and the third paragraph establishes the individual's legal liability.

With regards to *malice*, it is defined as behaviour carried out "in any way, directly or indirectly" to provide or gather funds for the commission of terrorist crimes or for a terrorist organisation. As clarified by the text itself, it is enough that the financing be carried out "with the intention of being used, or in the knowledge that it will be used", that is to say, it is not necessary that the funds have any consequence. The offence is established and thereafter the subjective elements of "intent" and "knowing" are considered, bringing all of their evidentiary difficulties with them. This definition of conduct – in its plain meaning without modification or adaptation – reiterates the definition contained in Article 2 of the Convention for the Suppression of the Financing of Terrorism.

In any case, here too we have a completely unnecessary and redundant definition [52]. The types of conduct that deal with effective economic support included in the new text are already referred to as a means of collaborating with a terrorist organisation in Art. 576 PC – or in the pre-existing and equally redundant [53] Art. 575 PC [54] – so this new definition makes little sense.

When dealing with the mere act of gathering funds "with the intention that those funds might be used", but without making actual contact with the organisation, the

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[48] Preamble, XXIX, fourth paragraph.

[49] Given that the corresponding conduct had already been laid out in the old Art. 576 PC.

[50] Note that, again, the doctrine established in STC 136/1999 is ostensibly ignored. It declared the inclusion of a variety of behaviours in the crime of collaborating with a terrorist organisation unconstitutional because of their disproportionate nature; see M. Llobet Anglí, *op. cit*., n. 6115.

[51] Of 9 December 1999; in force in Spain since 9 May 2002.

[52] Likewise F. Muñoz Conde, *op. cit.*, p. 930.

[53] See, in detail, M. Cancio Meliá, *Los delitos de terrorismo*, p. 256 and f.

[54] Likewise R. García Albero, *op. cit.*, p. 377.

definition intends only to punish the intention, and moreover, carries with it the *same penalty* that exists for those who uncover an individual's personal information or who provide arms or funding, that is, the most serious forms of collaborative conduct contained in Art. 576(1) PC. Again, the legislature completely ignores the STC 136/1999 [55], which warned about the unconstitutionality of an unlimited and indiscriminate classification for conduct of varying severity. The confusion today exists between Art. 576 PC and 575 PC (which still exists), and has meant that exactly the same cases receive incongruous sentences, an occurrence which will become more frequent now as a result of this entirely unnecessary new development. The legislator was warned: the report of the General Council of the Judiciary [56] regarding the 2007 preliminary draft indicated that in any event, the basis for this provision was a disclaimer clause in Art. 576(2) PC, and failing that, "absurd interpretational difficulties" [57] would ensue.

Recklessness is referred to in the Law 10/2010 of 28th April, which deals with the prevention of money laundering and terrorist financing, which in turn responds to the European Parliament and Council Directive 2005/60/CE of 26 October 2005 relating to the prevention of the use of the financial system for money laundering and terrorist financing. Regardless of the evaluation of this legal mechanism, it seems clear that this offence should not have been included under crimes of terrorism. The illegal aspect of the offence is the money laundering – a definition chosen, for example, by the German legislature. In any case, it is not a terrorist crime as it lacks the essential elements of such an offence, all of which include malice.

F. Propaganda crime (Art. 579.1 II PC)

Finally, the reform incorporates in the second paragraph of Article 579(1) PC a new type of residual offence that could be described as *propaganda*. The conduct is typically understood as the distribution or dissemination – by whatever means – of "messages or slogans" intended to "provoke, encourage or promote" terrorist offences, "... generating or increasing the risk of their actual commission". The messages or slogans must be directly linked to the risk of commission of an offence.

The new wording ought to be regarded as deeply flawed, clearly unconstitutional and one which raises considerable difficulties of implementation. The legislature continues from here on a road towards criminalising the belief in an ideology [58].

With respect to the former, although the reference to the origin of the risk is an acknowledgment of the STC 235/2007 [59], besides being a veiled reference to FD 2008/919/JHA, what is clear is that, in its entirety, this text does not comply

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[55] Containing the TC's ruling in the so-called *Herri Batasuna National Roundtable* case.

[56] From 2 February 2009.

[57] See also M. Llobet Anglí, *op. cit.*, n. 6139.

[58] M. Cancio Meliá, *Los delitos de terrorismo*, p. 248 and f., with additional references.

[59] Wherein the Constitutional Court declared the crime of justification of genocide constitutional, and unconstitutional the criminalisation of its denial, since the legitimate scope of such offence was seen as limited in any case by the Constitution – freedom of speech – strictly to indirect *incitement* to commit the act, and mere denial of genocide means not yet inciting to it.

with the Constitution. In this case, it deals plainly and simply with the definition of ideological adherence, that is to say, a subject matter that is even less than an apology or justification [60]. If you add to this offence the new description of "indoctrination" contained in Art. 576(3) PC, the crime of terrorist threats in Art. 170(2) PC and the crime of glorification in Art. 578 PC [61], it is notable that, in terms of substance, the definition of terrorist crimes has been extended to include the mere expression of an opinion [62], and procedurally, a whole host of worrying opportunities for the criminalisation of protest have been made available. It seems clear that we have gone beyond what is to be constitutionally permitted in a society driven by the rule of law [63].

Finally, it should also be stressed that the legislature is not telling the truth when it uses [64] the FD 2008/919/JHA as a justification for the introduction of this term of "indoctrination" [65]. The Framework Decision only requires the inclusion of "provocation to commit a terrorist offence", understood to include the broadcasting of messages *to incite the commission of said terrorist offences*, behaviour that was already covered by the PC (in Art. 579.1) and which is different from what is now included in the reform. It is one thing to induce and another to encourage or promote terrorist offences.

Regarding the latter, by dint of an ambiguous definition – also harmful to the principle of legality [66] – it opens the door to endless flaws, interpretative confusion and to potentially wrong effects in practice: Does it "encourage" the "perpetration" of terrorist crimes to yell, for example, "*gora ETA militarra*" [67]? Or is exaltation instead, to be considered amongst the conduct included in Art. 578 PC? Or perhaps it is provocation as defined by Article 579(1) I PC? Or could it come under "a public cry for the commission of violent acts" by a terrorist organisation, as laid out in Art. 170(2) PC?

Is a criminal policy rational if it arrests and prosecutes individuals who engage in this kind of demonstration for terrorist crimes and offenders [68]? The very fact that the legislature intervened here – albeit on improper, but very revealing terms – warning about the potential "breeding ground" [69] indicates that there is space in the new legal

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[60] In the words of T.S. Vives Antón *et al.*, *Parte Especial*, p. 795, "preparatory acts of preparatory acts" are punished; R. García Albero, *op. cit.*, p. 377, refers to the term "*provocación impropia*" ("incitation in a broader sense"). Also the State Council pointed out in its report on the draft version of the reform that this conduct needed to be restricted.

[61] See the delimitation efforts of M. Llobet Anglí, *op. cit.*, n. 6177 and f.

[62] See also amendment no. 217 in the Senate (presented by Grupo Parlamentario Entesa Catalana de Progrés).

[63] Likewise Muñoz Conde, *op. cit.*, *Parte Especial*, p. 935.

[64] Preamble, XXIX, fourth paragraph.

[65] Likewise R. García Albero, *op. cit.*, p. 377.

[66] Here too see amendment no. 5 in the Senate (Sampol i Mas PSM-EN).

[67] The ritual cry of ETA supporting militants: long live ETA!

[68] As an example: The German legislature – which delved deeply into this area in the 1970s and 1980s – abolished the criminalisation of propaganda in the year 2001, limiting it to cases in which members of an organisation use this propaganda in order to recruit new members.

[69] Preamble, XXIX, fourth paragraph.

definition for the criminalisation of all types of sympathisers or alleged sympathisers – provoking an action/reaction phenomenon [70] that, despite being well understood, has the potential to be developed further through the new definition.

4. Conclusion

Given the above observations, an assessment of the recent reform of terrorist crime reinforced by the implementation of the FD 2008 is straightforward. It can be succinctly characterised as being opposite to the "profound reorganisation and clarification" [71], which is what the legislature claims to have done with these offences. Instead of improving the many flaws that previously existed, the legislature has created more confusion and made matters worse. The content of reform in this area ranges from being unnecessary to being redundant to being clearly unconstitutional. The toughest and most extensive antiterrorist legislation throughout Europe has deteriorated further by creating new ways for the judiciary to interpret trifling rules.

In the first place, the reform confuses, as mentioned above, the concept of a terrorist organisation by introducing a general means of distinguishing between criminal organisations and groups, and by doing away with the common definition of membership. Secondly, it produces redundant and flawed definitions of what conduct is to be understood as collaboration and preparatory acts. The legislature does so by invoking the FD 2008/919/JAI as if it were a mantra for the justification of reforms that have nothing to do with what this rule even states [72].

The sole purpose of the responsible political actors was reform for the sake of reform, or, more accurately, reform for the sake of being able to show to the public that "something" had been done.

Thus, in short, it seems that Spanish anti-terrorist legislation contains significant discrepancies with regard to several key elements of the Constitution and the main characteristics of the rule of law: in particular the principles of legality (accuracy mandate), of proportionality, of fundamental rights in criminal proceedings and the constitutional requirement of rehabilitation. The FD has proven useful only with regard to the FD 2008 in politically justifying an extension of the law, which exceeds what

[70] See only Cancio Meliá, *Los delitos de terrorismo*, p. 62 and f., 72 and f., 77, with further references.

[71] Preamble (XXIX, first sentence).

[72] As an example, it is worth mentioning the transposition of the FD in Germany (a country with an antiterrorist criminal law that could be described as tough). It was carried out by the introduction in 2009 of paras. 89a, 89b and 91 *Strafgesetzbuch* – which has caused a very critical reaction in the country's doctrine: thus, for instance, the author of the monograph referring to the reform writes "welcome to Absurdistan", M. Zöller, "Willkommen in Absurdistan: Neue Straftatbestände zur Bekämpfung des Terrorismus", *Goltdammer's Archiv*, 11, 2010, p. 607 and f., with further references; it deals with conduct that had already been included in Spain in Arts. 576 or 579 (see also regarding the reform in that country N. Gazeas, Th. Grosse-Wilde, A. Kiessling, "Die neuen Tatbestände im Staatsschutzrecht – Versuch einer ersten Auslegung der §§ 89a, 89b und 91 StGB", *Neue Zeitschrift für Strafrecht*, 2009, p. 593 and f.). Using EU law as justification, but with provincial ignorance of comparative law.

was set out in EU legislation. It seems clear that an "enemy criminal law" [73] exists in this area of Spanish criminal law and is justified in political debate as being necessary for the prevention of future crimes in this area but that it is in fact contaminating other parts of the criminal justice system.

[73] On the concept of "Enemy Criminal law", see G. Jakobs, "Kriminalisierung im Vorfeld einer Rechtsgutsverletzung", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 97, 1985, p. 753 and f.; Id., "¿Derecho penal del enemigo? Un estudio acerca de los presupuestos de la juridicidad", in M. Cancio Meliá and G. Gómez-Jará Díez (eds.), *Derecho penal del enemigo. El discurso penal de la exclusión*, t. 2, Madrid/Buenos Aires, Edisofer/BdF, 2006, p. 93 and f. Stressing the analytical power of the concept and against its compatibility with a (criminal) law in the Rule of Law, see M. Cancio Meliá, "Feindstrafrecht?", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 117, 2005, p. 267 and f.; Id., "De nuevo: ¿'Derecho penal' del enemigo?", in G. Jakobs and M. Cancio Meliá, *Derecho penal del enemigo*, 2nd ed., Madrid, Civitas, 2006, p. 85 and f. In the opinion adopted here, the international controversy generated by this topic has been very fruitful, see the various articles contained in M. Cancio Meliá and G. Gómez-Jara Díez (eds.), *op. cit.*

"No thank you, we've already got one!"
Why EU anti-terrorist legislation has made little impact on the law of the UK [1]

John R. Spencer

1. Introduction

The UK has a long history of exposure to terrorism. Indeed, it could be said to date back 400 years, to the famous Gunpowder Plot, when Guy Fawkes and some fellow Catholics attempted to assassinate the Protestant King James I by blowing up the Houses of Parliament as he attended the official opening of the Parliamentary session on 5 November 1605. To this end, the conspirators got as far as smuggling 36 barrels of gunpowder into cellars underneath: a quantity which, according to a reconstruction carried on the 400th anniversary in 2005 [2], would have destroyed the Houses of Parliament with everybody in them, and also devastated the area around, had they exploded. The plot was detected just before this happened. The plotters were caught and some of them at least were interrogated under torture. They were then tried for treason, and on conviction put to death by "drawing, hanging and quartering" – the gruesome method of execution officially prescribed for male traitors until 1814. As British readers will well know, the thwarting of the plot is still commemorated with bonfires and fireworks on the 5 of November every year.

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[1] See generally C. Walker, *Blackstone's Guide to the Anti-terrorist Legislation*, London, Oxford University Press, 2002, and C. Walker, *Terrorism and the Law*, Oxford and New York, Oxford University Press, 2011. For comparative studies see A. Oemichen, *Terrorism and Anti-terror Legislation: the Terrorised Legislator – a Comparison of Counter-terrorism Legislation and its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France*, Oxford, Antwerp and Portland, Intersentia, 2009, and F. Galli, *British, French and Italian Measures to Deal with Terrorism* (doctoral thesis, University of Cambridge).

[2] For the ITV production, *The Gunpowder Plot, Exploding the Legend,* broadcast in November 2005.

In the second half of the nineteenth century the Fenians, an Irish republican group, resorted to terrorism in furtherance of their cause. The year 1867 saw a dramatic incident that was long remembered: the "Clerkenwell outrage", an inept attempt by Fenians to secure the release of some jailed colleagues by blowing up the wall of a prison, killing 12 people in the street and injuring many others in the process; and the following year saw an incident no less dramatic when O'Farrell, a Fenian sympathiser, shot and gravely injured Prince Alfred, Queen Victoria's second son, in an unsuccessful assassination attempt while on an official visit to Australia [3]. The early 1880s then saw London subjected to what was called the Fenian "dynamite campaign": a series of bomb explosions at high profile targets, several of them on the London Underground – though unlike the attacks on the London Underground in 2005, the aim seems to have been to damage property rather than to kill passengers. These explosions left a permanent mark on English law in the form of the Explosive Substances Act 1883. This law, which is still in force, set a trend by creating heavily-punishable offences aimed at preliminary conduct: including possessing explosives in suspicious circumstances.

Up to and into the middle years of the twentieth century, unrest in Northern Ireland continued to manifest itself from time to time in terrorist attacks in mainland Britain: most notably an Irish Republican Army bombing campaign in 1939. Then in 1969 began "The Troubles": a 29-year period of unrest and near-insurrection, with recurrent outbursts of violence between Protestants and Catholics, and recurrent bombing campaigns, some of them again in mainland Britain – the bloodiest of which were the Birmingham pub bombings in 1974, in which two bombs killed 21 innocent civilians and injured 162 [4]. This unhappy period came to an end with the Good Friday Agreement in 1998.

During the Troubles Parliament had passed a series of anti-terrorist laws that were intended to be temporary. When the end of the Troubles appeared to be in sight, the government of the day ordered an official enquiry into the law relating to terrorism, with a view to putting the law on a permanent footing. This enquiry, which was carried out by Lord Lloyd of Berwick, a senior judge, led to a Report in 1996, many of the recommendations of which the Labour government (which in the meantime had come to power) accepted. The result was that the United Kingdom law relating to terrorism was comprehensively overhauled and restated in the Terrorism Act 2000: a mini-code of 131 sections (articles) and 14 Schedules (annexes). It was with this new law that the UK faced the new wave of Islamic terrorism that began in earnest with the destruction of the World Trade Centre on 11 September 2001, and continued with various incidents in the UK, the worst of which were the London bombings of 7 July 2005 [5].

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[3] Incidentally provoking my maternal great-great-grandfather, a prolific pamphleteer, to write yet another pamphlet: S. Cozens, *The Attempted Assassination of His Royal Highness Prince Alfred*, Launceston, Tasmania, 1868.

[4] The resulting prosecution led to the "Birmingham Six Case", a famous miscarriage of justice: see *R v McIlkenny et al* (1991) 93 CrAppR 287.

[5] A list of terrorist plots in the UK since July 2005 can be found on the website of the Security Service at https://www.mi5.gov.uk/output/terrorist-plots-in-the-.html.

And so it was that, like Spain, the UK had already equipped itself with a comprehensive set of laws against terrorism at the time the 2002 EU Framework Decision on Terrorism was adopted. The UK's new laws, furthermore, already went considerably further than the Framework Decision required. In consequence it was not necessary to amend UK law to give effect to the 2002 Framework Decision, which has had no discernable influence on UK law.

How far UK anti-terrorism law already exceeded the requirements of the Framework Decision can be seen by taking the different elements of the 2002 Framework Decision in turn, and setting them alongside the law of the UK as it then stood.

2. UK anti-terrorist law at the time the Framework Decisions were adopted

In discussing "UK anti-terrorist law" a problem arises because the United Kingdom is made of three separate legal entities: England and Wales, Scotland and Northern Ireland. In principle, each has its own criminal justice system, including its own criminal law. However, the Westminster Parliament is able to enact legislation that applies throughout the whole of the United Kingdom and, starting with the Terrorism Act 2000, has regularly used this power to make uniform laws in respect of terrorism. Insofar as terrorist acts are caught by the ordinary criminal law, however, that law may differ as between one part of the UK and another. In what follows, remarks about the "general law" refer specifically to the law of England and Wales. As regards the matters of general law discussed in this chapter, in broad terms the position under the "general law" of Scotland and Northern Ireland will in fact be much the same – although there may be differences of terminology and minor detail.

The 2002 Framework Decision required all EU Member States to ensure that their national law provided for (in essence) the following five things.

The first was enhanced penalties for a list of offences set out in Article 1 when committed in the context of terrorism, as defined in the Framework Decision, "save where the sentences imposable are already the maximum possible sentences under national law". Under UK law, broadly speaking all of the offences so listed already carried a maximum sentence of life imprisonment – the heaviest penalty permissible under UK law since the abolition of capital punishment. A possible gap in UK law in this respect concerned in Article 1(i) of the Framework Decision, which required Member States to put threats to commit any of the other crimes mentioned in Article 1 on the same footing as actually committing them, the coverage of UK law in respect of threats being a little patchy. However, even here the most obvious cases were already covered in a manner sufficient to do what the Framework Decision required [6].

The second requirement, imposed by Article 2, was to make membership of terrorist groups a criminal offence, and to create a criminal offence of directing terrorist groups that carries a maximum penalty of at least 15 years. In the UK, membership of proscribed terrorist groups was already punishable (with up to 10

[6] For example, s. 2 of the Nuclear Material (Offences) Act 1983, criminalising terrorist threats to use nuclear material for terrorist purposes, s. 38 of the Public Order Act 1986, criminalising terrorist threats to contaminate food.

years' imprisonment) [7] and directing them already constituted an offence punishable with life imprisonment [8].

The third requirement, imposed by Article 3 together with Article 5, was to ensure that "aggravated theft", "extortion" and the creation of false administrative documents in connection with terrorism were punishable by "effective, proportionate and dissuasive penalties". In 2002 this sort of behaviour already carried heavy penalties under the general law. In English law, for example, theft of any item – however trivial and for whatever purpose – in theory carries a possible maximum penalty of seven years' imprisonment [9]; extortion constitutes the offence of blackmail, which carries a maximum penalty of 14 years [10]; and preparing false administrative documents is forgery, which carries a maximum penalty of 10 years [11].

The fourth requirement was to ensure that, in connection with all of these offences, criminal liability extended to accessories and to attempts to commit them. In the UK, accessories (to all crimes, whether grave or trivial) were already punishable, under the general law, to the same extent as principals [12], and there already existed a generalised criminal liability for attempt [13], applicable to all but the most trivial offences [14].

The fifth requirement was to ensure that criminal liability for all these offences attached to legal persons as well as natural ones. In the UK, a generalised criminal liability for legal persons – created by judicial activism rather than by legislation – had already existed for around 90 years [15].

It was the same story, essentially, with the second EU Framework Decision of 2008.

The 2008 instrument required Member States to criminalise a further range of behaviours: namely "public provocation to commit a terrorist offence", "recruitment for terrorism", "training for terrorism", and "aggravated theft", extortion and preparing false administrative documents in connection with these forms of misbehaviour. As regards this list of new offences the UK, once again, had got "ahead of the game". In reaction first to the destruction of the World Trade Centre in 2001, and then the London bombings of July 5 2005, the UK government had caused Parliament to pass three further pieces of legislation relating to terrorism, each of which added to the

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[7] Terrorism Act 2000, s. 11.

[8] Terrorism Act 2000, s. 56.

[9] Theft Act 1968, s. 7.

[10] Theft Act 1968 s. 21 (3).

[11] Forgery Act 1981 s. 6 (2).

[12] For England and Wales, see the Accessories and Abettors Act 1861, s. 8: "Whosever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted and punished as a principal offender".

[13] For England and Wales, see the Criminal Attempts Act 1981, s. 1.

[14] Under the Criminal Attempts Act 1981, there is no liability for attempting to commit a "summary offence" – the English equivalent of a *contravention.*

[15] In the absence of a criminal code, the details must be found in textbooks; such as *Smith and Hogan's Criminal Law*, London, Sweet & Maxwell (13th edition 2011, by D. Ormerod), Chapter 10.

measures already provided for by the Terrorism Act 2000. Of these, the Terrorism Act 2006 had already done all and more than the 2008 Framework Decision was to require of Member States two years later. In the paragraphs that follow, we shall examine the offences which the Framework Decision required Member States to create, and see what UK criminal law already provided for.

Training people in the use of firearms, explosives, or chemical, biological or nuclear weapons for unlawful purposes was already a criminal offence in the UK, punishable with up to 10 years' imprisonment, under Sections 54 and 55 of the Terrorism Act 2000 [16]. To this, the Terrorism Act 2006 had added a new offence of training in a wider range of terrorist "skills", together with offences of receiving terrorist training and attending a place where terrorist training is given.

Recruitment for terrorism was not, and still is not, a specific criminal offence as such. However, it is impossible to recruit a person for terrorism without committing a number of other criminal offences that are heavily punishable. As is further explained below, under the general law of all parts of the UK it was (and of course still is) a criminal offence to incite a person to commit any other criminal offence. To recruit a person to commit any specific act of terrorism which amounted to a crime would therefore make the inciter of the offence of inciting the commission of that criminal offence. Recruiting a person to join a terrorist organisation without any particular act of terrorism immediately in mind would, if the terrorist organisation had been officially proscribed, constitute the criminal offence of inciting that person to commit the offence of belonging to a terrorist organisation, contrary to Section 11 of the Terrorism Act 2000.

The 2008 Framework Decision defines "public provocation to commit a terrorist act" as "the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences [listed in Article 1(1) of the Framework Decision of 2002]". Under UK law, any intentional provocation to commit one of these offences – even if done privately rather than publicly – would have made the inciter guilty of the general offence of incitement. Case-law dating from the nineteenth century held that, to make a person guilty of the crime of incitement, "general incitement" was enough. Thus in the case of *Most* [17] a man was convicted of incitement to murder [18] when he published an article in a revolutionary newspaper advocating the assassination of kings, and in *Abu Hamza* [19] a firebrand Muslim preacher was convicted of incitement to murder in respect of sermons inciting the faithful (in general) to kill infidels (in general). However, in the aftermath of the London bombings in 2005 Tony Blair's "New Labour" government decided that a wider offence was needed, aimed at those who "glorify" – that is to say, publicly praise – terrorist acts committed in the past. With that in mind it promoted the legislation

[16] At an earlier stage it was a criminal offence under specific legislation aimed at terrorism in Northern Ireland.

[17] (1881) 7 QBD 244.

[18] A specific statutory offence, usually called "solicitation to murder", under s. 4 of the Offences against the Person Act 1861; and which explicitly covers incitement to murder persons who are outside the UK.

[19] [2006] EWCA Crim 2918, [2007] QB 659.

that, after lengthy debates in Parliament, eventually became law as Section 1 of the Terrorism Act 2006. This created a new offence of "direct or indirect encouragement or other inducement" to acts of terrorism. Going far beyond the law of existing law of incitement, and indeed far beyond the offence of "public provocation to commit a terrorist act" required by the 2008 Framework Decision, this new offence is not limited to those who intend to cause others to commit terrorist acts, but also catches those who are merely "reckless" as to whether their statements will encourage others to commit them. This potentially renders guilty not only those who desire their words to provoke terrorist acts, but also those who utter them merely foreseeing that their words may have this effect [20]. The new offence carries a maximum penalty of seven years' imprisonment.

3. A striking feature of UK anti-terrorist law: wide-ranging preliminary offences

From what has been said so far, readers will have already noticed that a striking feature of criminal law in the UK is its taste for "inchoate offences" – in other words, offences criminalising preliminary acts. For example, there has long existed in all parts of the UK a general offence of conspiracy, the *actus reus* of which is (merely) agreeing with another person to commit a criminal offence – whether the offence be grave or trivial, and irrespective of whether any action is thereafter taken to put the agreement into effect [21]. This offence is far wider than, for example, its approximate equivalent in French law, *association de malfaiteurs* [22], which is limited to agreements to commit offences punishable with at least five years' imprisonment, and also requires the agreement to be *caractérisé par un ou plusieurs faits matériels*; and the English offence of conspiracy, unlike *association de malfaiteurs*, carries no automatic *exemption de peine* for the repentant conspirator who, having agreed to commit a crime, then changes his mind and alerts the authorities [23]. Similarly, as previously mentioned, English law (and the law of the other parts of the UK) has long recognised a general offence of incitement – of which the person who incites another to commit a crime is guilty, irrespective of whether his incitement causes the person incited to take any action. In England and Wales, this offence was replaced in 2007 [24] by a new and even broader statutory offence of "encouraging or assisting", which penalises not only those who incite others to commit crimes, but also those who provide assistance in advance, for example by supplying equipment – once again, irrespective of whether the crime it was intended to facilitate takes place [25].

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[20] There is no statutory definition of recklessness in the UK, but it is generally taken to mean "advertent negligence"; i.e., taking an unreasonable risk, being aware that it exists; for a discussion see *Smith & Hogan*, note 15 above, p. 118.

[21] In England and Wales the offence of conspiracy, originally existing at common law – *i.e.* without any statutory basis – is now contained in s. 1 of the Criminal Law Act 1977.

[22] Code pénal Art. 450-1.

[23] Code pénal Art. 450-2.

[24] Serious Crime Act 2007 s. 44 and f.

[25] The provisions are very complicated. For a critical analysis, see D. Ormerod and R. Fortson, "Serious Crime Act 2007: The Part 2 Offences" [2009] Crim LR 389.

This tradition of preliminary offences has been developed by the creation of a range of new and specific inchoate offences related to terrorism. These include: possession of articles for terrorist purposes [26]; collection of information for terrorist purposes [27], eliciting, publishing or communicating information about the armed services useful for terrorism [28]; the preparation of terrorist acts [29]; and possession of radioactive materials for terrorist purposes [30]. All of these specific offences carry heavy maximum penalties – 10 years, 14 years, or imprisonment for life. They exist in addition to the offences of recruitment, training, being trained and membership of proscribed organisations which have already been mentioned. And they also co-exist with the specific preliminary offences in relation to explosives and explosions created by the Explosive Substances Act 1883; possession of an explosive substance with intent to endanger life [31], and making or possessing an explosive under suspicious circumstances [32].

Not only do these preliminary offences criminalize people for conduct which has not yet caused anybody any harm. Many of them have a further controversial feature in that the burden of proof is in part reversed. That is to say, they contain a provision saying "Where fact X is proved, fact Y is presumed, unless the accused is able to demonstrate the contrary". An example is Section 57 of the Terrorism Act 2000. This makes it an offence to possess "an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism", and then provides that "it is a defence for a person charged with an offence under this section to prove that his possession of the article was not for [such a purpose]". These "reverse burdens", as they are usually called, are questionably compatible with Article 6(2) of the European Convention, and in consequence have provoked a difficult body of case-law attempting to construe them in a way that does not contravene it [33].

4. A further striking feature: in criminal procedure, a tough pre-trial regime

From the previous paragraphs, readers will rightly infer that the substantive law in relation to terrorism in the UK is both wide-ranging and severe; and as they will now discover, in the parallel context of procedural law the UK has created a very tough regime of investigatory measures for dealing with cases of suspected terrorism, in particular as regards pre-charge detention for questioning by the police – or to put it in French law terms, *garde à vue*.

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[26] Terrorism Act 2000 s. 57, maximum penalty 15 years.

[27] Terrorism Act 2000 s. 58, maximum penalty 15 years.

[28] Terrorism Act 2000 s. 58A, maximum penalty 10 years.

[29] Terrorism Act 2006 s. 5, maximum penalty life imprisonment.

[30] Terrorism Act 2006, s. 9 and 10, maximum penalty life imprisonment.

[31] Explosive Substances Act 1883, s. 3 (b).

[32] Explosive Substances Act 1883, s. 4.

[33] See, *inter alia*, *R v DPP, ex parte Kebilene* [2000] 2 AC 326; *Sheldrake v DPP and Attorney General's Reference* (no. 4 of 2002) [2004] UKHL 43 [2005] 1 AC 264, and *R v G, R v J* [2009] UKHL 13, [2010] 1 AC 43.

Section 41 of the Terrorism Act 2000 gave the police power to arrest, without warrant, any person whom a constable "reasonably suspects to be a terrorist" – a "terrorist" meaning someone who has committed any of a range of specified offences, or who "is or has been concerned in the commission, preparation or instigation of acts of terrorism" [34]. Under the Act in its original form, a person so arrested could be detained for questioning by the police for maximum of seven days: 48 hours on the authority of the police themselves, and thereafter on the authority of a "warrant for further detention" issued by one of a specified list of judges [35]. In the aftermath of the destruction of the World Trade Centre on 9/11, Parliament happily acceded to the Home Secretary's wish to double this maximum period to 14 days [36].

Then when, in the aftermath of the London bombings in July 2005, Tony Blair's "New Labour" government introduced the Bill which eventually became the Terrorist Act 2006, this included a proposal to increase the maximum period from 14 days to 90. To make the point at issue here absolutely clear to Continental readers, what was under discussion was not the period during which a terrorist suspect, having been *mis en examen* by a *juge d'instruction*, could be held in a prison in order to be available for further questioning by the *juge d'instruction*, but the period during which the suspect could be held by the police for questioning by them: what the French would call *garde à vue.* This astonishing proposal was too authoritarian a measure even for the normally supine House of Commons and – though he had the vocal support of *The Sun*, Rupert Murdoch's hugely successful tabloid newspaper, which called on M.P.'s to "give Tony his 90 days" – the government's supporters in the House of Commons rebelled and, to the humiliation of Tony Blair, the government lost the crucial vote. In the end, a compromise was reached under which the detention period was doubled once again – from 14 days to 28 days – under a temporary amendment to the law which lapsed unless each year Parliament renewed it [37]. Three years later Tony Blair's successor as Prime Minister, Gordon Brown, keen to show that he could succeed where his predecessor had failed, pushed an extension of the detention limit to 42 days through the House of Commons. But the amendment was blocked by the Upper Chamber, the House of Lords, and so the maximum period remained fixed at 28 days. The Coalition government which took office after the 2010 election decided not to renew the temporary provision which turned the 14 days into 28, and in January 2011 it lapsed. So one year later, as this chapter goes to press, the maximum period during which terrorist suspects may be held for questioning by the police is once more 14 days [38].

The background to the previous government's attempts to extend the period during which the police can detain terrorist suspects for questioning is another feature of British criminal justice which seems very odd to continental lawyers' eyes: the fact

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[34] Terrorism Act 2000, s. 40.

[35] Terrorist Act 2000, Schedule 8, para. 29(4).

[36] Criminal Law Act 2003, s. 306.

[37] Prevention of Terrorism Act 2006, s. 25.

[38] Though at the time of writing, a legislative is change is being discussed which, if enacted, would give the Home Secretary a limited power, for use in national emergencies, to extend the maximum period once again.

that, as a general rule, the authorities have no legal power to question a person once criminal proceedings have been formally instituted against him and he has made the transition from suspect to defendant. Whereas continental lawyers see nothing wrong in permitting public prosecutors, or *juges d'instruction*, to put questions to defendants at this stage provided they have the legal right to refuse to answer them, British lawyers perceive "post-charge questioning" (as they call it) to be inherently oppressive. If this seems strange to continental eyes, it must of course seem even stranger that it was partly respect for this principle that led the previous government to attempt to extend enormously the powers to detain for questioning enjoyed by the police. Having failed to get its way in this respect, in 2008 the previous government then managed to persuade Parliament to pass a law which made "post-charge questioning" possible in terrorist cases [39]; but having secured their enactment the government did not bring these provisions into force, and they seem destined to remain in limbo on the statute-book as "virtual law".

The Terrorism Act 2000 also provided a legal basis for the police to stop and search any pedestrian or driver at random – that is, whether or not the police have any ground for suspecting the person whom they decide stop to be a terrorist. Under Section 44, a senior police officer who believed the existence of this power would be "expedient for the prevention of terrorism" could issue a general order activating this power in his area: an order which would then last for 28 days. By issuing a new order each time the old one lapsed, the Metropolitan Police in London exploited Section 4 to give themselves what amounted to a permanent power of random stop and search within the whole of the Greater London area. This resulted in a challenge to the European Court of Human Rights, which condemned the United Kingdom for failure to respect Article 8 of the Convention (right to privacy, etc.) [40]. In giving judgment, the Court made this comment:

> "[84] In this connection the Court is struck by the statistical and other evidence showing the extent to which resort is had by police officers to the powers of stop and search under s. 44 of the Act. The Ministry of Justice recorded a total of 33,177 searches in 2004/5, 44,545 in 2005/6, 37,000 in 2006/7 and 117,278 in 2007/8. In his report into the operation of the Act in 2007, Lord Carlile [41] noted that while arrests for other crimes had followed searches under s. 44, none of the many thousands of searches had ever related to a terrorism offence; in his 2008 report Lord Carlile noted that examples of poor and unnecessary use of s. 44 abounded, there being evidence of cases where the person stopped was so obviously far from any known terrorism profile that, realistically, there was not the slightest possibility of him/her being a terrorist, and no other feature to justify the stop".

In response to this judgment, the government – now the Coalition of Conservatives and Liberal Democrats which had replaced New Labour after the General Election in

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[39] Counter-terrorism Act 2008 s. 22-27.

[40] *Gillan v UK* 50 EHRR 1105 (45), [2010] Crim LR 415, 533.

[41] The Terrorism Act 2000, and later Acts dealing with terrorism, require the government to lay an annual return on the working of the legislation before Parliament. To this end, the government appoints an independent person to conduct the review. Until recently, the post was held by Lord Carlile. His annual reports are published by The Stationery Office.

2010 – caused Section 44 to be amended so as to reduce the powers it gives to the police [42].

5. The practical difficulties, despite a muscular pre-trial regime, of convicting terrorists in the criminal courts

By this stage, readers will have understood that the United Kingdom has equipped itself with a set of criminal offences relating to terrorism that are considerably more repressive than the EU Framework Decisions requires, and has matched them with an equally authoritarian set of procedural rules in relation to the investigation of suspected terrorist offences by the police. Yet, paradoxically, it was still the perception of the previous (New Labour) Government that the prosecution of terrorists in the criminal courts was unduly difficult. And to some extent this perception was justified, because, despite the severity of the law, two features of the trial process in the UK combine make the conviction of suspected terrorists in the criminal courts an uphill struggle.

The first is that terrorist offences, like all other serious offences, have to be tried in the Crown Court, where the tribunal of fact in disputed cases is a jury. In the UK, this means a jury composed entirely of lay persons, selected from the electoral roll at random, which deliberates in the absence of the judge, and delivers a simple verdict or "guilty" or "not guilty" [43]; and one from whose decision, where the verdict is "not guilty", the prosecution has no right of appeal, however clearly the evidence may have established the guilt of the accused. To a government that is desperately anxious to neutralise a suspected terrorist who it believes to be acutely dangerous, trial by jury in this shape and form appears to be an instrument that is worryingly unreliable; and there are grounds for this perception, as we shall see.

In the first place, there is the risk of "jury nobbling": that jurors will be bribed or – a more likely scenario in terrorist cases – intimidated. Where, as in Northern Ireland, the community is deeply divided, with one section sympathetic to the cause the terrorists are fighting for and another section bitterly opposed to it, to this risk is added the further risk of prejudice, either for or against the accused. For this reason, jury trial was for many years suspended for terrorist cases in Northern Ireland, such cases being tried before High Court judges sitting on their own. Though in reality they seem to have rendered justice fairly and even-handedly, these "Diplock courts" [44], as

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[42] Terrorism Act (2000) (Remedial Order), SI 2011 no. 631. But by this time, unfortunately, the excessive use of "stop and search" powers seems to have done serious damage to relations between the police and the public, particularly young persons belonging to ethnic minorities. In August 2011 riots broke out in a number of cities in the UK. Interviews with young people who had taken part in them revealed that the experience of being "stopped and searched" was a major factor in alienating young people from the police, and society in general.

[43] In Scotland there is a third possibility, a verdict of "not proven" – which has all the legal consequences of a "not guilty" verdict, although unlike a "not guilty" verdict it carries overtones of lingering suspicion.

[44] So called because they were introduced following a recommendation contained in *Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland*, chaired by Lord Diplock (Cmnd. 5185 1972). On the judicial performance of the Diplock Courts, see J. Jackson and S. Doran, *Judge without Jury – Diplock Trials in the Adversary System*, Oxford, Clarendon Press, 1995.

they were called, were strongly opposed on ideological grounds, because – rightly or wrongly – jury trial is widely seen in the common law world as an important democratic safeguard; and this in part because of the jury's power to acquit obviously guilty people in the teeth of the evidence where they feel the prosecution was oppressive, or because the jurors are out of sympathy with the law which the defendant was accused of breaking. In consequence, as part of the Northern Ireland "Peace Process", the Diplock courts are in the process of being abolished there [45]; and their extension to other parts of the UK is not at present a political possibility.

In addition to the particular problems which led to the creation of the Diplock courts in Northern Ireland there is the more general problem, or perceived problem, that juries are "too soft" and tend to acquit in cases where the evidence is clear and reason suggests that they should convict.

Whether UK juries really are systematically "too soft" in this respect is a much debated topic which cannot be properly examined here. A recent and well-respected study [46] suggests that on average they convict in 64 per cent of the cases in which they are called upon to determine the issue of guilt or innocence – or in other words, that they acquit in 36 per cent of cases; figures which to continental lawyers will seem astonishing, at any rate until they realise that even in the Crown Court juries try only the small minority – some 12 per cent [47] – of cases where defendants plead "not guilty", most defendants eventually pleading guilty, commonly as part of some kind of deal between prosecution and defence.

But whether or not juries are systematically inclined to acquit in cases where they should convict, there can be no doubt that juries sometimes include individuals who are exceptionally credulous, or highly irresponsible, or both, and in England and Wales and in Northern Ireland, where a majority of at least 10 jurors out of 12 is required to convict [48], it takes only three of them to derail a trial. A striking demonstration of this phenomenon occurred in March 2011 in a high-profile case, the trial of Delroy Grant. Grant, nicknamed "the Night Stalker", was accused of a series of rapes and other grave sexual offences, committed in the course of burglaries over a space of 17 years. To this string of offences he was linked by DNA evidence that was seemingly irrefutable. His defence was that his former wife, from whom he was now estranged, had saved up samples of his semen and persuaded a confederate to break into burgled houses and distribute it, in order to incriminate him. After eight hours of deliberation, the jury eventually convicted – but then only by a majority of 10 to 2. In other words, of the jurors in that case, two were sufficiently cretinous to feel that this preposterous defence left them with a reasonable doubt as to the defendant's guilt.

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[45] The current legal basis for non-jury trials in Northern Ireland is Sections 1-9 of the Justice and Security (Northern Ireland) Act 2007. These should have expired by now, but in the face of further terrorist activity in Northern Ireland the government has recently extended them by a further two years: see the Justice and Security (Northern Ireland) Act 2007 (Extension of duration of non-jury trial provisions) Order, SI 2011/1720.

[46] C. THOMAS, *Are Juries Fair?*, Ministry of Justice Research Series 1/10, February 2010, p. 27.

[47] *Ibid*., p. 26.

[48] Scotland, by contrast, uses a jury of 15, which convicts by a simple majority.

Had there been not two but three of them, he would have escaped conviction, at least on that occasion [49].

A final problem with jury trial is that, in its modern UK form at least, it is extremely slow, and in consequence extremely expensive. Two weeks after the London bombings on 7 July 2005, another group of would-be suicide bombers tried to carry out a similar attack, but thanks to a defect in the explosives their bombs failed to go off. When prosecuted, they claimed that they had always intended their bombs not to explode. This defence was almost as implausible as Delroy Grant's explanation of the presence of his DNA on the bodies of people he had raped. Yet the resulting jury trial nevertheless took five and half months to examine it from every possible angle before reaching what, to any sane observer, must have seemed the obvious conclusion from the outset. The main beneficiaries of this lengthy and expensive state of affairs are the barristers involved in jury trials, in whose ranks, inevitably, are to be found the most enthusiastic defenders of the institution – so causing the journalist Simon Jenkins, a jury sceptic, to condemn jury trial as the "barristers' Common Agricultural Policy" [50].

The difficulty of convicting terrorist suspects – and indeed many other dangerous criminals – in the criminal courts is magnified by the restrictive rules of evidence that apply in criminal cases; and in particular, by the rule that the contents of intercepted telephone-calls and intercepted letters are not admissible as evidence. In all three parts of the UK the authorities have the legal power to intercept communications, but any incriminating statements that so come to light may only be used "operationally": that is, as a starting-point for the collection of other material which is legally admissible. So if, for example, the police tap the telephone of a latter-day Guy Fawkes and record him plotting with his fellow-conspirators to blow up the Queen at the official opening of Parliament, the prosecution may not use the tape-recording of this incriminating conversation if Fawkes and colleagues are then brought to trial, and will have to resort to other means to prove his guilt. As the law stands, the prosecution can adduce evidence of the fact that Fawkes and his colleagues spent the period leading up to 5 November telephoning one another – but it may not adduce evidence of what was said. The difficulties this creates for prosecutors are graphically described by Lord Lloyd, a senior judge with experience in such cases, in his evidence to an official committee [51]:

> "… even if there is just enough other evidence to bring them to trial, it is painful to watch the prosecution attempting to prove a conspiracy by adducing evidence of a pattern of telephone conversations between the conspirators when the best evidence is there on the tape recording".

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[49] In English law, this would have produced what is known as a "hung jury"; a situation which is neither an acquittal nor a conviction, and which entitles the prosecution, if it so wishes, to proceed to a new trial.

[50] In an article entitled "Trupti Patel and the rotten courts of Salem", *The Times*, 13 June 2003.

[51] Written evidence to the Chilcot Committee, note 53 below.

The origins of this rule are not, as might be thought, the ancient traditions of the common law and its concern for civil liberties. In fact the opposite is true. The rule is modern, and its basis is a statute, first enacted in 1985 and then re-enacted in 2000. And the purpose of the rule is not to protect civil liberties, but rather *raison d'Etat.* The official explanation for the rule is that the ban is necessary to prevent criminals and terrorists from discovering that their telephones are tapped, and the way that this is done – facts which, if they were known, would render useless what is at present a valuable method of monitoring the activities of criminals and terrorists. But as everybody, including major criminals and terrorists, already knows that telephones are sometimes tapped by the authorities and letters sometimes intercepted in the post, this explanation looks very unconvincing. And the underlying reasoning, if it is sound, appears to prove too much: it would also justify banning fingerprint evidence lest burglars took to wearing gloves and DNA evidence lest rapists took to using condoms. Sceptics widely believe that what really lies behind the rule is a desire to protect the acts of the executive in its various manifestations from uncomfortable examination in the courts. As the consequence of a series of historical accidents, in all three parts of the UK warrants to intercept communications are issued not by judges, but by Ministers: usually the Home Secretary. Neither they nor their civil servants wish the legality or propriety of their decisions to issue warrants to be scrutinised by judges in any prosecutions that might follow, and to avoid this, prefer a situation in which the fruit of the intercept can only be used as "operational material", even though this is a dreadful obstacle to prosecution.

In recent years, the ban on using telephone intercepts as evidence has been much criticised, and successive governments have come under increasing pressure to promote legislation to remove it [52]. In January 2008 an official committee recommended its removal [53], after which the then Prime Minister, Gordon Brown, announced his conversion to the idea. But since then, nothing more has happened. And so the ban remains, and with it, the needless difficulties that it creates for the conviction of terrorists in the criminal courts.

6. The legislative response, administrative detention, rather than reform of criminal evidence and procedure

In response to the perceived problems of prosecuting terrorists, the previous Government – alone among the governments of the Member States of the EU – decided to introduce, for terrorist suspects, a regime of administrative detention, by order of the Home Secretary.

The first version of this, enacted by the Anti-terrorism, Crime and Disorder Act 2001, applied solely to foreign terrorist suspects whom the Home Secretary

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[52] See, *inter alia*, *Intercept Evidence: Lifting the Ban. A JUSTICE report.* October 2006 (available on the JUSTICE website); J. SPENCER, "Intercept evidence – the case for change", *Justice of the Peace*, 172, 2008, p. 651-655 and 671-672; J. SPENCER, "Telephone-tap evidence and administrative detention in the UK", in M. WADE and A. MALJEVIC (eds.), *A War on Terror?*, New York, Dordrecht, Heidelberg and London, Springer, 2010.

[53] *Privy Council Review of Intercept as Evidence; Report to the Prime Minister and the Home Secretary*, 30 January 2008, Cm 7324.

would have liked to deport, but could not because they might be tortured or killed if returned to their country of origin. In 2005, this form of administrative detention was – sensationally – condemned by the House of Lords [54] as contrary to the European Convention on Human Rights [55]. It was in this case that one of the judges, Lord Hoffmann, made the following remark which has become famous:

> "[97] The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. This is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give terrorists such a victory".

The House of Lords condemned the provisions of the Anti-Terrorism, Crime and Disorder Act that permitted to the Home Secretary to hold foreign terrorist suspects in jail without trial indefinitely as contrary to the European Convention on Human Rights for two main reasons: first, because they contravened Article 5 (the right to liberty), and secondly because they discriminated unfairly and unnecessarily between citizens and foreigners, and hence contravened Article 14 of the European Convention (prohibition of discrimination). Potential terrorists, it was said, could as easily be nationals as foreigners, and if there was no need for the Home Secretary to be able to impose indefinite administrative detention on terrorist suspects who were nationals, there was no need for him to be able to impose it on those who happened to be foreigners.

In response to this decision, the government did not – as many hoped – abandon its attempt to impose administrative detention on suspected terrorists. Instead its response was to devise a new scheme for administrative detention that it hoped the courts would accept as compatible with the Convention. In the Prevention of Terrorism Act 2005, the government persuaded Parliament to enact a regime of "control orders". Instead of allowing him to put suspects in prison, this allowed the Home Secretary to impose a range of different restrictions on their lives, the most severe of which would amount in practice to putting them under house arrest. And to avoid the complaint about discrimination, these new powers applied to citizens as well as to foreign nationals. Of these control orders there were in principle two types: "derogating control orders", where the restrictions amounted to an infringement of liberty as protected by Article 5 of the Convention, and "non-derogating control orders", where the restrictions imposed were less severe. Derogating orders were made by a court, on the application of the Home Secretary. Non-derogating orders were made by the Home Secretary, but subject to review by a court. To make a non-derogating control order, the Home Secretary must have had "reasonable grounds for suspecting that the individual is or has been involved in terrorism", and must have considered that the imposition of a control order was necessary "for purposes connected with protecting members of the public from a risk of terrorism". The role of the reviewing court was limited. According to the Act, "the function of the court… is to consider whether the

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[54] *I.e.* the House of Lords which was until 2009 as the final court of appeal, not the Upper Chamber of the Legislature.

[55] *A v Secretary of State for the Home Office* [2004] UKHL 56; [2005] 2 AC 68, [2005] 2 WLR 87.

decision of the Secretary of State to make the order he did was obviously flawed". The reviewing court sat in private – and unlike the criminal courts, telephone intercepts were admissible in evidence. It was also a feature of the procedure that the evidence, on which the order is made, though disclosed to the court, was kept from the person who is the subject of the order.

Unsurprisingly, control orders proved extremely controversial, and attempts to impose them were regularly challenged in the courts. In all, only 38 control orders were imposed, all of them of the "non-derogating" type. In seven of these cases, the subject of the order absconded, never to be seen again, and the remainder provoked an orgy of litigation. To cut a long legal story very short, the judges were uneasy about them and the resulting case-law imposed limits on their use which, in the view of those who approved of them, greatly undermined their usefulness. From the Home Secretary's point of view, the final blow was a decision of the House of Lords in June 2009 which held that, in the light of the decision of the Grand Chamber of the European Court of Human Rights in *A v United Kingdom* [56], a person seeking to challenge a control order must be permitted to know the case against him, and given a chance to answer it; and it was therefore not sufficient, in cases where the Home Secretary believed that disclosing the nature of the case to the "controlee" himself would be dangerous, for the nature of the case and the supporting evidence to be disclosed to a "special advocate" who was not allowed to have any contact with the controlee [57].

When the Labour government lost the General Election in May 2010 and a Coalition of Conservatives and Liberal Democrats came to power, the leading Coalition politicians had been highly critical of the outgoing government's heavy-handed record on matters affecting civil liberties and one of the first things the new government did was to announce that there would be an "urgent review" of control orders. This led those who were critical of administrative detention for terrorist suspects to hope that it would now be abolished: but this was not to be. Instead, in January 2011 the Home Secretary announced that, though control orders were to be abolished, they would be replaced by a new regime of administrative detention to be called "Terrorism Prevention and Investigation Measures" – or "TPIMs" for short: an announcement which provoked Shami Chakrabati, the Director of the human rights group Liberty, to say that "Spin and semantics aside, control orders are retained and rebranded, if in a slightly lower-fat form", and "As before, the innocent may be punished without a fair hearing and the guilty will escape the full force of the criminal law" [58]. A Bill to this effect was introduced in Parliament which, in December 2011, became law as the Terrorism Prevention and Investigation Measures Act. The main "lower-fat" elements in TPIMs are two: first, in order to make one, the Home Secretary must have a "reasonable belief" that the person in question is or has been involved in terrorist activity, whereas control orders required no more than "reasonable suspicion"; and secondly, whereas

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[56] Application no. 3455/05, 19 February 2009; (2009) 49 E.H.R.R. 29.

[57] *Secretary of State for the Home Department v. AF (no. 3)*, [2009] UKHL 28, [2010] 2 AC 269.

[58] *BBC News*, 26 January 2011.

control orders once made could be renewed indefinitely, a person may not be detained under a TPIMS for more than two years unless there is evidence of further terrorist activity. The new law, needless to say, does nothing to change the exclusionary rule that prevents the use of telephone intercepts in criminal proceedings.

To my friends in Continental Europe, these developments in the United Kingdom are a paradox. Was it not at Runnymede, in England, that the autocratic King John was forced in 1215 to sign Magna Carta, the celebrated Clause 29 of which provides that:

> "No freeman shall be taken or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed, nor will we pass upon him nor condemn him, unless by the lawful judgment of his peers, of by the law of his land…".

And was it not in England that, in the constitutional conflicts of the seventeenth century, a King was first deprived of his sovereign power to imprison his subjects at his will? So how can it be that it is the United Kingdom, the cradle of civil liberties, which alone of all the countries in the European Union has reacted to the threat of terrorism by legalising administrative detention?

The answer, I fear, involves another paradox. The United Kingdom, unlike Italy, and Germany, and most of the rest of the European Union, has not experienced within living memory the reality of a regime where civil liberties are not respected. Not since the seventeenth century has it been ruled by a dictator, not since 1066 has it been occupied by a foreign power, and never in the twentieth century was it ruled by a communist government that treated civil liberties with practical contempt. It is human nature, unfortunately, to take for granted and to fail to value those good things that you have always had. As the saying goes, "you never think about the well until the well runs dry".

Austrian counter-terrorism legislation and case law

Robert KERT

1. Introduction

If one were to have read the Austrian media in the last two years, one might have come away with the impression that Austria is a country full of terrorists and that it has a real terrorism problem. By way of example, these are the sorts of headlines that have appeared: 'Activists for fathers' rights suspected of terrorism'; 'Students continue to be suspected of terrorism and are still in pre-trial detention'; 'Terrorism trial against animal rights activists ends after more than one year'.

The question is: Is this really a terrorism problem? Or is it a problem of terrorism provisions that have gone too far? Or is it a problem of the application of these provisions? These cases will be discussed later on in this analysis.

Prior to 2002, the year when the EU Framework Decision 2002/475/JHA on combating terrorism [1] came into force, the Austrian Criminal Code (*Strafgesetzbuch*) did not contain any provisions on terrorism. Terrorist acts were (only) punished on the basis of existing criminal offences. It was not considered necessary to punish people for merely being members of a terrorist association, before they committed a specific offence (or were attempting to commit a criminal offence) such as murder, kidnapping or the hijacking of an aeroplane. With regard to offences punishing preparatory acts (before the concrete infringement of protected legal interests like life or limb, property and liberty), Austrian law contained provisions on 'Criminal conspiracy' [2] and 'Criminal association' [3]. In 1993, the offence of 'Criminal organisation' was introduced as it was regarded as a shortcoming in the fight against organised crime

[1] *OJ*, no. L 164, 22 June 2002, p. 3.

[2] *Verbrecherisches Komplott*, S. 277 öStGB.

[3] *Kriminelle Vereinigung*, S. 278 öStGB.

that Austrian criminal law did not contain a provision according to which a member of a criminal organisation could be punished merely because of his/her membership of a criminal organisation [4].

2. Legislation to implement Framework Decisions 2002 and 2008

A. Transposition of Framework Decision 2002/475/JHA

To implement Framework Decision 2002/475/JHA on combating terrorism (and the UN Convention for the Suppression of the Financing of Terrorism [5], implemented at the same time), the Austrian Criminal Code was amended in August 2002 [6]. A new criminal offence of 'terrorist group' was established; higher penalties were introduced for offences qualified as terrorist and a statutory definition of 'terrorism financing' was introduced. The following explanations only relate to the provisions transposing the Framework Decision.

1. Terrorist offences

The list of *terrorist offences* in principle was taken from the Framework Decision (Article 1(1)) into Austrian legislation. The provision lists all statutory definitions of offences which correspond to the offences in Article 1(1) FD [7]. The terrorist offences are murder, grievous bodily harm, kidnapping, aggravated coercion, aggravated dangerous threat, aggravated destruction of data if this can cause a significant danger to the life of another person or to another's property, intentional endangerment of the public and of the environment, seizure of aircraft, intentional endangerment of air traffic and criminal offences according to Section 50 of the Weapons Act or Section 7 of the Act on Munitions. The list of offences was only limited in comparison to the Framework Decision in that not every attack on the physical integrity of a person [8] and every threat is a terrorist offence but only grievous bodily harm and aggravated dangerous threats fall under the provision. On the other hand, the scope of the list seems to be wider because the list of offences is more general than the list of behaviours in the Framework Decision.

To be qualified as being a terrorist offence, an offence must "cause grave and long lasting disturbance to public life" or "grave damage to economic life". It is not necessary for these consequences to actually materialise. In fact, it is sufficient for it to be likely that the act has such a consequence. It is a so-called 'offence of potential endangerment' for which it is required that an act is appropriate to cause a

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[4] Report of the Parliamentary Judicial Committee, JAB StGNov 1993, 2.

[5] International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999, signed by Austria on 24 September 2001 and ratified on 15 April 2002.

[6] Strafrechtsänderungsgesetz (Act Amending Criminal Law) 2002, *BGBl*, no.134, 2002.

[7] S. 278c öStGB.

[8] According to the Explanatory Report to the Government Bill (EBRV 1166 BlgNR 21. GP, p. 38), in a practical case it is not thinkable that a minor assault could be appropriate to cause a grave and long-lasting disturbance to public life or grave damage to economic life.

consequence [9]. The terms used are new in Austrian criminal law and it is yet unclear how they should be interpreted. The Explanatory Report to the Government Bill merely states that a grave disturbance or destruction of public life and of economic life is necessary [10]. A grave disturbance is presumed to be where the act is of a size that it may lead to a massive disturbance of public life in a bigger region (*e.g.* in a big city) because, for example, public security cannot be guaranteed [11]. How long a long-lasting disturbance must last is regarded differently in Austrian doctrine. It must last at least two months to be regarded as long-lasting [12].

Grave damage to economic life is an extensive failure or total breakdown in the operation of important branches of the economy or of big enterprises, which results in the supply to the population of goods, services, infrastructure and communication systems not being guaranteed or not being sufficiently guaranteed or results in financial and capital markets being hit hard. An example could be the complete breakdown in the supply of energy, water or food, of traffic facilities (railway, streets or air traffic) or large parts of agriculture. There is no fixed level or amount as to what constitutes grave damage. In parts of the doctrine € 800,000 is seen as relevant damage [13].

This likelihood of terrorism must not only objectively exist but it must also include the intent of the perpetrator. *Dolus eventualis* is sufficient.

The *terrorist aim* provided for in Article 1(1) FD was introduced into Austrian law as a subjective element of the offence. It is required that the perpetrator acts with the intent to intimidate the population seriously, to unduly compel the government or international organisation to perform, acquiesce or abstain from performing any act or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. It is not necessary that the offender has the intention to achieve any of these aims, but conditional intent (*dolus eventualis*) is sufficient [14].

Moreover, based on Article 1(2) FD, the Austrian Criminal Code contains a *negative definition of terrorism*: an act is not a terrorist offence if it aims to establish or re-establish democratic or constitutional order or to exercise or protect human rights [15]. People who exercise their legitimate right to express their opinion must not be accused of terrorism even if they commit a criminal offence when exercising this

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[9] W. Wessely, "Zu den neuen Terrorismustatbeständen im StGB", *Österreichische Juristen-Zeitung*, 2004, p. 827, at p. 828.

[10] Explanatory Remarks to the Government Bill, EBRV 1166 BlgNR 21. GP, p. 38.

[11] F. Plöchl, in F. Höpfel and E. Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch*, Wien, Manz, 2009, § 278c marginal number 8.

[12] Compare *ibid*., § 278c, marginal number 8: "some weeks"; C. Bertel and K. Schwaighofer, Besonderer Teil II, 9th ed., Wien, Springer, 2010, § 278c marginal number 2: "at least some months".

[13] B.P. Oshidari *et al*., *Salzburger Kommentar zum Strafgesetzbuch*, Wien, Lexis Nexis, 2005, § 275 marginal number 18.

[14] See W. Wessely, *op. cit*., p. 828; E.M. Maier, "Strafrecht – Kriegsrecht – Ausnahmezustand? Der Rechtsstaat vor der Herausforderung des Terrorismus", *Journal für Rechtspolitik*, 2006, p. 27 (30).

[15] S. 278c(3) öStGB.

right. The Explanatory Remarks to the Government Bill note that this provision will in particular refer to acts (*e.g.* by political opposition groups) which are committed in non-democratic societies outside the European Union and which must be adjudicated in Austria [16]. However, these acts can remain punishable (if they are not justified in another way) but not as terrorist offences.

For terrorist offences, the Austrian legislator has established an aggravating circumstance which changes the range of penalties: if a criminal offence is described in law as a terrorist offence, this is not a specific offence, but it has the consequence that the maximum sentence provided for that offence is *raised by half* [17], but it must not be more than 20 years [18].

2. Introduction of the 'terrorist group' offence

Besides this aggravating circumstance of terrorist offences, a *new offence of 'terrorist group'* was introduced [19]. The statutory definition distinguishes between three different offences:

1. *Directing* a terrorist group is punishable by custodial sentences from five to fifteen years.
2. If the terrorist group *only refers to threatening* to commit a terrorist offence, directing a terrorist group is punishable by a custodial sentence between one and ten years. In this distinction, Austrian legislation follows Article 5(3) FD.
3. *Participating* in the activities of a terrorist group as a member is also punishable by custodial sentences between one and ten years.

The definition of 'terrorist group' in the Austrian Criminal Code corresponds exactly to the definition of Article 2(1) FD. A terrorist group is a group of more than two persons, established over a period of time, whose aim is for one or more members of the group to commit one or more terrorist offences [20]. The group must be established over a period of time but it is sufficient that the association is directed towards committing a single terrorist offence [21]. It is not necessary that the group has a high degree of organisation. A formal membership or formally determined roles within the group are not necessary. But the association must not be accidentally created only to commit one criminal offence [22].

Directing means the authority to issue orders to the other members of the terrorist group. It is not necessary for it to be a comprehensive authority; it can also be limited to subareas of the organisation, but it must be of relevance for the whole association. The main criterion is that the person has, *de facto*, a leading position, which gives him/

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[16] Explanatory Report to the Governmental Bill, EBRV 1166 BlgNR 21. GP, p. 39 f; seen as problematic by C. Bertel and K. Schwaighofer, *op. cit.*, § 278c marginal number 4.

[17] S. 278c(2) öStGB.

[18] Twenty years is the maximum for prison sentences limited in time in Austrian criminal law. Beyond that, only life imprisonment penalties are foreseen. But it is not admissible to change a prison sentence which is limited in time to life imprisonment.

[19] S. 278b öStGB.

[20] S. 278b(3) öStGB.

[21] F. Plöchl, *op. cit*., § 278b marginal number 7.

[22] W. Wessely, *op. cit*., p. 831.

her the authority that his/her orders, instructions and commands are actually obeyed and carried out. Therefore directors are persons who belong to the leader board or take part in the leadership of the association. This can be an ideological or operational leadership that decides on the strategic objectives of the association and can give orders to members [23].

Participating as a member of a terrorist group requires that, in the framework of a terrorist aim, a person commits a terrorist offence or participates in terrorist activities by supplying information, by financial means or by supporting the terrorist group in another way with the knowledge that s/he supports the terrorist group or its criminal activities. Such support can also take the form of recruitment or training for terrorist purposes. It is not necessary that the organisation has already started to act. Participating in a terrorist group may be punished with a custodial sentence of up to ten years.

3. Political discussion during the transposition of the 2002 Framework Decision

During the legislative process, there was *criticism* that the new provisions do not systematically fit into the Austrian criminal law system and that they are too *vague* [24]. According to the case law of the Austrian Constitutional Court, a statutory definition of a criminal offence must be so precise that, for a citizen, it is clear which behaviour is punishable [25]. During the legislative process, doubt was cast on whether the new provisions fulfil this requirement given that many indefinite legal terms are used and their interpretation is decisive as to whether a person is punishable or not. It was regarded as a problem that the preparatory stage of criminal offences was criminalised, which necessarily means that the statutory requirements for criminal liability cannot be very concrete. Moreover, some people cautioned that these provisions could also be applicable to the actions of NGOs (*e.g.* environmental organisations). The negative definition of terrorism was criticised in particular as being too indefinite as it would not be clear enough what the democratic circumstances are and what the acts to establish them are [26]. Whether, for example, Palestinian, Kurdish or Iraqi groups act for these aims can be a question of political opinion. But the answer to this question can be decisive as to whether a behaviour is punishable as a terrorist offence or not. Therefore it is difficult to anticipate which type of behaviour is punishable and which is not as the assessment of the behaviour as being punishable depends on decisions which are primarily of a political nature.

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[23] F. Plöchl, *op. cit.*, § 278b marginal number 10; H. Hinterhofer, *Strafrecht Besonderer Teil II*, 4th ed., Wien, WUV Universitätsverlag, 2005, p. 251.

[24] See *e.g.* the statements of experts regarding the draft of the Ministry of Justice: http://www.parlinkom.gv.at/PAKT/VHG/XXI/I/I_01166/index.shtml#tab-VorparlamentarischesVerfahren.

[25] See Constitutional Court (*Verfassungsgerichtshof*) 30 June 1988, VfSlg 11.776; 4 March 1992, VfSlg 13.012. See also R. Thienel, in K. Korinek and M. Holoubek (ed.), *Österreichisches Bundesverfassungsrecht*, Wien, Springer, 1999, Article 7 EMRK marginal number 12.

[26] See, *e.g.*, statement of the Constitutional Service of the Federal Chancellery, GZ 602.474/2-V/A/5/02 and the statement of Amnesty International Austria on the ministerial draft; W. Wessely, *op. cit.*, p. 829; H. Hinterhofer, *op. cit.*, p. 253; E.M. Maier, *op. cit.*, p. 31.

B. Transposition of Framework Decision 2008/919/JHA: the 'Terrorism Prevention Law'

Framework Decision 2008/919/JHA was transposed into Austrian law together with the Council of Europe Convention on the Prevention of Terrorism (2005) [27] in two stages in December 2010 and November 2011. In December 2009, a big "*terrorism prevention law*" (*Terrorismuspräventionsgesetz*) had been drafted and announced by the Austrian Ministry of Justice and presented by the government in the summer of 2010 [28]. This draft bill had contained new statutory definitions of the offences of 'training for terrorist purposes', 'instruction on the commission of terrorist offences' and 'provocation to commit terrorist offences and approval of terrorist offences' [29]. Due to many protests against it, only parts of it were passed by the Parliament in December 2010 [30].

Inter alia, NGOs and associations of journalists argued that the statutory definitions would be so indefinite that even journalists who report about terrorist groups would be threatened with punishment according to the provision of 'instruction on the commission of terrorist offences'. NGOs saw it as a problem that the proposed provisions were so indefinite that they could be used to repress civil society organisations which are not wanted by the state. It was seen as a problem that every public call to protest where means of coercion are used (*e.g.* the occupation of places to hamper the construction of a building) to force a government or other public authority to behave in a certain way could fall under the offence of 'provocation to commit terrorist offences and approval of terrorist offences' [31].

1. Training for terrorist purposes

Due to these discussions, in December 2010 only a law establishing a *new offence of* "*training for terrorist purposes*" [32] was passed by parliament, as it was considered necessary to implement the FD 2008 [33]. According to this provision, a person is punishable for instructing somebody how to make or use explosives, firearms or other weapons or noxious or hazardous substances or in other specific methods or techniques for the purpose of committing a terrorist offence if s/he knows that the skills provided are intended to be used for this purpose. Here, the Austrian provision corresponds to Article 3(1)(c) FD. The statutory definition requires the knowledge of the offender

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[27] CETS no. 196.

[28] Government Bill for a Federal Law amending the Criminal Code to prevent terrorism (Terrorism Prevention Law 2010), 674 BlgNR 24. GP, p. 1.

[29] "*Ausbildung für terroristische Zwecke*", "*Anleitung zur Begehung einer terroristischen Straftat*", "*Aufforderung zu terroristischen Straftaten und Gutheißung terroristischer Straftaten*".

[30] Bundesgesetz, mit dem das Strafgesetzbuch, die Strafprozessordnung 1975, das Staatsanwaltschaftsgesetz und das Gerichtsorganisationsgesetz zur Stärkung der strafrechtlichen Kompetenz geändert werden (strafrechtliches Kompetenzpaket), *BGBl*, 2010, no. 108.

[31] See, *e.g.*, "Widerstand gegen Bandion-Ortners Anti-Terror-Gesetz", *Die Presse*, 15 January 2010.

[32] S. 278e öStGB.

[33] See Report of the Parliamentary Judicial Committee (JAB), 1009 BlgNR 24. GP, p. 2.

that the imparted abilities shall be used for the purpose of the commission of one or more terrorist offences. Whether these abilities are actually used for the commission of terrorist offences is irrelevant for criminal liability according to this provision. It is punishable by a custodial sentence of one to ten years, which corresponds to the penalties for being a member of a terrorist group [34].

Although there was no legal requirement either in the EU 2008 Framework Decision or in any other international legal instrument, the Austrian legislator did not only introduce a criminal offence of active training but made also punishable the fact of being trained. The Austrian government considered it necessary to introduce such a provision in order to prosecute people who travel abroad to be trained in terrorist camps [35]. The provision of Section 278e(2) öStGB in particular covers participation in terrorist camps for the purpose of committing terrorist offences. The perpetrator must have the intention of using the acquired skills to commit a terrorist offence. For this 'passive' education, a custodial sentence of up to five years is provided. But the penalty must not be higher than the penalty foreseen for the intended criminal offence.

2. Instruction on the commission of terrorist offences

In spite of the discussions on the government bill [36] in autumn 2011 the other two criminal provisions were – nearly in the same wording as in the government bill – passed by the Austrian parliament [37]. According to the new provision of "*instruction on the commission of terrorist offences*" [38] a person is punishable, if s/he offers a media, which is, due to its content, intended to instruct the commission of a terrorist offence or offers such information on the internet or makes it accessible to another person if s/he acts with the intention of inciting the commission of a terrorist act. This special intention was added to the statutory definition after the above-mentioned objections to limit the offence and to prevent journalists reporting about terrorist activities being punishable according to this provision. For that offence a prison sentence of up to two years is foreseen. The same penalty is foreseen for a person who procures such information in such a media or from the internet to commit a terrorist offence.

Whereas the provision on "training for terrorist purposes" refers to a typical education situation between teacher and pupil, the provision of "instruction on the commission of terrorist offences" covers situations where *information* is *made available* as instruction to commit terrorist offences or the private study of information from media or from the internet. Additionally to make the information available, the

[34] S. 278b(2) öStGB.

[35] See Explanatory Remarks to the Governmental Bill, 674 BlgNR 24. GP, p. 5.

[36] Governmental Bill for a Federal Law amending the Criminal Code to prevent terrorism (Terrorism Prevention Law 2010), 674 BlgNR 24. GP, p. 1.

[37] Bundesgesetz, mit dem das Strafgesetzbuch zur Verhinderung von Terrorismus sowie das Strafgesetzbuch und die Strafprozessordnung 1975 zur Verbesserung des strafrechtlichen Schutzes der Umwelt geändert werden, *BGBl* I, 2011, no. 103.

[38] S. 278f öStGB.

circumstances of the circulation must be appropriate to motivate someone to commit a terrorist offence.

3. Provocation to commit terrorist offences and approval of terrorist offences

According to the new provision of "provocation to commit terrorist offence" and "approval of terrorist offence" [39] a person is punishable for provoking the commission of a terrorist act in print, broadcast or in another media or otherwise publicly in a way that is available for many people. Whereas the Framework Decision provides that such a provocation must cause a danger that one or more terrorist offences be committed, Austrian law does not require the behaviour to have caused such a danger. Therefore the Austrian definition of the offence seems to be wider than the one in the Framework Decision. A penalty of imprisonment of up to two years is envisaged in the legislation.

In the same way, a person shall be punished for the *endorsement* in a media or otherwise in public of *the commission of terrorist offences* in a way which is appropriate to create the circumstances in which one or more offences may be committed [40].

According to the Explanatory Report to the Government Bill, this provision shall complete two existing offences to prosecute the so-called "preachers of hate" [41].

There are two criminal offences in the Austrian Criminal Code which could serve as instruments in such cases: The offences of "provocation to commit a criminal offence and endorsement of criminal acts" [42] and "sedition" [43], according to which it is punishable to call for or endorse a hostile act against certain groups (*e.g.* religious, racial or ethnic groups) in a way which might endanger public order. The government considered it necessary, however, to introduce a new criminal provision since the provision of S. 282 öStGB requires that the act is noticed by at least 150 people and this requirement would not make it possible to counter such "preachers of hate" effectively as this criterion would be too strict and therefore not all cases could be covered [44]. According to the new provision of S. 282a öStGB it will be sufficient for the provocation to commit a terrorist offence that around 30 persons gain access to the content of the provocation.

Besides the introduction of these new provisions the definition of "*sedition*" was also *amended* since the old version required that the means of commission was appropriate to endanger public order and therefore the legislator saw it as too narrow to be used to combat "preachers of hate". This definition was extended.

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[39] S. 282a öStGB.

[40] S. 282a(2) öStGB

[41] Explanatory Report to the Government Bill, 674 BlgNR 24. GP, 6.

[42] "*Aufforderung zu mit Strafe bedrohten Handlungen und Gutheißung mit Strafe bedrohter Handlungen*", S. 282 öStGB.

[43] "*Verhetzung*", S. 283 öStGB

[44] Explanatory Report to the Governmental Bill, 674 BlgNR 24. GP, 6.

C. Jurisdiction

To fulfil the requirements of both Framework Decisions on *extraterritorial jurisdiction*, a new provision was introduced into the Criminal Code [45]. This provision does not only refer to the offences of "terrorist group" (Section 278b öStGB), "terrorist offences" [46], "training for terrorist purposes" [47] and "instruction on the commission of terrorist offences" [48], but also to certain other criminal offences if they are linked to terrorist offences: aggravated theft [49], blackmailing [50] and falsification of documents [51]. Such offences are linked to terrorist offences if they are committed with the aim of committing one of the terrorist offences in Sections 278b to 278f öStGB.

In these cases it is foreseen that Austria has jurisdiction irrespective of double criminality requirement (Section 64(1)), if

- the offender is Austrian or if s/he has acquired Austrian citizenship later and still has it when the criminal procedure has started;
- the offender has his/her residence or his/her habitual abode in Austria;
- the offence has been committed for the benefit of a legal person established in Austria;
- the offence has been committed against the National Council, the Federal Council, the Federal government, a provincial parliament, a provincial government, the Constitutional Court, the Administrative Court, the Supreme Court or another court or authority or against the Austrian population;
- the offence has been committed against an institution of the European Union or a body set up in accordance with the Treaty establishing the European Community or the Treaty on European Union which is based in Austria;
- the offender was a foreigner at the time of the offence, stays in Austria and cannot be extradited regardless of whether his/her behaviour is also punishable according to the laws in the state where the offence is committed [52].

With these provisions Austria fulfils all the requirements of Article 9(1) FD [53].

These provisions have, *inter alia*, the consequence that participation in terrorist camps abroad is prosecuted in Austria independently of the criminal liability of the act under the law of the territory in which the act has been committed, if, for example, at the time of the commission of the offence, the offender is Austrian, resident in Austria or s/he stays in Austria and cannot be extradited.

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[45] S. 64 öStGB.

[46] S. 278c öStGB.

[47] S. 278e öStGB.

[48] S. 278f öStGB.

[49] S. 128 to 131 öStGB.

[50] S. 144, 145 öStGB.

[51] S. 223, 224 öStGB.

[52] See F. Höpfel and U. Kathrein, in F. Höpfel and E. Ratz (eds.), *op. cit.*, Manz, Wien 2011, § 64 marginal number 22d.

[53] For more details see Explanatory remarks to the Government Bill (EBRV), 1166 BlgNR 21. GP, p. 21 f.

3. Case law

With regard to the application of the provisions in practice, so far only one case of terrorism has been brought to court [54]. This was a case of a Muslim couple who, as members of Al Qaida, published a video message on the internet requesting the Austrian and the German government to withdraw their troops from Afghanistan. The threat that they expressed was that, if the governments did not do that, they would bitterly regret not doing it. Moreover, on the internet, they called for terrorist offences to be carried out, particularly in football stadiums during the 2008 European Championship and against Austrian and foreign politicians and international buildings in Vienna. They were convicted, *inter alia*, of directing a terrorist group [55].

Although the Austrian Supreme Court made two decisions in this case [56], legal questions on the interpretation of the terrorism provisions did not play an important role in this case. This may be due to the fact that it was, in the first instance, a trial before a jury, where a reasoning of the judgement by the court is not foreseen and therefore the available legal remedies are limited. In the first decision, the Supreme Court rendered the judgement null and void for procedural reasons because, in the judgement, the establishment of facts concerning the constituent fact of "established over a period of time" was missing. But the Supreme Court did not go into details about how to interpret the element of crime "established over a period of time".

There were two other – procedural – aspects in this proceeding which were discussed at great length (also in public) during the procedure:

a. During the investigation procedure the first known case of an *online search* was carried out by the police although an explicit rule has been missing in Austrian criminal procedure. A special type of spy software was clandestinely installed on the suspects' computer and made screenshots every 60 seconds and subsequently transferred these pictures to the police. Furthermore, key log data was transferred and monitored by the police so that the police acquired a picture of nearly all the computer activities of the suspects. However, the Regional Court in Criminal Matters in Vienna [57] regarded the online search of a computer, executed by the police, as admissible and applied the rules on the surveillance of the content of telecommunication and on optical and acoustic surveillance to these investigative measures.

   The Austrian Supreme Court [58] did not say anything about the admissibility of carrying out the measure, but stated that there is no legal prohibition on using the results of the online search in a trial. According to the Supreme Court, bans on the use of evidence are only provided in exceptional cases but this was not such a

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[54] In May 2012, another case was brought to Court in Vienna, in which four men have been charged with being members of a terrorist group and having organised trips to terrorist camps.

[55] S. 178b(1) öStGB.

[56] *Oberster Gerichtshof* (Supreme Court) 27 August 2008, 13 Os 83/08t, Juristische Blätter 2009, p. 527; 27 August 2009, 13 Os 39/09y (unrep.).

[57] *Landesgericht für Strafsachen Wien* (Regional Court for Criminal Matters Vienna), 12 March 2008, 443 Hv 1/08h.

[58] *Oberster Gerichtshof* (Supreme Court) 27 August 2008, 13 Os 83/08t, Juristische Blätter 2009, p. 527.

case. Therefore it was admissible to use the results. This action by the police and the fact that the court saw it as admissible was criticised by parts of the doctrine, which regarded it as necessary that there are explicit statutory provisions which permit such an investigative measure, which encroaches in a particularly intensive way on the private sphere of a person and gives insight into the thinking and wishes of persons. The similar reference to the provisions on telecommunication surveillance and optical and acoustic surveillance has not been regarded admissible because surveillance with electronic means is different [59]. As a consequence of this investigative procedure, the introduction of rules on online search has been discussed and a group of experts has been appointed to write up a draft of a legal basis for online searches. This working group suggested that a group of judges should be competent to decide on the admissibility of such a measure since an online search would not only concern the current communication of the suspect but also other data which was saved in the past. But until now there have been no explicit provisions in the Code of Criminal Procedure [60].

b. The second ground for public discussions was that the *female defendant* appeared *totally veiled with a burqa at trial*. After the court had asked her to take off the burqa and she had refused to do that, she was excluded from the trial because this was seen as being unseemly behaviour. The Austrian Supreme Court [61] did not see it as a violation of fundamental rights and confirmed the legitimacy of the exclusion. According to the Supreme Court, it is a fundamental rule of human communication in Austria for the face to be unveiled. Therefore it would have been up to the defendant to give convincing reasons why her behaviour was not only a politically and ideologically motivated demonstration for which the court was not the right place. The Supreme Court did not see the exercise of a religious custom in the veiling of the face as it would not be a typical practice in the Islamic religious community. This triggered a lively debate on procedural rules and freedom of religion in Austria. [62]

4. Application of terrorism provisions in investigation proceedings

The provisions on terrorism have been discussed at great length by the Austrian public in recent years. The reason for this is that some investigation proceedings show how far reaching the scope of application of the terrorism definitions can be

[59] See B.-C. Funk, "Online-Durchsuchung und Grundrechte", in Bundesministerium für Inneres (ed.), Online-Durchsuchung, Wien, Neuer Wissenschaftlicher Verlag, 2008, p. 55 (58); see also the Report of the interministerial Working Group "Online-Durchsuchung" from 13 March 2008.

[60] C. Pilnacek, A. Pscheidl, "Das Strafverfahren und seine Grundsätze (Teil I) — Alte Hüte im neuen Gewand oder Fundgrube für die Auslegung?", *Österreichische Juristen-Zeitung*, 2008, p. 629 (633); A. Venier, "Die Online-Durchsuchung. Oder: Die Freiheit der Gedanken", *Anwaltsblatt*, 2009, 480.

[61] Oberster Gerichtshof (Supreme Court) 27 August 2008, 13 Os 83/08t, *Juristische Blätter*, 2009, p. 527 with a commentary of H. Schütz.

[62] See E. Pentz, "Verschleierung: ein "ungeziemendes Benehmen"? Der Umgang der österreichischen Justiz mit einer verschleierten Angeklagten", juridikum 2008, p. 147 and f.

and what consequences this can have. As already mentioned at the beginning of this analysis, there have been several criminal investigations which have been based on the suspicion of membership of a terrorist organisation.

In one case, the leaders of an *association of divorced fathers* who were fighting for the right to visit and to take custody of their children were investigated. They were suspected of having shown in videos judges who have made decisions in family cases and insulted them in the internet. Moreover, activists demanded in the internet to give back a "stolen child" (meaning a child where the right of the father to visit the child was limited), otherwise they would fetch the child with other means [63].

In another case, some *students* were accused of terrorism. They were suspected of setting two dustbins on fire and wanting to *obstruct the deportation of foreigners*. After a lengthy period of surveillance, a video was found in one of the students' notebooks, which showed a police transport of foreigners without a residence permit from the detention for deportation to the airport. This video had been made by these art students for their studies, due to this video the police suspected them of wanting to hamper a deportation and thus planned the disturbance of the flight traffic and liberation of prisoners. Therefore they were accused of wanting "to compel a public authority to perform or abstain from performing an act". The students were kept in pre-trial detention for seven weeks and the investigations into the possibility of their belonging to terrorist group were pursued for several months [64].

In both cases, the charges were dropped after a certain period of investigative proceedings. But both cases show the extensive interpretation and application of terrorism provisions by the police. Currently, the topic is particularly sensitive in Austria because there was a major criminal procedure against activists of animal liberation groups who were accused of being members of a "criminal organisation" (not a terrorist association, although this would have been more obvious). After more than one year of trial they were found *not guilty*, not only not guilty of being members of a criminal organisation but also of any other offence. However, during the investigation, a lot of invasive investigative measures had been applied such as acoustic and optical surveillance and undercover investigations, which were always justified because they were suspected of being members of a criminal organisation. As a result, there is a discussion in Austria on how the scope of application of these organisation and preparatory offences can be limited. And this discussion does not only concern the statutory definition of criminal organisations but also of terrorist groups.

The aforementioned cases reveal one major problem of the statutory definition of "terrorist group" and other terrorist offences. Even if the case is dropped later or the persons are found not guilty, the provision on a "terrorist group" as well as the one on a "criminal organisation" are *used* in investigative proceedings *to carry out investigative measures* which would not be allowed only because of the specific offences that the people are suspected of.

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[63] See "Justiz: Väter-Aktivisten unter Terrorverdacht", *Die Presse*, 20 February 2010; "Väter-Aktivist unter Terror-Verdacht", *Kleine Zeitung*, 25 February 2010.

[64] See "Kunststudenten unter Terrorverdacht", *Der Standard*, 14 February 2011.

Intrusive procedural investigation measures such as telephone tapping, data mining or optical and acoustic surveillance require either concrete suspicion of severe crimes which are punishable by high custodial sentences (*e.g.* custodial sentences of more than ten years for optical and acoustic surveillance) or the suspicion of a criminal organisation or terrorist group or punishable acts committed or planned within the framework of such an organisation or association. Therefore if, for example, only offences with lower penalties, such as the destruction of property, have been committed or can be proved, several investigative measures are not allowed but if there is a suspicion of terrorist association, the whole range of measures can be applied.

Moreover the suspicion that someone might belong to a terrorist group (or criminal organisation) under certain circumstances seems to be easier to construct as a prerequisite for an investigation measure than the suspicion of an offence against life and limb or against property if it is not so clear whose behaviour has caused damage. For the suspicion of a terrorist group or a criminal organisation, the judicial authorities seem to consider sufficient that there are contacts between the suspects and the suspicion that one of the members of these groups could have committed such an offence. Often this suspicion is quite vague and is *per se* – as the mentioned cases show – not sufficient for a conviction, since the terrorist aim cannot be proven in the end. The wide scope of application of preparatory offences such as the terrorist provisions does not require the suspicion of a concrete criminal offence. This makes it quite easy for the police to refer to these provisions to carry out investigative measures, since it is not necessary to prove that an act actually caused a damage or injury.

This is the main problem of terrorist offences in practice. To cover behaviour in the preparation phase of a criminal offence, it is necessary to choose formulations of the statutory definitions which are quite broad and only require a few objective elements. The statutory definition of a terrorist group only requires the participation in a group of at least three persons established over a period of time. These are requirements which are not very difficult to prove, but which do not make a group a terrorist group.

The circumstance which is essential to be a terrorist group is terrorist intent. This is a purely subjective element, for which it is often not possible to present concrete elements, but which depends on the arguments put forward by law enforcement authorities. Austrian law does not require that planning for terrorist attacks is specifically and firmly established. It is sufficient that there is a general plan to commit any terrorist offence (not necessarily specified at the moment) by at least one member of the group [65]. Determining whether an offence is a terrorist offence primarily depends on whether the perpetrator intends to intimidate a population seriously; to compel unduly a government or international organisation to perform, to allow or abstain from performing any act; or to seriously destabilise or destroy the fundamental political, constitutional, economic or socials structures of a country or an international organisation. Since *dolus eventualis* is sufficient, it does not require specific prerequisites to assert a suspicion which is necessary for investigative measures. The consequence of all this is that it is, in some cases, easier to come up

[65] See F. Plöchl, *op. cit.*, § 278b marginal number 7.

with elements to suspect somebody of terrorist (or organised crime) offences since the statutory definitions are broader than for other offences.

This means that there is a danger that the existence of a suspicion of a terrorist offence is pointed out to carry out an investigative measure in spite of a lack of real evidence for such an offence. Even if this does not lead to a conviction, this can have serious consequences for the suspects as the legal proceedings against the animal activists shows. The long proceedings against them meant that they incurred huge costs (for defence lawyers) and resulted in them losing their jobs, having a presence in the media for months and damaging their reputation

However, this is not only a problem of legal provisions but also of the police and of the prosecution authorities that apply these provisions to such groups. It is clear that it is not the purpose of these offences to prosecute groups protesting about political, social or economic issues. It is the task of the police and public prosecution services to apply these provisions to those cases that should be covered by these provisions. The statutory definitions of offences may be broad but law enforcement authorities should interpret them in a way that they are only applied in cases which were intended to be covered by these provisions.

5. Conclusion

Criminal law is increasingly seen as a means to prevent terrorism as the name of Austrian government bill ("Terrorism prevention law") suggests. This aim highlights the problem of the criminal provisions against terrorism. Terrorists are often not afraid of being punished as they are either ready to die or go to prison for their terrorist acts. In that sense, it is difficult to say whether criminal law provisions are an appropriate means of preventing terrorism. In order to have any preventive effect they have to cover behaviour long before the commission of a concrete offence.

To achieve this aim, rather high penalties are provided for actions which are carried out in the forefront of concrete infringements of legally protected interests. The provisions on terrorist offences make a type of behaviour punishable which would not be punishable *per se* [66]. The main problem of such offences – not only terrorist offences, but also the provisions on criminal organisations – is that the main factor for punishment is the aim of a behaviour which is not particularly dangerous *per se*. As a consequence, the statutory definitions of offences are rather broad and vague. This makes it difficult to state whether such behaviour is really dangerous and worthy of punishment.

The problem of these broad definitions could be seen in Austrian practice where groups protesting or fighting for rights have been prosecuted for terrorism or organised crime. If the legal provisions enable the application of such provisions to cases which are definitely not cases of terrorism (or organised crime), it is the task of the legislator to provide for limitations to the offences. The existing negative definition of terrorism in Austria is too narrow and too indefinite to solve this problem. If the legislator does not provide limitations to the offences, there is a danger that such provisions are used and abused to investigate or prosecute opposition groups. It is therefore necessary

[66] See F. Plöchl, *op. cit.*, § 278a marginal number 2 and § 278b marginal number 2.

– on a national as well as on a European level – to find limitations to the statutory definitions, which clearly exclude the application of terrorism provisions to opposition groups and NGOs.

Domestic provisions and case law: the Belgian case [1]

Anne Weyembergh and Laurent Kennes

1. The context

Until recently, the terrorist threat facing Belgium was far more limited than the threat facing other Member States of the EU, such as Italy, Spain, France, Germany and the UK.

However, this does not mean that it was totally non-existent. As was the case for numerous other western European States, in first half of the 1980s Belgium had to face extreme left-wing domestic terrorism, especially the activities of the so-called cellules communistes combattantes (CCC) [Combatant communist cells]. Although this group carried out a number of terrorist attacks which resulted in the death of two firemen and three injured persons [2], they were not as serious as those carried out by the German Rote Armee Fraktion (RAF) or the Italian Brigate Rosse [3].

During the late 1980s and 1990s, no significant terrorist threat was recorded. But the situation changed about ten years ago. Although, as in other EU countries (see for instance the case of Italy), domestic terrorism does not seem to present the main danger any more, two recent cases show that such a threat has not completely disappeared: one concerns the left-wing extremist group parti communiste politico-

[1] The authors wish to thank Julie Dutry (currently *Substitut du procureur du Ro*i and until, February 2012, *attaché à la DG Législation – SPF Justice*, in charge of terrorism files) for her precious assistance and observations. Parts of this has been inspired by A. Weyembergh and L. Kennes, *Droit pénal spécial*, Limal, Anthemis, 2011, T. 1, p. 101 and f.

[2] See especially the attack of 1st May 1985 in front of the head office of the Fédération des entreprises de Belgique (FEB).

[3] For more information about the CCC's activities and links with RAF and Action directe, see especially R. Haquin and P. Stéphany, *Les grands dossiers criminels en Belgique*, Bruxelles, Racine, 2005, p. 261 and f.

militaire (PCPM) [4] and the other concerns the right-wing extremist group Blood and Honour Vlaanderen [5].

However, according to intelligence and investigative authorities, the international terrorist threat and especially the threat related to Islamist terrorism has become of major concern. With some exceptions (see especially the *Nizar Trabelsi* case, also known as the case of the military barracks of Kleine Brogel [6]), criminal judicial procedures and/or judgments in Belgium do not concern the preparation or realisation of specific terrorist attacks on Belgian territory. Instead, they concern participation in terrorist groups. Belgium seems to serve as a logistics base for terrorist Jihadist groups, cells and networks. It also appears that recruitment and training for terrorism has been organised from Belgium (see especially the *Afghan kamikaze network* case, also called the *Malika El Aroud* case [7]). These latter cases also show that Belgium has not avoided the phenomena of homegrown terrorism and self-radicalisation.

Unlike Spain or France for instance, Belgium is not, as such, a target for separatist terrorist organisations. However, some members of organisations such as ETA or the PKK are present on Belgian territory and have been arrested [8].

By comparison with other EU Member States such as the UK, Belgium does not face a significant threat from animal rights groups or environmental eco-terrorist groups.

2. The legislation adopted to implement the 2002 and 2008 FDs

Before the transposition of the 2002 FD, Belgium was among the Member States of the EU that did not have terrorist offences as such in their criminal law. Belgian criminal law did not refer to terrorist offences as such because the terrorist threat was limited and because terrorist cases could be dealt with on the grounds of other incriminations and qualifications – as was especially shown by the convictions handed out in the *CCC group* case [9] and the *Nizar Trabelsi* case or case of the military barracks of Kleine Brogel [10].

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[4] Also called case of the *secours rouge international.* This case is still pending. In March 2012, the Chambre du Conseil of Brussels should pronounce itself on the transfer of the four individuals concerned to the tribunal correctionnel.

[5] This case is still pending. The decision of the Tribunal correctionnel de Dendermonde should be issued some time in March 2012.

[6] Among the facts forming the basis of the case was the attempted suicide attack against the military barracks of Kleine Brogel (see *infra*).

[7] See *infra*.

[8] In this regard, see for example the *TE-SAT 2011 report* (*EU Terrorism Situation and Trend Report*), p. 21 and 37.

[9] Four members of the Cellules communistes combattantes (CCC) [Communist combatant cells], including Pierre Carette and Bertrand Sassoye, were tried by the Cour d'assises de Bruxelles in September and October 1988. It resulted in their being sentenced to life imprisonment (*réclusion à perpétuité*).

[10] The individuals concerned, including Nizar Trabelsi, were sentenced in a decision in the first degree of 30 September 2003 by the tribunal correctionnel de Bruxelles, which was subsequently confirmed by a decision of the Cour d'appel de Bruxelles in June 2004 (see *infra*).

The implementation of the 2002 FD through the Belgian law of 19 December 2003 concerning terrorist offences [11] introduced significant legislative changes. It inserted terrorist offences and offences related to a terrorist group into Belgian law. The implementing law of 19 December 2003 introduced a new Title I*ter* in the second part of the Criminal Code [12], containing Articles 137 and following, which will be analysed afterwards.

Belgium has not implemented the 2008 FD yet. A draft bill has been prepared by the Ministry of Justice but has not even been officially submitted to the parliament because of the long-running Belgian political crisis and the successive resignations of governments. Following the establishment of a new government in December 2011, the implementation of the 2008 FD is one of the priority files of the new Minister of Justice, Annemie Turtelboom. It may well be that more than was the case with the transposition of the 2002 FD, the transposition of the 2008 FD could result in sensitive debates related to the vague and extensive definitions of the offences concerned, to the consequently large margin for manoeuvre left to the judges and to the respect of the legality principle. The potential conflict with freedom of speech and expression could of course also be raised. The need for transposition could be debated too. For recruitment and training for terrorism, some could argue on the basis of the existing case law (see *infra*) that the pre-existing terrorist offences and especially the offences related to a terrorist group are sufficient. However the question would then be whether the interpretation of the existing offences by case law only meets the European Court of Justice (ECJ) requirements in order to consider it a complete transposition, which gives sufficient guarantees in terms of legal security [13]. For "public provocation to commit a terrorist offence", it could be argued that it is already covered by an ancient

[11] *Moniteur Belge*, 29 December 2003. This law also implemented the UN Convention for the repression of terrorism financing of 9 Dec. 1999 (Article 141 CP).

[12] For more information about this law, see especially M.-A. Beernaert, "La loi du 19 décembre 2003 relative aux infractions terroristes : quand le droit pénal belge évolue sous la dictée de l'Union européenne", *J.T.*, 2004, p. 585 and f.; D. Flore, "La loi du 19 décembre 2003 relative aux infractions terroristes : genèse, principes et conséquences", in *Questions d'actualités de droit pénal et de procédure pénale*, Bruylant, Bruxelles, 2005, p. 209 and f.; V. Hameeuw, "Strafbaarstelling van terroristische misdrijven : van Europees kaderbesluit tot het Belgische Strafwetboek", *T. Strafr.*, 2005, p. 2 and f.

[13] Transposition into national law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation ; sometimes a general legal context may, depending on the content of the directive, be adequate. The Court nevertheless demands that the transposition is carried out in such a way as to guarantee the full application of the directive in a sufficiently clear and precise manner. The provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. In this regard, the Court has ruled that, in order to achieve the clarity and precision needed to meet the requirement of legal certainty, it is not sufficient that the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive (ECJ, case C-144/99, *Commission v. Netherlands*, paras. 20 and 21) (see K. Lenaerts and P. Van Nuffel, *Constitutional Law of the EU*, London, Thomson, Sweet and Maxwell, 2nd ed., 2005, p. 766 and f.).

law dating back to 1891 [14], which incriminates incitement to commit criminal offences in general. However such law only covers *direct* incitement whereas the 2008 FD covers both *direct* and *indirect* incitement. That is why, according to the Belgian federal prosecutor, J. Delmulle, for example, it would not be sufficient to rely on the existing legislation [15].

3. The legislation in detail

A. Definition of offences and penalties

The new Title I*ter* introduced by law of 19 December 2003 into the Belgian Criminal Code concerning terrorist offences includes Articles 137 to 141*ter* of the Criminal Code (hereafter CC).

With these new provisions, only two types of offences defined in the 2002 FD were explicitly implemented, namely terrorist offences (Articles 137 and 138 CC) on the one hand (1) and the offences relating to a terrorist group (Articles 139 and 140 CC) on the other hand (2). Concerning the third type of offences referred to in the FD, *i.e.* offences linked to terrorist activities, they were considered as being already covered by Belgian criminal law. The Belgian legislator also took the opportunity to put domestic law into line with the UN International Convention of 9 December 1999 on the Suppression of the Financing of Terrorism. Although the transposition of the 2002 FD covered most of the 1999 Convention requirements, the contribution to the commission of a terrorist offence committed independently of a terrorist group was added (3). The Belgian legislator also added some clarification regarding the scope of the provisions concerned (4).

1. The terrorist offences (Articles 137 and 138 CC)

Article 137 gives a definition of the terrorist offences which is quite faithful to the requirements of the 2002 EU FD. The three constituent elements are present, namely the material acts, the particular seriousness of the danger created and the moral element or terrorist intent.

Article 137, para. 2 and 3, list the material acts which can constitute a terrorist offence. They are either pre-existing criminal offences (para. 2) [16] or new offences which did not exist previously and which are only punishable as terrorist offences (para. 3) [17]. In line with the 2002 EU FD, the threat to realise one of the offences

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[14] See *Loi du 25 mars 1891 portant répression de la provocation à commettre des crimes ou des délits* [Law of 25 March 1891 on repressing provocation to commit crimes or offences].

[15] See the hearing of 3 February 2009 of J. Delmulle, Federal prosecutor concerning the evaluation of antiterrorist legislation on 3 February 2009, *Doc. parl.*, Chambre, S.O. 52, 2008-2009, 2128.

[16] They cover, for example, homicide, voluntary grievous bodily harm, hostage taking, abduction, massive destruction or damage of constructions (bridges, buildings, dikes, roads, etc), means of transportation (ships, cars, aircrafts, etc.), computer systems – insofar as this destruction or damage puts human lives in jeopardy or leads to significant economic losses –, etc.

[17] They cover, for example, the making and storage of nuclear and chemical weapons, use of such arms or biological arms, research and development of chemical arms, release of

identified is also provided for. According to the explanatory note, however, such a threat must be *serious* [18].

To be qualified as terrorist offences, these acts must result in a serious danger: they must be acts which, because of their nature or context, could seriously harm a country or an international organisation.

Terrorist offences imply a terrorist intent, which is defined in the same terms as in the FD: the offence must have been committed "with the aim of seriously intimidating a population, or unduly compelling a government or an international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or of an international organization".

Article 138 provides for the penalties in full conformity with the EU FD. For the pre-existing offences listed in Article 137, para. 2, Article 138, para. 1, organises a system of aggravation of the penalties. The sanctions are those provided for for the pre-existing offences systematically aggravated. For example, the fine is replaced by a sentence of imprisonment of one year to three years, imprisonment of six months maximum is replaced by a prison sentence of three years maximum, etc. Regarding the new offences of Article 137, para. 3, the penalties are provided for by Article 138, para. 2. They are all of a criminal nature, except for the threat which is sanctioned with a prison sentence of three months to five years if it concerns an offence punishable with a correctional sentence ("*peine correctionnelle*") and by a prison sentence of five to ten years if it concerned an offence punishable with a criminal sentence ("*peine criminelle*").

2. The offences relating to a terrorist group (Articles 139 and 140 CC)

Before examining the act of participation in a terrorist group, the existence of a terrorist group must be scrutinised. That is the reason why Article 139, para. 1, first defines such a group. The definition is expressed identically as in the 2002 FD, namely "a structured association of more than two persons, established over a period of time and acting in concert to commit terrorist offences covered by Article 137". The notion of "structured association" is not defined as such. In this regard, reference is to be made to the definition of Article 2, para. 1, of the 2002 FD. The article nonetheless stipulates that an organisation whose real purpose is solely of political, trade union or philanthropic, philosophical or religious nature, or which solely pursues any other legitimate aim, cannot, as such, be considered a terrorist group.

Article 140 CC makes it a criminal offence to participate in the activity of a terrorist group. Such participation can take two forms: either the situation of anyone who participates in an activity of a terrorist group, including by providing information or material resources to that group or through any form of financing of a terrorist group's activity, in the knowledge that such participation aids the commission of

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dangerous substances which put human lives in jeopardy and the disruption of the supply of fundamental natural resources which put human lives in jeopardy.

[18] *Doc. parl.*, Chambre, S.O. 2003-2004, n° 51-258-1, p. 11.

a *crime* or *délit* of the terrorist group (para. 1) or the direction of a terrorist group (para. 2).

The requirement that the participant has the knowledge that such participation aids the commission of an offence is essential and must be demonstrated by the public prosecutor. Participation without such knowledge is not sanctioned by Article 140. The *travaux préparatoires* are very clear in this respect [19]. This element of knowledge is *a fortiori* required for acts of direction of a terrorist group [20].

The penalties for leading a terrorist group are more severe than those incurred for "mere" participation: whereas the participant will be sanctioned with a prison sentence of five to ten years and a fine from 550 to 27,500 euros, the leader will be sanctioned with a prison sentence from 15 to 20 years and a fine from 5,500 to 1,100,000 euros.

3. Contribution to the commission of a terrorist offence committed independently of a terrorist group (Article 141 CC)

Article 141 was added to put Belgian law in line with the UN International Convention of 9 December 1999 on the Suppression of the Financing of Terrorism. Although the transposition of the 2002 FD covered most of the 1999 Convention requirements, the contribution to the commission of a terrorist offence committed independently of a terrorist group was not as such covered. This was inserted by Article 141, which punishes each person who, outside the cases provided for in Article 140, furnishes the means, including a financial contribution, with a view to committing a terrorist offence of Article 137 by way of a prison sentence from five to ten years and a fine from 550 to 27,500 euros.

*B. Two clauses framing/restricting the scope of application of the offences (Articles 141*bis *and 141*ter *CC)*

Articles 141*bis* and 141*ter* CC give some details about the scope of the legislation concerning terrorist offences.

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[19] *Doc. parl.*, Chambre, S.O., 2003-2004, n° 258/001, p. 13: "(…) the person *must know that his/her participation contributes to the perpetration of crimes and offences by a terrorist group*. An example of this might be people who financially support an organisation to allow it to buy weapons. The existence of the 'terrorist group' depends to a large extent on these anonymous people who finance it or give it a basis through material or intellectual services. It is desirable to incriminate such behavour in a person, who *knowingly* allows the perpetration of a crime or an offence. The form that these contributions take or their occasional or systematic nature is not taken into account".

From the so-called *travaux préparatoires* it also emerges that the *crimes* and *délits* to the commission of which the participation should contribute "are, in first place, terrorist offences but may include other offences. We know that terrorist groups are often guilty of other offences such as money laundering to collect the funds necessary for their activities" (*Doc. parl.*, Chambre, S.O., 2003-2004, n° 258/001, p. 13) (free translation).

[20] From the *travaux préparatoires*, it results that: "it will be more generally about people who take on the main responsibilities within the group. For this category of people, a heavier penalty is justified because of their central role in the 'terrorist group', they are more knowledgeable about the offences than anyone else and because they take the final decisions" (Doc. parl., Chambre, S.O., 2003-2004, n° 258/001, p. 14) (free translation).

Reflecting the eleventh para. of the preamble of the 2002 FD, Article 141*bis* excludes from the scope of Articles 137 to 140, on the one hand, actions by armed forces during periods of armed conflict, as defined and governed by international humanitarian law and, on the other hand, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties.

Article 141*ter* contains a safeguard clause related to fundamental rights and freedoms, in particular freedom of assembly and association. This clause was very much criticised since it is of limited use in legal terms because it is obvious that Belgium is bound by the European Convention on Human Rights, including its Articles 8 to 11. It underlines the sensitivity of the new provisions related to terrorist offences.

C. Some specific procedural rules applicable to terrorist offences

We will limit ourselves to mention three specific procedural rules applicable to terrorist offences.

First, some specific investigation methods (*méthodes particulières de recherche* or *MPR*) and other particular investigation techniques can be used where terrorist offences are concerned [21].

The Belgian law dated 19 December 2003 added the terrorist offences to the list of offences where telephone tapping was allowed, a list which is contained in Article 90*ter*, para. 2, of the Code of Criminal Procedure or *Code d'instruction criminelle* (hereafter *CCP*). The latter provides for a list of offences which, by reference, determine the scope of application of various other measures implying an interference in privacy and authorised by the Code, such as, for example, undercover operations, observation technology enabling law enforcement officers to look at what is happening in houses, hearing witnesses on the basis of anonymity, discreet visual controls or proactive investigations.

Second, the terrorist offences are submitted to specific rules concerning extraterritorial competences, which are inspired by Article 9, para. 1, of the EU 2002 FD. Belgian authorities have jurisdiction in respect of offences covered by the Title I*ter* of the Criminal Code perpetrated outside Belgium when:

- the offence was committed by a Belgian national or any person who has his/her main residence in Belgium (Article 6, 1°*ter* of the Preliminary Title of the CCP);
- the offence was committed against a Belgian national, a Belgian institution or an institution or a body of the European Union having its seat in Belgium (Article 10*ter* 4° of the Preliminary Title of the CCP);
- extraterritorial competence is imposed under a rule of international law binding on Belgium (Article 12*bis* of the Preliminary Title of the CCP).

[21] See M.L. Cesoni, "Terrorisme et involutions démocratiques", *Rev. dr. pén.*, 2002, p. 141 and f.

Third, the Office of the Federal Prosecutor (the so-called parquet fédéral) may exercise prosecution when a good justice administration requires it (Article 144*ter* of the *Code judiciaire*). In practice, such centralisation nearly always happens [22].

4. Brief assessment of the Belgian implementing law

Generally speaking, the Belgian law of 19 December 2003 is in line with the 2002 FD. As emerges from the previous brief description, the imprint of the 2002 FD is indeed very much present. The report from the Commission on the implementation of the FD pointed out a gap existing in the transposition law [23]. This lacuna concerns the incrimination of attempted minor terrorism offences (the so-called *tentatives de délit*). The draft bill implementing the EU 2008 FD should fill this gap.

The Belgian law of 19 December 2003 was severely criticised, especially by part of Belgian doctrine, by defence lawyers and by NGOs working in the field of human rights protection. One of the main criticisms it had to face concerned the vagueness of some constituent elements of the terrorist offences and the resulting breach of the legality principle. In spite of such criticisms, the proposal, which subsequently became the law of 19 December 2003, was adopted without too many difficulties. In its advice on the draft proposal [24], the Council of State (Law section) considered that, although checking the realisation of some of the constituent elements of the terrorist offences could create difficulties, the proposal met the requirements of the legality principle [25]. It concludes on this point by stating that "Whether regarding the appreciation of the intentional element or that of the materialness of the offence, it will be up to jurisdictions to interpret Article 136*bis* in a restrictive way by basing themselves on the objective elements that emerge from the file. For possible scenarios on the borderline, the benefit of the doubt will go to the accused" [26].

During the discussions in parliament, some members noticed the broad margin of manoeuvre left to the judicial authorities [27] and underlined the need to safeguard

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[22] See especially *circulaire commune de la ministre de la Justice et du Collège des procureurs généraux relative à l'approche judiciaire en matière de terrorisme* [joint circular of the Ministry of Justice and the College of general prosecutors relating to the judicial approach to terrorism] (COL 9/2005). Such circular was several times completed by addenda, as COL 18/2006 (concerning special investigation judges – *juges d'instruction*) and COL 2/2007 about the Organe de Coordination pour l'Analyse de la Menace (*OCAM*) [the Coordination Body for Threat Analysis]. On the advantages of such centralisation, see J. Delmulle, *Doc. parl.*, Chambre, S.O. 52, 2008-2009, 2128, p. 18 et s., p. 52.

[23] Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combatting terrorism (6 November 2007, COM (2007) 681 final), p. 8.

[24] For a critical approach of this advice, see. M.L. Cesoni, "Une évaluation des législations antiterroristes: les nouvelles incriminations", *op. cit*., p. 12.

[25] It considered that the draft proposal "is not drafted in such a way that the notions that it contains would deprive those subject to the rule of the requirement of precision, clarity and predictability (Conseil d'Etat, Opinion no. 34.362/4, § 8) (free translation).

[26] *Ibid.* (free translation).

[27] See for example M. Giet (*Doc. parl.*, Chambre, S.O. 2003-2004, n° 51-258-4).

human rights [28]. Their interventions only resulted in the maintenance or development of formal guarantees as the ones provided for in Article 141*ter* CC [29].

The proposal was first adopted within the Chambre des Représentants on 13 November 2003 by 131 votes to three with one abstention. It was then transmitted to the Senate where a few senators said that they were concerned about the broad definition of terrorist offences and/or referred to the concerns expressed by some NGOs [30]. These objections were, however, quickly set aside and the text was adopted by the Senate on 5 December 2003.

After the adoption of the law, three NGOs (Ligue des droits de l'homme, Liga voor Mensenrechten and the Syndicat des avocats pour la démocratie) introduced a request for annulment before the Belgian Constitutional Court. Through a decision dated 13 July 2005, the Court rejected the request [31]. It did not consider necessary to refer a preliminary ruling to the European Court of Justice as requested by the NGOs. On the basis of the case law of the European Convention on Human Rights, the Constitutional Court identified some possible difficulties of interpretation, particularly regarding the terrorist intent or *mens rea* of the terrorist offences. But it considered that the courts will have to strictly interpret the relevant penal provisions [32], to take into consideration the various formal safeguards contained in Title I*ter* CC (Articles 139, para. 2, and 141*ter* CC) [33]. And it concluded that even if it leaves a wide margin of appreciation to the judge, the law does not confer on him an autonomous power of incrimination, which would affect the competences of the legislator.

Despite this ruling, the risks for the legality principle continued to be stressed [34]. The extensive interpretation of the offences related to a terrorist group given by some

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[28] See for example Mr Giet, Muls, Mrs Claes and Taelman (*Ibid*.).

[29] "*En cette matière, il vaut mieux être inutilement explicite que dangereusement silencieux et ambigu*" ["In this area, it is better to be uselessly explicit than dangerously silent and ambiguous"], *Doc. parl.,* Chambre, S.O. 2003-2004, n° 51-258-4, p. 10-11.

[30] See Mr Vankrunkelsven and Mrs Nyssens, Sénat de Belgique, S.O. 2003-2004, 3-332/3, 3 December 2003.

[31] Ruling no. 125/2005 (available on the website http://www.arbitrage.be/): "The principle of criminal legality proceeds (...) from the idea that criminal law must be formulated in terms that allow everyone to know, at the moment when they adopt a particular behaviour, if it is punishable or not. It requires that the legislator indicates, in sufficiently precise, clear terms and offering legal certainty, what facts are punished so that on the one hand the person who adopts a particular behaviour can evaluate beforehand in a satisfactory way what the criminal consequence of this behaviour will be and, on the other hand, that too much power of appreciation is not left to the judge. However, the principle of legality in criminal law does not prevent the law attributing a power of appreciation to the judge. It is necessary to take account of the nature of generality of laws, the diversity and variability of situations as well as the subjects that they apply to and the evolution of behaviours that they punish" (free translation).

[32] See point B.7.2.

[33] See point B.7.3.

[34] See especially the concern expressed by Greenpeace and trade unions at their hearings of 9 June 2009 on their assessment of the legislation on terrorist offences, *Doc. parl.*, Chambre, S.O. 52, 2008-2009, 2128, p. 59 and f.) and the concern of NGOs active in the field of protection of human rights as the Ligue des droits de l'homme and the Comité de vigilance en matière

courts – and especially the ruling of the Court of Appeal of Ghent in the *DHKP-C* case [35] – as well as variations in the interpretations by case law – in this *DHKP-C* case – have partly fed such worries.

Another criticism addressed to Articles 137 and f. CC concerns the preventive nature of the incriminations provided. Such a criticism relates especially to the incrimination of the threat to realise a terrorist offence even if not followed by any effect (Article 137, para. 3, 6°) or to the incrimination of the contribution to an offence which has eventually neither been committed nor even attempted (Article 141) [36]. More generally speaking, a source of concern is the shift of the judicial intervention from a reactive and repressive nature (downstream of the criminal acts) towards a preventive nature (upstream of the criminal acts) [37] or the move or enlargement of criminal law towards prevention and its consequences.

It is a safe bet that the future amendments which should soon be brought to Title I*ter* CC in order to implement the EU 2008 FD will not hush up the aforementioned criticisms or put an end to the practical implementation/interpretation difficulties.

5. Terrorist offences in Belgian case law

Since 2003, more than 40 individuals have been tried before the Belgian courts under terrorism charges [38]. In 2010, 65 new files were opened (54 went through the '*information*' process and 11 through the '*instruction*' process).

To our knowledge, up until now, no prosecution has been launched and no case has been brought to the Belgian courts on the basis of the qualification of terrorist offences (Articles 137 and 138 of CC). But four main cases have given rise to prosecutions and judgments involving offences related to a terrorist group (Articles 139 and 140 CC). They all concern facts committed after the entry into force of the Belgian law dated 19 December 2003. These four cases are the following:

- The case of the *Moroccan Islamic Combattant Group* (GICM − *Groupe islamique combattant marocain*) (A)
- *The DHKP-C* case (Revolutionary People's Liberation Party–Front) (B)
- The case of the Iraki kamikaze network (*affaire dite de la "filière kamikaze irakienne"*) (C) and

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de lutte contre le terrorisme (Comité T) (see the annual reports of this Comité T available on the website : http://www.liguedh.be). See also M.L. Cesoni, "Une évaluation des législations antiterroristes: les nouvelles incriminations", avis pour la Commission de la Justice de la Chambre, octobre 2009 and M. Moucheron, "Chronique de criminologie. Le terme terrorisme et la construction européenne: une histoire obscure", *Rev. dr. pén.*, 2004, p. 889 and f.

[35] A. Weyembergh and V. Santamaria, "Lutte contre le terrorisme et droits fondamentaux dans le cadre du troisième pilier. La décision-cadre du 13 juin 2002 relative à la lutte contre le terrorisme et le principe de la légalité", *op. cit.*

[36] See M.L. Cesoni, "Une évaluation des législations antiterroristes : les nouvelles incriminations", *op. cit*., p. 4, 13, 14 and 17.

[37] See the hearing of D. Vandermeersch, Doc. parl., Chambre, S.O. 52, 2008-2009, 2128, p. 43.

[38] For numbers, see also those provided in the successive TE-SAT reports.

− The case of the Afghan kamikaze network (*affaire dite de la* "*filière kamikaze afghane*") (D).

A. The case of the Moroccan Islamic Combattant Group *(GICM* − Groupe islamique combattant marocain*)*

Following the terrorist attacks in Madrid, waves of searches carried out in March and June 2004 in Brussels and in Maaseik led to the arrest and prosecution of 13 people for having created a support cell for the GICM in Belgium. In this context, they were suspected of having supported the transfer to Europe of members of the group, some of them having received military training in Afghan camps linked to Al Qaeda and others being Islamist extremists sought in Morocco. They were said to have provided false documents as well as logistics support (lodging, vehicles, GSM etc.). These people were, *inter alia*, prosecuted for taking part in the activities of a terrorist group or as a leader of such a group.

On 16 February 2006 [39], the Tribunal correctionnel of Brussels convicted most of the defendants under the abovementioned qualifications. On 15 September 2006, the Court of Appeal of Brussels toughened up the penalties of the four defendants by default. Three of them then opposed this decision, which resulted in a contradictory ruling on 19 January 2007 [40]. The court was seized of criminal procedure issues which will not be detailed here [41]. As to the qualifications linked to the terrorist group, some defendants contested that the GICM could be qualified as a terrorist group as defined by Article 139, para. 1, of the criminal code [42]. On this point, the court expressly rejected the argument put forward by the defence counsel according to which it would be up to the public prosecutor to prove the involvement of the group of defendants in terrorist attacks or to target preparatory acts showing that they would have contributed to the perpetration of *crimes* and *délits* by a terrorist group. The court declared on this point that "it is in no way required that the group structured with a view to committing terrorist offences has already committed them for its members to be punishable, nor even that it is preparing a specific one" [43].

The court also examined if each of the three defendants had taken part in a terrorist group activity in the knowledge that this involvement contributed to the committing of a *crime* or a *délit* by the group and in what capacity. The court noted that this was the case when the three defendants had taken part in an activity of the terrorist group GICM, in particular by being members of the Belgian cell of this group, this cell being an essential logistical support cell for the smooth organisation of the terrorist group.

Finally, the court convicted two defendants in their capacity as leaders of the terrorist group. Basing itself on the *travaux préparatoires*, the court underlined that it does not need to be the only leader, *i.e.* to be the only person at the top of the hierarchy

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[39] Corr. Bruxelles (54th Chamber *bis*), 16 February 2006.

[40] Bruxelles (12th Chamber), 19 January 2007.

[41] On its competence, on the specific investigation methods authorised by the examining magistrate, on the information provided by the Sûreté de l'Etat or the hearings carried out in Morocco and in France (p. 13 to 32).

[42] Judgement, p. 33 to 36.

[43] Judgement, p. 33 (free translation).

of a group but that the person must have a 'key role' by taking on responsibilities fundamental to the smooth running of the group and by taking decisions or initiatives needed to ensure the permanence of its structure [44]. They were sentenced respectively to seven and six years imprisonment.

As for the third defendant, convicted for taking part in activities of the terrorist group GICM, he was sentenced to five years imprisonment.

The three people convicted by the Court of Appeal then introduced a *pourvoi en cassation*, which the Court of Cassation rejected on 27 June 2007 [45]. As the domestic appeals' procedures had been exhausted, an appeal to the European Court of Human Rights was made at the end of 2007 [46].

The analysis of this decision shows very clearly that, in order to convict a person on the basis of offences related to a terrorist group (Article 139-140 CP), it is sufficient to establish the existence of a terrorist group and of an act of participation in one of this group's activities. There is no need to establish commission or a plan to commit a terrorist offence in Belgium or abroad (Article 137).

B. The DHKP-C *case (Revolutionary People's Liberation Party–Front)*

Eleven defendants were taken to court, of which several had been arrested in Knokke in September 1999 in an appartment where weapons, munitions, false papers and documents relating to the armed struggle led by the DHKP-C in Turkey were found. Two defendants were accused of being leaders of a terrorist group, namely Bahar K. and Musa A.

This case resulted in a high number of judicial decisions, namely four decisions on the substance of the case and two rulings by the Cour de cassation.

On 28 February 2006 [47], the tribunal correctionnel of Bruges deemed that the DHKP-C corresponds to the definition of a terrorist group. Musa A. was sentenced to six years, in particular as a leader of a terrorist group and Bahar K. to four years as a '*mere*' participant in the activities of a terrorist group and not as a leader.

Via its ruling of 7 November 2006 [48], the Court of Appeal of Ghent confirmed DHKP-C as a terrorist group [49]. The sentences handed out were more severe for some defendants, including Musa A., who was sentenced to six years imprisonment

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[44] Judgement, p. 62.

[45] Cass. 27 June 2007, P.07.0333.F/1.

[46] In this regard *El Haski v. Belgium* still pending (see also decision by the Court of 29 June 2010, *Hakimi v. Belgium*).

[47] Corr. Bruges (14th Chamber), 28 February 2006.

[48] Ghent (6th Chamber), 7 December 2007.

[49] On this occasion, the Court of Appeal of Ghent expressly underlined that registering the DHKP-C on the European Union's terrorist organisations' list is not sufficient as proof and does not exempt the judge from assessing whether the organisation matches the criteria of terrorist group as defined in Article 139 of the criminal code (judgement, p. 125-126; along the same lines, see also Court of Appeal of Antwerp, 7 February 2008, p. 48). With regard to these lists, see, among others, S. Lavaux et P. Pieters, "Les listes nationales et internationales des organisations terroristes", *Rev. dr. pén.*, 2008, p. 715 and f.

and Bahar K., sentenced to five years imprisonment this time in his capacity as *leader* of a terrorist group.

On 19 April 2007 [50], this decision was quashed by the Court of Cassation, for procedural reasons that have nothing to do with what capacity the defendants were acting in [51].

The case was then referred to the Court of Appeal of Antwerp, which delivered a ruling on 7 February 2008 [52]. The court acquitted Musa A. and Bahar K. of the offence of taking part in the activities of a terrorist group, and by extension, of the offence consisting of leading such a group.

The Antwerp Court of Appeal's decision therefore offered a fundamentally different view of the facts that had been referred to it but also on the interpretation of the offences of taking part in the activities of a terrorist group. The reasoning for the decision is formulated, on this point, in the following terms:

> "It does not emerge from any element of the file that the defendants had formed a terrorist group during the period during which they were facing charges. No element emerges that they had for a single moment the intention to form an association in order to commit terrorist offences as set out in the law. It clearly emerges that they do not condemn this kind of offence and quite the reverse. It is not up to the court to judge the way that the defendants think".

In this respect, the court refers to Article 141*ter* of the criminal code:

> "No provision of this chapter can be interpreted as aiming to reduce or hinder rights or fundamental liberties such as the right to strike, freedom of meeting, of association or of expression, including the right to found trade unions with others and to consort for the defence of their interests and the related right to demonstrate and such as enshrined in particular by Articles 8 to 11 of the European convention for the protection of human rights and fundamental freedoms. No element emerges from the file that during the period covered by the charges, the defendants have gone beyond the exercise of the rights of which the law foresees that they cannot in any case be reduced or hindered" [53].

The ruling was quashed, rightly we think, by the Court of Cassation on appeal by the federal prosecutor. On 24 June 2008, the Court of Cassation in particular considered that taking part in the activities of a terrorist group does not require that the perpetrator has directly taken part in a terrorist offence in Belgium or abroad. The ruling of the court is formulated in the following terms:

> "12. The means, in this branch, invokes violation of Articles 139 and 140 of the criminal code: from the fact that the aforementioned defendants are not implicated in terrorist attacks committed abroad, it cannot be legally deduced that the criminal organisation does not exist.

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[50] Cass., 19 April 2007, P.06.1605.N/1.

[51] The ruling was based on the violation of Articles 6, para. 1 European Convention on Human Rights and 14 para. 1 of the International Covenant on Civil and Political Rights, which do not only require that the legal body is independent and impartial but also that there is no appearance of dependance or partiality.

[52] Antwerp (13th Chamber), 7 February 2008.

[53] Judgement, p. 159 (free translation).

> 13. Article 140, para. 1, of the criminal code punishes any leader of a terrorist group defined in Article 139 of the same code.
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> Article 139, al. 1, of the criminal code, stipulates that by a terrorist group must be understood the structured association of more than two people, established in time, and which acts in a concerted way to commit terrorist offences covered in Article 137.
>
> 14. A leader of a terrorist group can be punished if it is established that it concerns a terrorist group and, subsequently, that the person concerned is the leader of this group. *Incrimination does not require that this person has him/herself had the intention of committing any terrorist offence in Belgium or elsewhere or that he/she was involved when the latter was committed.*
>
> By deciding otherwise, the appeal judges have not legally justified their decision" [54].

Following this second ruling of *cassation*, the case was referred to the Court of Appeal of Brussels, which delivered its decision on 23 December 2009 [55]. This ruling, clearer and, in law, more convincing than that of the Court of Appeal of Antwerp, acquits the defendants from the charges based on the offences linked to a terrorist group. The court of appeal gave as reasoning for its decision that no element emerged from the file that these two defendants would have played a leading role within a terrorist group or that they would have taken part in an activity of a terrorist group in the sense of Article 140 of the criminal code. According to the court, it is neither shown that the activities reproached of the two defendants during the period in question have contributed to the commission of a *crime* or of a *délit* by the terrorist group or that they knew of it. The court pointed out that, *inter alia*, the information disseminated in the DHKP-C information office and its interpretation by the defendants falls under the protection of the right to freedom of expression [56].

The epic legal journey of this case shows the difficulty for the judicial authorities to apply, in practice, the offences of leading a terrorist group or taking part in its activities. Whereas the two first appeal courts (of Bruges and Ghent) gave an extensive interpretation of the offence of participation in a terrorist group's activities and especially an extensive interpretation of the notion of direction of such a group, the last two ones (of Antwerp and Brussels) gave, on the contrary, a strict interpretation of these notions. Such variations fed the abovementioned criticisms and concerns relating to the vagueness of the definition of the terrorist offences.

*C. The case of the Iraki kamikaze network (***affaire dite de la "filière kamikaze irakienne"***)*

This case followed the kamikaze attack by Muriel Degauque in Iraq in November 2005 and the death of her husband, killed by the Americans when he was preparing to commit a suicide attack. Six people faced charges for their involvement in a group transferring Jihad recruits to Iraq. One of them, namely Bilal S., was in particular charged for having taken part in the activities of a terrorist group as a leader. Four

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[54] Cass., 24 June 2008, P.08.0408.N (it is our underlining) (free translation).

[55] Brussels (13th chamber), 23 December 2009.

[56] Judgement, p. 30 to 32.

others were charged for having taken part in the activities of a terrorist group as members. That was the case for Youness L., who had basically gone to Iraq to fight the American 'invader' and had had a leg amputed there. Another defendant, Pascal C. converted to Islam and a friend of the husband of Murielle Degauque, had provided support during his departure and had then proceeded to convert his young companion, aged 19, in order to leave together for Iraq.

This case was the subject of a first decision by the Tribunal correctionnel of Brussels dated 10 January 2008 [57]. The court looked at the application of the aforementioned clause of Article 141*bis* of the criminal code [58]. It rejected the arguments made by the defence of some of the accused invoking this so-called 'exclusion clause' of Article 141*bis* CP. It considered that the behaviour of the defendants concerned came under the law on terrorism and not international humanitarian law [59]. The court convicted Bilal S., in particular as being a leader of a terrorist group [60] to ten years imprisonment, the reason for the severity of this sentence being because of its particularly dangerous nature. Youness L. and Pascal C. were, for their part, convicted *inter alia* as members of a terrorist group [61] to five years of prison but benefited from a suspension for the time exceeding the custodial detention that they had already undergone. Another defendant was sentenced to the same punishment but together with a partial suspended sentence. A fifth defendant was sentenced to a lighter punishment of 28 months.

Both the defence counsel and the public prosecutor launched an appeal of the judgement. Through a ruling of 26 June 2008 [62], the Court of Appeal of Brussels confirmed – via a reasoning different from that pursued by the Tribunal correctionnel of Brussels – the rejection of the application of the exclusion clause of Article 141*bis* but considerably reduced the sentences given against the defendants and acquitted Pascal C. The reasoning of the court with regard to the latter is interesting as regards the interpretation of the notion of participation in a terrorist group. The court established that Pascal C. had direct contacts and phone contacts with the other members of the group and particularly with the person who directs the group, that he shared their views, was arrested in their company, that he provided assistance to a potential kamikaze recruit. But the Court of Appeal considered that such assistance was not of the same nature as the assistance provided for by other members of the group. The acts of participation by Pascal C. could be justified by other motives than the will to take part in a terrorist group and more particularly by his friendship with the abovementioned kamikaze candidate. The court consequently concluded that Pascal C. did not commit an act of participation in a terrorist group's activities with the knowledge that these acts would allow the realisation of offences by the group.

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[57] Tribunal corr. Bruxelles (49th Chamber *bis*), 10 January 2008.

[58] See *infra*.

[59] On the difficulty for Belgian judges to qualify complex and distant situations on the basis of international humanitarian law, see O. VENET, "Infractions terroristes et droit humanitaire: l'article 141*bis* du code pénal", *JT*, 2010, p. 169 and f.

[60] See judgement, p. 128.

[61] Judgement, p. 137.

[62] Court of Appeal Bruxelles (12th Chamber), 26 June 2006.

*D. The case of the Afghan kamikaze network (***affaire dite de la "filière kamikaze afghane"***)*

This case was about ten people facing charges of taking part in the activities of a terrorist group, of which three as leaders. Among the latter facing charges was Malika E.A., accused *inter alia* for her responsibility for the creation and management of a Jihadi website and for her role in recruiting and financing potential fighters wanting to go back to Waziristan to do some military training there and, if necessary, to fight alongside the Taliban on Afghan soil.

Through its ruling of 10 May 2010 [63], the Tribunal correctionnel of Brussels declared eight of the ten defendants guilty, of which Malika E.A., who was sentenced to eight years of imprisonment mainly for taking part as a leader of a terrorist group. This description and this sentence, as with that given against Muhammed E.A.B. for taking part in a terrorist group, have been confirmed by the Court of Appeal, which gave its decision on 1 December 2010 [64]. In general, these two decisions confirmed the principles previously highlighted for the interpretation of the applicable legal provisions, *inter alia* in the case of the Iraqi network. They have, *inter alia*, also ruled out the application of Article 141*bis* of the criminal code. And having concluded in the realisation of the legal conditions of the existence of a terrorist group, the Court of Appeal confirmed that Malika E.A. did take part in the activities of such a group by basing itself in particular on her intervention in the creation and management of a Jihadi propaganda site, on her active participation in the recruitment of Jihadi combatants, on her aid for the financing of potential combatants and on her aid for the translations of texts with a Jihadi connotation posted on the aforementioned website. The court also confirmed her function as a leader by basing itself on her coordinating activities, which shows the importance of her responsibilities and her key role within the terrorist group. As for the participation by Muhammed E.A.B. in the activities of this group, it was also confirmed on the basis of his role as an intermediary in bringing Jihadi recrutis to the area, advice provided to Malika E.A. and his collaboration in bringing necessary funds to the Jihadi group.

6. Perception of the instrument at the national level

The perception of the 2002 FD and of the national implementing provisions depends in particular on the professional profile or background of the persons. Schematically, two groups emerge, whose opinions are difficult to reconcile.

On the one side, defence lawyers [65] and NGOs working in the field of human rights protection and other NGOs are very critical: as seen previously, criticisms relate to the legality principle and to the preventive nature of some of the new incriminations [66].

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[63] Tribunal correctionnel, Bruxelles (49th Chamber), 10 May 2010.

[64] Court of Appeal Bruxelles (11th Chamber), 1 December 2010.

[65] In this regard see for instance the contribution of C. Marchand to this book.

[66] See the hearing of D. Vandermeersch, Doc. parl., Chambre, S.O. 52, 2008-2009, 2128, p. 43.

On the other side, prosecution authorities and others involved in the fight against terrorism are rather positive towards the new offences, especially underlining their necessity, the improvement of investigative techniques and cooperation in the field. This is not to say that they are considering the Belgian law of December 2003 as perfect. They also identify some problems, such as the difficulties raised by the exclusion clause of Article 141*bis*.

The doctrine is divided. Some authors are quite critical [67] whereas others are more positive towards the legislation [68].

7. Conclusion

As seen in the developments noted above, Belgian law was very much marked by the EU 2002 FD. Its imprint is very strong if we compare Article 137 and f. CC with the text of the framework decision. Consequently, it was subjected to similar criticisms. It remains to be seen how – and when – the 2008 EU FD will be implemented. It will surely result in criticisms and concerns. Those will probably be even stronger than in the case of the 2002 EU FD since the new offences added by the 2008 one go even further upstream from the commission of terrorist offences. The need for practitioners to interpret them narrowly will be all the more essential.

[67] See for example M.L. Cesoni.

[68] See for example D. Flore.

Denmark: criminal law as an anchorage point for proactive anti-terrorism legislation

Jørn Vestergaard

1. Introduction: Two packages of anti-terrorist legislation in Denmark

The response to the 9/11 terrorist attacks was to put considerable effort into shoring up security both at international and domestic levels. This included many specific measures enacted by the international community and by individual States. In global, European and national contexts, *inter alia*, the UN 1999 Terrorist Financing Convention [1] and the wide-ranging United Nations Security Council Resolution SCR 1373 [2], which was passed shortly after 9/11, both had a big impact on legislation. With its batteries recharged and renewed determination, the European Union again took up the challenge of preparing various legislative acts. Up until then, negotiations on legislative acts had been moving ahead only very slowly. Political agreement was

[1] The International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999. Denmark was one of the many countries that had not yet ratified the convention in 2001. The convention obliges States to criminalise direct or indirect provision or collection of funds where the intention is for them to be used in order to carry out an act of terrorism. For an act to constitute an offence, it shall not be necessary that the funds were actually used to carry out an act of terrorism. Support for humanitarian aid may, depending on the circumstances, be considered a criminal act if the recipient of the funding is known to be involved in terrorism. The convention also places demands on legislation regarding jurisdiction, judicial cooperation, prosecution, extradition, the freezing and confiscation of assets, criminal liability for legal persons, etc.

[2] UN Security Council Resolution no. 1373 of 28 September 2001 is binding under international law. This initiative substantially expanded the Security Council's powers as an international legislature. The Security Council made a significant contribution to the globalisation of criminal law by committing all Member States to criminalise certain acts, freeze individuals' and others' funds, etc., on the basis of Chapter VII of the UN Charter.

quickly reached on two Framework Decisions, one on combating terrorism [3] and another on a European arrest warrant [4]. In order to comply with the UN Security Council's resolutions on targeted sanctions, the EU also established shared blacklists requiring Member States to freeze the assets of listed individuals and organisations, etc. The intrusiveness of these lists and the flimsy nature of the legal safeguards associated with them raise a number of fundamental questions with regard to due process and fundamental rights [5].

This strong response in terms of measures to combat and prevent international terrorism has had a particularly profound impact on criminal law [6]. In Denmark, the events of 9/11 immediately triggered a series of legislative initiatives. These were clustered into a single anti-terrorism package, which was enacted in 2002. A second anti-terrorism package was adopted in 2006 in the wake of the terrorist bombings in Madrid and London. Together, the two anti-terrorism packages significantly expanded the scope of substantive criminal law.

The amendments to the provisions in the substantive part of the Penal Code have prompted grave concerns as some of the legislative initiatives represent far-reaching new forms of criminalisation with a rather indeterminate scope. The boundaries of criminal law have been pushed so that they encompass various modalities of participation in activities that might represent a hypothetical risk of facilitating actual terrorist acts but that might actually be only very remotely linked to such activities. The *actus reus* as well as the *mens rea* requirements for incurring criminal liability are stipulated in quite vague terms, not only in the statutory provisions, but also in the preparatory work for the underlying legislation. In general, the two anti-terrorist packages consist of rushed measures based on preparatory work that is of insufficient legislative quality. The enacted criminal law provisions consist partly of verbatim transcripts of formulations found in EU law and other international sources that are not suitable as paradigms for drafting statutes under a domestic legal order.

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[3] The Council's Framework Decision 2002/475 of 13 June 2002 on combating terrorism. Following political agreement on the FD, on 27 December 2001, the Council adopted two common positions that expressed agreement on the need for criminalisation, freezing of assets, police and judicial co-operation, see the common positions 2001/930 and 2001/931 CFSP.

[4] Council Framework Decision 2002/584 of 13 June 2002 on the European Arrest Warrant.

[5] A vast amount of literature and jurisprudence has emerged with regard to the regimes concerning listing and freezing. For a recent account, see J. Vestergaard, "Terror Financing – Asset Freezing, Human Rights and the European Legal Order", *New Journal of European Criminal Law*, 2011/2, p. 175-200. Among the particularly lucid contributions to the literature, those by Cameron and Eckes, respectively, deserve special attention. Regarding Danish law on the freezing regime, see section at the end of this article.

[6] For a thorough examination of the international legislation and its impact on national law, see Erling J. Husabø and I. Bruce, *Fighting Terrorism through Multilevel Criminal Legislation. Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law*, Leiden/Boston, Martinus Nijhoff Publishers, 2009.

2. Terrorism provisions as a point of reference for other legislation

The provisions regarding acts of terrorism and offences related to terrorism enshrined in the Penal Code (PC) do not just prescribe a ban on certain acts, making them punishable offences that a perpetrator may be convicted of in a criminal court. They also constitute an anchorage point to which all other legislation on combating and preventing terrorism is attached, *i.e.* a common point of reference. Thus, the rules laid down in the Penal Code provide the basic foundations for many other components of subsequent anti-terrorism legislation, *i.e.* for regulations that determine the nature and scope of special powers held by various government bodies regarding cases involving "crimes against the State" [7].

A whole series of statutes found elsewhere in legislation are linked to these provisions. Therefore, the provisions defining terrorist offences are integrated into other legislation as they constitute parts of the material criteria demarcating the limits for other offences and as they, further, set the boundaries for the exercise of various powers vested in the courts, law enforcement and intelligence agencies, and other government authorities. Consequently, the substantive criminal provisions considerably influence decision-making regarding, for example, instigating coercive and particularly intrusive measures in criminal investigations and proceedings, disclosing or exchanging sensitive personal information and other kinds of data, refusing to grant citizenship, expelling foreigners from the country, placing aliens in detention or restricting their freedom, etc. The concerns about potentially undermining legal rights due to the adoption of vague and wide-reaching provisions under substantive criminal law relate in particular to the contagious effect of the legislative initiatives on decision-making in intelligence, investigative and administrative law contexts, where there is considerable risk of due process and fundamental rights being put in jeopardy. The provisions are conducive, for example, to an exaggerated propensity to authorise disproportionate control measures – including, in particular, targeting political activists and people with a non-Danish ethnic background – who belong to groups that communicate via unclear and/or coded messages or use militant rhetoric.

3. The core provision on terrorist acts – Section 114 PC [8]

A. Legislation

The 2002 anti-terrorism package inserted a new and innovative Section 114 into Chapter 13 of the Penal Code [9]. The provision did not in itself broaden the already existing scope of criminalisation. Evidently, terrorist acts could earlier have been punished under previously established provisions concerning various forms of serious crime, irrespective of a perpetrator's terrorist motive. Politically, however, there was a desire "to convey more clearly that terrorism in all its forms is unacceptable in a

[7] Such "crimes against the State" are determined by the provisions in Chapters 12 and 13 of the Penal Code. The anti-terror provisions in Sections 114-114 h PC are placed in Chapter 13.

[8] See Annex at the end of this contribution.

[9] A provision with the same numbering previously contained a so-called 'corps ban' against supporting or participating in certain militant groups; the provisions have now been moved to Sections 114 f and 114 g, which will be analysed later.

democratic society", as the Government's explanatory memorandum to the bill put it. Under the new Section 114, the maximum penalty for all kinds of terrorist acts now became life imprisonment, a noticeably more severe punishment than that authorised for at least some of the particular offences included under the new statute, as the acts listed in Section 114 can be of a quite varying nature and, accordingly, attributed a different degree of culpability.

The amended Section 114 contains a definition of "terrorism". The statutory definition lists a number of offences committed with the intent to seriously "intimidate a population", to compel a government or an international organisation or to destabilise or destroy the social order in certain specified ways (see a partial citation of the actual statute below).

In the explanatory memorandum that forms the preparatory work for Section 114, it was stated that the statute covers both acts that have a further political purpose and actions whose goal is solely to generate general unrest and economic chaos. The statute is particularly open and far-reaching, among other things because the Penal Code, in line with the Framework Decision on combating terrorism, has adopted the term "destabilise or destroy (...) fundamental political, constitutional, economic or social *structures*". The concept of "structures" is not used in a similar manner anywhere else in Danish legislation. The legislative material upon which the legislative act is based contains no particular indication of how the concept should be interpreted in a criminal law context. It covers the highest of government authorities as well as municipal and decentralised official bodies. From a legal perspective, this lack of clarity is quite worrying, especially in light of the fact that the latitude for sentencing extends – without any differentiation – all the way to life imprisonment as the maximum penalty.

In line with the Framework Decision on combating terrorism, liability for violation of Section 114 PC also requires that the act committed may "seriously damage" a country or an international organisation. The exact meaning of this observation is not particularly clear although it is worth noting that some sort of legally relevant distinction was meant to be established. According to the travaux préparatoires however, the intention was not, for example, to limit the scope of the application of this provision to any specific type of harm, *e.g.* damaging basic infrastructure. In principle, therefore, Section 114 covers any form of serious harm.

The *mens rea* element required under Section 114 may be any form or degree of intent. In principle, therefore, even *dolus eventualis* (*Eventualvorsatz, bedingter Vorsatz*) could imply criminal liability. The same applies to the subsequent provisions on various offences related to terrorism. In other words, depending on the circumstances, it may be sufficient that a person has realised the risk of a certain occurrence qualifying as an *actus reus* element under Section 114.

The intent at the heart of the terrorism statute must be related to causing one or more of the specifically listed consequences of committing an offence of the sort particularly enumerated in the provision. Such "terrorist intent" may entail:

– seriously *intimidating* a population, or
– unduly *compelling* a government, in Denmark or abroad, or an international organisation, to perform or abstain from performing any act, or

– seriously *destabilising* or *destroying "*the fundamental political, constitutional, economic or social structures of a country or an international organisation".

In other words, the technical completion of the offence stipulated under Section 114 has been moved forward in the sense that it depends on the perpetrator's preparatory acts and the relevant intent, not on the commission of a fully-fledged act of terrorism. Thus, a defendant may be deemed criminally liable without any of the consequences listed actually occurring. The offence has been completed when one of the crimes listed in the provision has been committed, provided that the perpetrator acted with the necessary intent to bring about one of the stated consequences. A terrorist act can also consist of threatening to commit one of the offences specifically listed under Section 114.

It is well known that major difficulties arise in terms of reaching a consensus on the definition of terrorism both when drafting international agreements and in domestic legislative contexts [10]. Two themes in particular give rise to different views. One is the possible recognition of a right of resistance for freedom fighters combating an oppressive regime or an occupying power and the other related to what is understood as being State terrorism. During the 6-7 December 2001 discussions about the Commission's proposal for a Framework Decision on combating terrorism, Council statement 109/02 was issued in order to express political agreement that, for the Member States of the European Union, the proposed Framework Decision would cover acts "committed by individuals whose objectives constitute a threat to their democratic societies respecting the rule of law and the civilisation upon which these societies are founded". Further, it was stated that the Framework Decision "cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring these democratic values… could now be considered as 'terrorist' acts" [11].

According to the Council statement mentioned above, the Framework Decision can also not be used for incriminating, on terrorist grounds, "persons exercising their fundamental rights to display their opinions, even if in the course of the exercise of such rights they commit offences" [12]. In principle, this implies that demonstrators and activists cannot normally be charged under sections related to terrorism. The legal boundaries are, however, still fluid.

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[10] Under the auspices of the United Nations, a draft comprehensive convention has been under discussion for several years.

[11] Even though acts committed in the interest of preserving or restoring democratic values are, in principle, not considered to be terrorist in nature, the type and proportionality of the act may be of crucial relevance for the legal assessment. The killing of civilians can, under certain circumstances, be deemed to be an act of terror, even if the purpose was to rebel against a dictatorship or expel an occupying power. See below about the case against individuals associated with the company "Fighters+Lovers".

[12] The aim of the Council's statement is reflected more broadly in the Framework Decision's preamble recital 10, which declares respect for fundamental rights, such as those expressed in the ECHR and national constitutional traditions, *e.g.* regarding freedom of assembly, association and expression.

The Council statement regarding the interpretation of the Framework Decision is quoted in the memorandum issued by the Danish Parliament's Judiciary Committee accompanying the bill concerning the 2002 anti-terrorism package. The Committee noted that the Council statement should be taken into consideration in the interpretation of the new statute to rule out criminal liability in atypical cases not reasonably meant to be covered [13]. The Penal Code provisions on terrorist activities and related offences must therefore be implemented in the light of these statements. When conducting an overall assessment of whether such a specific incident qualifies as terrorism, it may be relevant to include information on the perceptions of authoritative players in the international community, *e.g.* the UN General Assembly or the UN Security Council.

The phrasing chosen in Section 114 is essentially the same as that of the Framework Decision. This reflects an unfortunate legislative technique. It is one thing that an intergovernmental legal act such as a Framework Decision uses relatively broad and vague terms. Depending on the circumstances, this may be reasonable and necessary, as international legislation may cover declarations of principle of a more or less general nature, which – although binding on the contracting States – may be phrased with a relatively high level of abstraction that requires meticulous transposition into the domestic law of the individual Member States. Wording of this sort is not necessarily suitable when it comes to defining offences under national criminal law, where a higher degree of precision should ideally be sought in accordance with a *lex certa* principle. The legislative technique used in the present context can hardly be said to meet the usual requirements for either readability or clarity and precision. Indeed, other Member States have opted to implement the framework decision in completely different ways to Denmark.

It is a matter of particular concern that the new provision under Section 114 operates with a general maximum penalty of life imprisonment. In doing so, the legislature has, in quite a broad area covering very different types of offences, granted vast discretionary sentencing power to the judiciary. This sends a confusing signal to the courts and the public, since all the offences listed are placed on an equal footing in terms of sentencing latitude. The lack of differentiation between various degrees of culpability for specific offences is in itself problematic. Furthermore, increasing the maximum penalty indiscriminately to life imprisonment for all the underlying offences implies that there is *no statute of limitations* for any of the offences listed. This may very well be appropriate for some of the specific offences covered by the new provision, but in certain types of cases it would appear unreasonable that less serious offences do not have a statute of limitations.

B. Case law

When Section 114 was enacted in 2002, it did not appear very likely that the new statute would often – if ever – be adopted in criminal judgements. Rather, it was expected that the provision would be used as a legal basis for court decisions

[13] A majority of the Judiciary Committee's members expressed the view that "the concept of terrorism is defined in relation to the legitimate State, which is based on universal values: human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms".

regarding preliminary procedural actions, *e.g.* wiretapping, bugging, data-sniffing, room searching, etc. However, in a proportionally large number of actual cases, defendants have been indicted and convicted under Section 114. The reasons behind such a substantial number of terrorist cases will not be scrutinised further in this article. It is sufficient here to point to the possible impact on Islamic radicalisation from the fact that Denmark is a close ally of the USA, that the Danish government has been a very active and vocal participant in the military operations in Iraq and Afghanistan, that the political climate in Denmark is utterly tainted by xenophobic and anti-Muslim sentiment and that the publication of the cartoons of the Prophet Muhammad in the newspaper *Jyllands-Posten* has been noticed all over the world and has caused anger and uproar in Muslim communities.

1. Glostrup case [14]

T was found guilty of attempted terrorism under Section 114(1)(1) PC (homicide), see Section 21 PC (attempt). T and two co-defendants were charged with planning a trip to Bosnia in order to procure weapons and explosives for use in a terrorist act at an unspecified location either in Denmark or abroad. The co-defendants were an 18-year-old Swedish citizen, M1, and a 19-year-old Turkish national living in Denmark, M2. M1 and M2 subsequently acquired at least approximately 19.8 kg of explosives, a suicide belt, a detonator and a pistol with a silencer and ammunition. The attempted offences were prevented by the arrest of M1 and M2 by the local police in Bosnia. When apprehended, M1 had a suicide video in his possession. Both were subsequently convicted by Bosnian courts of planning a terrorist act and sentenced to prison for eight and six years respectively.

Initially, T was supposed to travel with the other two to Bosnia, but he was prevented from doing so when his father learned of their plans and confiscated his passport. Observing that, on the one hand, T had been found guilty of attempting the most serious form of terrorism, and that, on the other hand, he had merely just turned 16 at the time of the offence, the Supreme Court sentenced him to seven years imprisonment.

Three other defendants were found guilty by the jury but the verdicts were overruled by the High Court judges. The Director of Prosecution (*Rigsadvokaten*) subsequently dropped the charges against two of the three and pursued a new indictment against the third. At the retrial, this defendant was acquitted by the jury despite the presiding judge favouring a guilty verdict in his summing-up prior to the jury's deliberations.

The case gave rise to discussion about the court's accommodation of the prosecutor's wish to present character witnesses in order to shed light on the defendants' religious beliefs and possible radicalisation, including one of the defendants' former teachers.

The prosecutor subsequently contended that T, who is also a Jordanian national, should be deprived of the Danish citizenship he obtained at birth. The authorisation for such a measure had recently been established by an amendment to the Act on Citizenship. On this count, however, the municipal court decided in favour of the

[14] U 2008.127 H. U = *Ugeskrift for Retsvæsen*, a weekly journal recording court cases of common interest. H = *Højesteret*, *i.e.* the Supreme Court.

defendant. T was born in Denmark to parents who were Danish citizens. He grew up in Denmark. He speaks and writes fluent Danish. Conversely, T has only had very limited links with Jordan, where he would risk prosecution and conviction for the same crime for which he was convicted in Denmark or risk suffering harm specifically because he had a conviction for terrorism.

2. Vollsmose case [15]

Three defendants were convicted by a jury of attempted terrorism under Section 114(1)(1) and (1)(7) [homicide and bomb detonation], see Section 21 [attempt] for jointly, including by conspiring, acquiring fertiliser chemicals and laboratory equipment, and by producing home-made explosives, having made preparations for the manufacture of one or more bombs for use in a terrorist act at an unspecified location in either Denmark or abroad, a plan that failed because the group members were arrested prior to completion of any terrorist act. The Supreme Court stated that the ordinary sentence for attempted terrorism by bomb detonation and homicide is 12 years imprisonment [16]. Thus, such sentences were imposed on two of the defendants. The third defendant's involvement had been of a subordinate nature and, at one point, he had even tried to withdraw from the scheme. For these reasons, he was merely sentenced to five years imprisonment. A fourth defendant was entirely acquitted by the jury. The case raised questions about the Danish Security and Intelligence Service's (Politiets Efterretningstjeneste, PET) use of informants and undercover agents, the partial lack of disclosure of case documents on file to the defence, the introduction of character witnesses and the court's exclusion of defence witnesses.

3. Glasvej case [17]

Two defendants aged 22 were found guilty of attempted terrorism by acquiring bomb manuals and chemicals and by producing and detonating the unstable explosive TATP, which they had tested on the staircase in the building where they lived and in other places. The main perpetrator was sentenced to 12 years' imprisonment, the co-defendant to eight years plus permanent expulsion from Denmark. The court based the sentencing decisions on the fact that there had been contacts with al-Qaeda and that the main perpetrator had attended training camps in Waziristan. A total of eight people had been arrested, of which only two were later indicted and convicted.

4. Axe attack on "Mohammad" cartoonist [18]

A 28-year-old Somalian man was convicted, *inter alia*, of attempted terrorism by endeavouring to assassinate the newspaper cartoonist Kurt Westergaard. The defendant was sentenced to ten years imprisonment and to permanent expulsion from Denmark. The perpetrator broke into the cartoonist's house on the evening of

[15] U 2008.1587 H.

[16] Twelve years imprisonment is also the ordinary punishment for completed homicide. The normal penalty for attempted homicide is six years' imprisonment.

[17] TfK 2009.762 Ø. TfK = *Tidsskrift for Kriminalret*, a monthly journal recording criminal law cases of common interest. Ø = *Østre Landsret*, *i.e.* the Eastern High Court.

[18] U 2011 27.78 V. V = *Vestre Landsret*, *i.e.* the Western High Court.

1 January 2010 by smashing a window with an axe and was also in possession of a sharp-edged knife. His intention to kill the cartoonist was thwarted because the latter had taken refuge in his bathroom, which the police had previously secured as an emergency saferoom and because the police arrived minutes after Westergaard had pushed the emergency button.

For some months prior to the offence, the defendant had made multiple internet searches for information about militant Islamic groups and their attitudes and reactions to the cartoons and to Westergaard. Explaining his reasons for seeking out the cartoonist as his target, the defendant testified that he actually did not consider the Mohammad cartoons offensive *per se* but he felt provoked by Westergaard's repeated endorsement of the justifications for publishing them without any empathy for Muslims insulted by the drawings. Consequently, the court found sufficient reason to assume that the defendant's motive for attacking the cartoonist derived from the fact that Westergaard had drawn one of the newspaper cartoons and had participated actively in the debate about them.

The court's guilty verdict was justified as follows. The Muhammad cartoons and the debate about them has given rise to violent reactions all over the world, including attacks on Danish government institutions and has presented challenges to the basic principles of a democratic society, *e.g.* the freedom of expression within the framework of the law and the embedded right to participate in public debate. These reactions have still not ceased. As one of the cartoonists, Westergaard has attracted enormous public attention and has appeared as the very personification of both the cartoons and the justification for publishing them. This has led to Westergaard being given special police protection, which is commonly known.

Further, the court referred to the statement in the preparatory works of Section 114 PC "that the concept of terrorism is defined in relation to the legitimate State, which is built upon universal values: human dignity, liberty, equality and solidarity, respect for human rights and fundamental freedoms. The legitimate State is founded on the principles of democracy and the rule of law. Terrorism poses a threat to democracy, the free exercise of human rights and economic and social development". The court also mentioned that the statute shall be interpreted in the light of the above mentioned Council statement upon which the EU Member States had expressed political agreement.

For these reasons, the court found that the attempted killing of Westergaard in his own home for having drawn a caricature of the Prophet Muhammad and subsequently defending his right to have it published must be considered a violation of Section 114.

In the High Court, three jurors voted to acquit the defendant of the count regarding attempted terrorism while the judges and the other three jurors voted to uphold the ruling of the municipal court. A request for admission of the case for a third instance review before the Supreme Court has been filed by the defence.

5. Lors Doukaev case [19]

A 25-year-old Chechen residing in Belgium was convicted, *inter alia*, of attempted terrorism by being in possession of a bomb containing TATP, which he intended to send to the offices of the newspaper *Jyllands-Posten* in Jutland. The newspaper is the one in which the Muhammad cartoons were initially published. The perpetrator entered Denmark under a false name, registered at the Hotel Jørgensen in downtown Copenhagen using a second fake identity and ordered a bus ticket to Liège under yet another false name. He brought with him to Denmark a bomb device and a gun, ostensibly for personal security, although he did not wish to provide further details regarding his alleged need for protection. He had worn varying disguises when visiting various shops. The bomb exploded in his hands in a bathroom at the hotel where he was lodging and, after a dramatic chase, he was arrested in a nearby public park.

The defendant explained that, a few days before the explosion, he had defused the bomb because he no longer needed it, but while doing so had dropped some ball bearings into the TATP. When the bomb exploded, he was removing the metal balls from the explosive so that he would be able to bring the TATP with him home again safely. The explosion allegedly took place because he accidentally bumped the plastic box containing the explosives against the toilet bowl. However, technical analyses revealed that the metal balls had not been loose but had been fixed to a layer of cardboard and placed against the inside of the top cover of the box, and that there had been cardboard between the metal balls and the TATP.

Items found in the bathroom, where the toilet bowl had been blown to pieces, included fragmented metal balls in the ceiling and the floor, balls coated in glue residue, a nine-volt battery with its poles ripped out, the remains of cardboard and glue residue, ripped out pieces of bare wire formed into loops, fishing line coated with glue residue, a plastic box imprinted with a pattern of ball bearing balls and fragments of sample envelopes. Also found in the defendant's bag in the bathroom was a map of the city on which the address of *Jyllands-Posten* appeared in his handwriting. A hard disk belonging to the defendant contained files about the manufacturing of explosives etc. as well as videos containing militant Islamist propaganda.

As a result of an explosion when he was a child in Chechnya, the defendant wore a prosthetic leg. He had removed serial numbers from it, as well as from the gun, which might otherwise have identified him.

The court found that, at the time of the explosion, the defendant had packed the bomb into the two sample envelopes with the intent of sending them to the main office of the newspaper *Jyllands-Posten*. The defendant's own explanations were rejected as unreliable. It was concluded that the bomb was supposed to go off when the letter was opened by staff at the newspaper.

6. Activist arsonists' case [20]

Five individuals belonging to a group of militant activists have been charged with attempted terrorism. The charges include arson attacks and attempted attacks on

[19] Copenhagen Municipal Court judgement, 30 May 2011, unreported.

[20] Copenhagen police charge, August 2011. No indictment has yet been triggered.

the Police Educational Centre, the Police Intelligence and Security headquarters, the Parliament building, the Greek embassy and several buildings belonging to private companies, *e.g.* in the fur trade.

4. Support for terrorism, etc.

A. Legislation

Inspiration for the drafting of Penal Code provisions concerning miscellaneous types of conduct more or less closely related to actual terrorist acts was primarily derived from the templates used in the design of various UN legal instruments, and partly inspired by the Framework Decision.

It is a punishable preparatory offence under Danish law to fund or in some other way aid or abet a specific criminal enterprise, *e.g.* a concrete act of terrorism. The defendant will in that case become liable either as a co-perpetrator or as an accomplice to the act in question, possibly with reference to the general and extremely broad provision on criminal participation in Section 23 PC. Such liability requires that the defendant has acted with some degree of concretised intent that the main offence be completed, *e.g.* with regard to location, time and method. The new anti-terror legislation has made it a criminal offence to support a terrorist or a terrorist organisation as such or to facilitate such a person's or entity's activities, even though the general, and rather wide-reaching, rules regarding co-perpetration by aiding do not apply [21].

In the absence of a sufficiently tangible intent to contribute to the commitment of a specific act of terrorism or terror-like act, providing economic or financial support to a terrorist, a terrorist group, or a terrorist organisation, may constitute a violation of the exceedingly vague and wide-ranging provision on financing, etc., in PC Section 114 b (originally 114 a) [22]. After amendments included in the 2006 anti-terror package, the criminal offences covered by 114 b are now set as follows:

> "*Section 114 b.* Imprisonment of up to ten years shall be imposed on anyone who
>
> 1) directly or indirectly *provides financial support* for,
>
> 2) directly or indirectly *procures or collects funds* for, or
>
> 3) directly or indirectly *makes money, other assets or financial or other similar services available* to a person, group or association that commits or intends to commit acts covered by Section 114 or Section 114 a" [23].

The provision's para. 1) covers the individual provider of contributions; para. 2) the middlemen; and para. 3) business people who interact with terrorists or terrorist organisations, etc. The phrase "directly or indirectly" implies that it is not of crucial significance whether the contact with a terrorist or terrorist group is direct or via – maybe even multiple – middlemen.

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[21] See Sections 114 b and 114 e PC.

[22] The maximum penalty under Section 114 b is imprisonment for up to ten years. The Framework Decision "only" requires a maximum of at least eight years, see Article 5(3).

[23] Regarding Section 114 a, see below about terrorist-like acts introduced in 2006 under the second anti-terror package.

This provision also targets the funding of organisations whose activities include both humanitarian and terrorist activities. The idea is that it is in principle immaterial whether the actual support "allegedly has a humanitarian purpose" if the recipient "is known to commit terrorist acts" [24], as stated in the preparatory work ahead of the government's bill. The justification offered in the explanatory memorandum is that the Terrorist Financing Convention requires the criminalisation of the procurement or collection of funds that "in whole or in part" are intended to be used to carry out terrorist acts [25]. The stated justification is of questionable tenability, since the convention does not explicitly require the criminalisation of acts that have an entirely humanitarian purpose. If, in a specific case, it can be ensured in a satisfactory manner that no part of the funds are used for the purchase of weapons or explosives or for any other form of funding of terrorist acts, but exclusively for supplying food, medicine, teaching materials or for the construction of emergency shelters, then a possible course of action might be to interpret Section 114 b restrictively. It would, of course, be a completely different matter if a contributor merely claimed humanitarian motives but was unable to document adequate precautions to ensure that funds were not used for, or do not support, acts of terror. The judiciary has not subscribed to such an interpretation of the statute [26].

B. Case law

1. Fighters+Lovers case [27]

Six activists had been involved, via the company Fighters+Lovers, in selling T-shirts worth approximately DKK 25,000 in order to transfer a portion of the profit to the organisations FARC (Fuerzas Armadas Revolucionarias de Colombia) and the PFLP (Popular Front for the Liberation of Palestine). Allegedly, the money was earmarked for purchasing radio equipment for the FARC and a printing press for the PFLP. The activists were indicted for attempting to procure funding for terrorist organisations [28]. All defendants were acquitted by the municipal court which did not, on the merits of the case, find sufficient grounds to consider the FARC and the PFLP as terrorist organisations. On appeal, the High Court found them guilty. Two were sentenced to six months imprisonment, two to four months and two to 60 days. The sentences for the last four individuals mentioned were suspended. One defendant was acquitted.

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[24] The Terrorist Financing Convention contains a general definition of terrorism but otherwise refers in an appendix to the nine other conventions relating to various forms of terrorism, etc.

[25] See Article 2(1). Security Council Resolution 1373 also requires criminalisation of financing, but does not explicitly require a ban on funding meant exclusively for humanitarian projects.

[26] In this, the Danish judiciary is in line with the much criticised judgement of the US Supreme Court in *Holder v. Humanitarian Law Project*, 561 US (2010). The court observed, *inter alia*, that money raised for charitable purposes could be redirected to funding the group's violent activities or unencumber other funds for use in facilitating such activities.

[27] U 2009.1453 H.

[28] See Section 114 b(2) PC, see Section 21 (attempt).

The High Court held that the FARC has been responsible for launching indiscriminate mortal attacks in which civilians were victims and that the FARC has killed civilians, subjected civilians to serious violence and carried out kidnappings, including of politicians and a presidential candidate, in order to undermine the political process in Columbia.

As far as the PFLP is concerned, the court found that the organisation had, in a number of incidents, attacked and killed civilians, *e.g.* by using car bombs and suicide bombers, and that the PFLP's militant wing, the Abu Ali Mustafa Brigades, had carried out attacks, including suicide attacks, in which civilians had been killed and wounded.

The defendants' assertion was that, according to the preparatory memorandum, Section 114 PC must be interpreted restrictively in the light of the Council statement linked to EU's Framework Decision on combating terrorism, which should imply that the two organisations' militant actions would not be covered by the provision. However, this assertion was not accepted by the court. The defendants' references to the Colombian government's violations of human rights and Israeli violations of Palestinian human rights did not justify the assaults on civilians by the FARC and the PFLP.

The court found that the defendants had been aware, or at least had considered it predominantly probable, that the FARC and the PFLP had committed terrorist acts covered by Section 114 of the Danish Penal Code or had intended so to do. The majority finding of the court stressed the defendants' own explanations about the FARC and PFLP's activities and that the website of Fighters+Lovers stated that anti-terror legislation meant that the firm's customers could find themselves in legal trouble if they purchased T-shirts in support of the FARC and the PFLP. The fact that the funds were allegedly raised for humanitarian purposes was therefore insignificant to the High Court's ruling on the question of guilt or innocence. However, one of the judges stated that the FARC must be considered a rebel movement and the PFLP a resistance movement and that such organisations therefore cannot be assigned the required terrorism intent. Thus, this member of the court voted to acquit all of the defendants entirely.

One of the defendants had been indicted solely because he had placed a poster on his hot-dog cart displaying the T-shirts and a web address. The court found his participation to be insufficient for a conviction.

The court stressed that the actions had been planned, well organised and premeditated. The sentences imposed differed due to the contribution by each of the defendants to the criminal undertaking.

The Supreme Court upheld the High Court ruling but suspended all the sentences due to an acknowledgement of the fact that the scope of Section 114 b PC had been questionable previous to the trial.

2. 'Rebellion' case [29]

An association labelled Rebellion (Foreningen Oprør) published documents in Danish, English and Spanish on its website, calling for European democracy and solidarity movements to participate in continuing resistance to European anti-terror legislation, the EU terror lists, and the international "war on terror". The documents also stated that the association had transferred substantial amounts to the PFLP and the FARC. The documents contained proposals for a campaign that included fundraising in various countries, the publication of information about the initiative and a conference attended by representatives of all of the participating organisations in Copenhagen. The aim was to publicise a joint transfer of the funds collected for the liberation movements and the issuing of a common statement. Since there were sufficient grounds to assume that the documents were published as part of an attempt to procure financial support for terrorist groups, they were seized, a ruling upheld by the Supreme Court. Later, a spokesperson for the association was convicted and sentenced to six months suspended imprisonment under Section 114 b (1)(2) PC.

3. Horserød-Stutthof Foreningen & Den Faglige Klub [30]

The 72-year-old chairman of an association of former concentration camp prisoners was convicted and sentenced to six months' imprisonment. Due to the defendant's age, the court suspended four months. Subsequently to the Fighters+Lovers judgement, his association had collected DKK 17,700 for the PFLP. Consequently, he was convicted of a similar offence as the defendants in the Fighters+Lovers case, and at this time mitigating circumstances regarding legal uncertainty were no longer accepted. Likewise, a chairman for a labour union movement was convicted and sentenced to six months' suspended imprisonment for collecting DKK 10,000 intended for the FARC.

Inclusion on either the UN or EU terror list will normally constitute sufficient grounds for seizure under the regulations contained in the Administration of Justice Act. On the other hand, the mere fact of a person or organisation being included on either list does not necessarily in itself imply sufficient proof in criminal proceedings that the party involved is a terrorist/terrorist group. In principle, this depends on the court's assessment of the evidence presented, as was demonstrated in the municipal court's judgement on the Fighters+Lovers indictment. In practice, however, inclusion on a terrorist list will serve as a compelling presumption that financial or other support for the person or organisation concerned is covered by Section 114 b PC. Obviously, intelligence and law enforcement agencies will have sufficient reason to initiate investigations in case of activities connected with individuals or groups on a terror list.

[29] U 2007.1831 HK and Copenhagen Municipal Court judgement, 16 March 2010, unreported.

[30] Copenhagen Municipal Court judgement, 16 June 2011, unreported.

4. Al-Aqsa case [31]

In 2005, charges were brought – for the first time – under Section 114 b PC (originally Section 114 a) against the chairperson and treasurer of the al-Aqsa Association in Denmark. The investigation was initiated in 2002, when information was received that members of the association had collected and transferred funds to organisations and individuals in the Middle East with links to Hamas, which is on the EU terror list. The prosecution service failed to provide sufficient evidence that the involved organisations were part of Hamas or that the transferred funds were forwarded to Hamas. The High Court therefore upheld a municipal court acquittal by a vote of 3-3.

The *mens rea* requirement under Section 114 b is intent and even the lowest degree of intent is sufficient. It is sufficient that the perpetrator acted in the light of an assumption that the recipient or client would have some kind of connection to terrorism. In other words, there is no requirement that the individual has concretisised a criminal intent with regard to location, time and method of perpetration. Depending on the circumstances, loans or advice may constitute punishable offences if the provider possessed the requisite perception of the customer or client's links to terrorist activity. It is therefore a punishable offence for banks, other financial institutions and individuals to make money or other financial services available to such individuals or entities or to disseminate information about such services, irrespective of whether it is done in the knowledge that the funds or services will be used to facilitate or carry out specific acts of terrorism.

Section 110 c PC contains rules about the violation of prohibitions that are part of international or EU sanctions adopted in order to implement foreign and security policy decisions, including with a view to countering terrorism. Violations of sanctions against third countries, individuals, groups or legal persons can be punished with equal severity, irrespective of whether the sanctions are set by the UN Security Council or the EU, and regardless of whether they are implemented under the auspices of the UN or the EU. In instances related to terrorism, the statute is ancillary to Section 114 b.

5. Promoting terrorism

A. Legislation

An "extended complicity rule" has been added to the Penal Code, which prohibits any form of assistance etc. to an individual, a group or an association that commits or has the intention to commit terrorism or an act related to terrorism [32]. This statute even covers activity which cannot be attributed to specific acts of terrorism

> "*Section 114 e*. Imprisonment of up to six years shall be imposed on anyone who otherwise advances the activities of an individual, a group or an association, committing or intending to commit actions included in Sections 114, 114 a, 114 b, 114 c, or 114 d".

[31] Eastern High Court appellate judgement, 6 February 2008, unreported.

[32] See Section 114 e (originally Section 114 b as introduced in 2002 and amended in 2006 to become Section 114 e).

According to the preparatory work done for the anti-terrorism legislative packages, the aim of this provision is, *inter alia*, to target anyone who provides professional and general advice that is not directly related to a specific terrorist act, *e.g.* in the form of a lawyer or accountant offering assistance to an organisation that the provider knows commits terrorist acts. This may imply the attribution of criminal liability to "a person who, in relation to a specific act of terror may only be complicit at third or fourth hand", as it is noted in the government's explanatory memorandum to its bill. It is acknowledged in the memorandum that an extension of the criminal law concept of complicity to "broadly include any form of support for organisations without necessarily being able to attribute the funding to specific acts of terror can raise fundamental concerns". Still, it is further stated that "we are dealing here with extremely serious crimes of a generally dangerous nature". However, the statute does not actually in itself criminalise "extremely serious crimes of a generally dangerous nature" but covers offences characterised by a noteworthy distance to such acts.

In the preparatory work, it is also stated, in broad terms and with regard to the application of Section 114 e, that a person "who wilfully promotes criminal activity or enterprise in a group of people with familiarity of the group's overall terrorist aim, and thus provides a form of contribution to the commission of a terrorist act, as defined in the bill, would be punishable under the extraordinary complicity rule, even if the person concerned has no intent to contribute to a specific terrorist act". These remarks leave several loose ends.

With regard to the part of Section 114 e that relates to complicity to an offence under the above mentioned Section 114 b (1)(2), a highly unusual innovation under Danish criminal law has been introduced, *i.e.* a statutory liability for "complicity to complicity", meaning even complicity in remote participation of a kind that in itself would not normally qualify as complicity. However, at the core of the statute there is naturally a portion of reason and courts have not applied the provision excessively.

B. Case law

1. Said Mansour case [33]

The very first person to be indicted under the new anti-terror provisions was a Danish citizen of Moroccan origin. This radical Islamist was found guilty under Sections 114 b PC (now Section 114 e and 136(1) (public incitement to crime) and Section 266 b (hate speech) [34].The defendant had produced and distributed materials that explicitly called for militant jihad, including by depicting known terrorists and celebrating suicide bombings and the killing of innocent hostages. The materials unmistakably constituted incitement to commit acts of terror against the alleged enemies of Islam. The court stated that the defendant's activities should be characterised as professional and general advice to terrorist groups related to al-Qaeda and groups inspired by al-Qaeda, that the materials could be used to recruit members to such groups and that such individuals would be bolstered in their intent to commit terrorist acts. The defendant was sentenced to three years and six months of imprisonment.

[33] Copenhagen City Court judgement, 11 March 2007, unreported.

[34] Partially see Section 21 (attempt).

The prosecutor contended that the convicted defendant, who is also a Moroccan national, should be deprived of his Danish citizenship. The authorisation for such a measure had recently been established by amendment to the Act on Citizenship. On this count, the court decided in favour of the defendant, referring *inter alia* to the length of the sentence imposed, the duration of his stay in Denmark, the lengthy period since his last trip to Morocco and the risk of exposing him to ill treatment upon his return to Morocco.

In the aforementioned case concerning two members of the al-Aqsa association in Denmark and the association *per se*, the charges were in principle brought under Section 114 b, or subordinately under 114 e. As previously mentioned, the case referred to the collection and transfer of funds to certain organisations in the Middle East.

2. TRO Denmark case [35]

In the television news programme *Sunday Magazine* broadcast by *Danmarks Radio (DR)*, the organisation Tamils Rehabilitation Organisation (TRO Denmark) was accused of having sent money collected for tsunami victims to the Tamil Tigers, an organisation that appears on the EU terror list. DR presented documents from the Canadian intelligence service that describes TRO in Canada as a front for the Tamil Tigers. Based on the TV programme, the Public Prosecutor for Economic Crime ("the Fraud Squad") launched investigations into TRO's activities with regard to possible violations of Section 114 b PC (now Section 114 e). Accounts belonging to the organisation were seized. In the course of the investigations, TRO Denmark was added to the USA's terror list, but the court was not sufficiently furnished with in-depth information as to why the organisation had been included on that list. However, the court found that the conditions for seizure ('freezing') with a view to confiscation had been met by reference to inclusion on the US list. The Danish Board of Appeal Permission has granted permission to challenge the seizure in the Supreme Court.

3. ROJ TV A/S & Mesopotamia Broadcast A/S METV [36]

Two companies have been convicted of facilitating terrorism by repeat broadcasting of propaganda in favour of the Kurdish organisation PKK/Kongra Gel, which has been blacklisted by the EU. The broadcasts include interviews with PKK leaders and sympathisers, coverage of battles between Kurds and Turkish authorities, and reports from PKK training camps. The Copenhagen Municipal Court supported the prosecutor's claims that the broadcasting system has acted as a mouthpiece for the PKK, *e.g.* by advocating association with the PKK and participation in terrorism actions conducted by PKK and by glorification of the PKK and terrorism actions committed by the organisation. The indictment was addressed to the two corporations as legal persons. Each company were sentenced to 40 day fines of DKK 64,000 (equivalent of € 8,500). The prosecutor's demand that the corporations be legally

[35] Eastern High Court ruling, 8 April 2008, unreported.

[36] Copenhagen Municipal Court judgement of 10 January 2012. In addition to indicting the two companies, the prosecutor seized their bank accounts in order to secure trial costs and payment of possible fines. However, the court held that a freezing measure would infringe the defendants' right of expression under ECHR Article 10, see U 2011.918 Ø.

disqualified from broadcasting TV programmes was overruled. In accordance with the travaux préparatoires concerning the rules on criminal responsibility for legal persons, the court found no authorisation for depriving companies from the right to exercise certain rights, as such authorisation is only granted with regard to individuals. Thus, the judgement represents a kind of paradox, as the broadcasting system has been convicted of facilitating terrorism, but hasn't been banned from continuing its activities. Previously, an independent administrative board has considered the question of revoking the corporation's broadcasting licence three times without finding sufficient reason to do so. As neither the defendants nor the prosecutor are fully satisfied by the judgement, an appellate process is to be expected.

6. The "corps ban"

A. Legislation

Provisions prohibiting affiliation with or support for militant groups were introduced in 1934 by special legislation and in 1952 transferred to the Penal Code in the form of the then current Section 114. The amendments established by the relevant anti-terror packages split this traditional 'corps ban' into two separate statutes, now Sections 114 f and 114 g. According to the first of these provisions, criminal liability may be invoked for participating in or supporting a militant group's activities even if the activity is less serious than actual terrorist activity. Thus, both statutes are ancillary to the preceding terrorism-related provisions.

> "*Section 114 f*. Imprisonment of up to six years shall be imposed on anyone who, by any act other than those included under Sections 114-114 e, participates in or provides substantial financial support or other considerable support to any corps, group or association, which intends, by use of force, to exert influence on public affairs or cause public order disturbances".
>
> "*Section 114 g*. Fine or imprisonment of up to two years shall be imposed on anyone who participates in an illegal military organisation or group".

B. Case law

No judgement has ever included a count relating to the corps ban. The prevalence of criminal investigations conducted with a reference to this provision is not publicly known. The ban is vague and wide-ranging but it does, however, only cover support of a major significance. In light of this, it seems odd that the aforementioned provision in Section 114 b, with a ten-year punishment framework and a highly indefinite scope, does not include a more significant requirement.

7. Terrorism-like offences

The 2006 anti-terrorism package further extended the scope of criminalisation, including via the insertion of a new Section 114 a into the Penal Code. The amendment act also entailed restructuring procedures and redeploying competences for law enforcement agencies, etc. The scope of application for various agencies' executive powers was considerably extended by the new amendments to the Penal Code. Thus, the second anti-terrorism package not only expanded the scope of substantive criminal law but also made it even easier to initiate investigations, surveillance, etc.

In an effort to justify the criminal law part of the 2006 anti-terrorism bill, reference was made to a wish to accede to the 2005 convention established by the European Council on the Prevention of Terrorism. Basically, the European Convention obligates States to criminalise incitement/recruiting/training in terrorism (see below). However, at the time when the convention was being prepared, agreement could not be reached on a general definition of terrorism. The convention text therefore only contains an empty framework provision for so-called *terrorist offences*. This concept is then completed by reference to a number of older conventions listed in an appendix to the new convention. These conventions deal with terrorist acts as well as other more or less violent offences without necessarily identifying a particular purpose, motive or intent with respect to intimidating a population, threatening a government, etc., such as is required to prove terrorist intent under the EU Framework Decision and Section 114 of the Danish Penal Code. The conventions cover security for diplomats, airlines, maritime vessels, nuclear power plants and platforms on the continental shelf. They also cover hostage-taking, terrorist bombings and the funding of terrorism. Admittedly, the conventions listed in the appendix to the European Convention were adopted with an overall aim of combating terrorism in various guises, but they also include a diverse range of other types of acts, irrespective of whether these entail a terrorist motive or not. The conventions reflect the fact that the UN has not been able to establish a consensus on a uniform definition of terrorism, which is why the "salami-slicer method" has been employed instead. When, occasionally, the opportunity arose after the occurrence of yet another type of serious attack on common goods recognised as such by the international society, an additional convention was introduced, focusing on specific types of actions, of which some, but not all, have a terrorist aim.

The new Section 114 a is a rambling, verbose and unreadable statute that lists the above-mentioned global conventions. It authorises enhanced sentences for offences that are covered by the conventions but which do not constitute terrorist acts in the stricter sense of Section 114.

> "*Section 114 a*. If one of the acts mentioned under Section 1-6 below is committed without the act being covered by Section 114, the punishment may exceed the statutory maximum penalty for the offence by up to half (...)" [37].

The opening of the statute quoted above is then followed by a long-winded and complicated catalogue, in six separate paragraphs, of the offences that trigger the prescribed enhancement of the ordinarily authorised sentencing maximum. Each paragraph consists of a long list of selected provisions from the substantive part of the Penal Code, accompanied by a requirement that the particular offence is also covered by one of the specified treaty provisions. For considerations of space, only the simplest paragraph, which is found in 114 a(3), will be cited here:

> "3) Violation of Section 261(1) or (2) when the act is covered by Article (1) of the International Convention against the Taking of Hostages dated 17 December 1979".

[37] The second part of the first paragraph under Section 114 a provides that the punishment under certain conditions can be increased to imprisonment for up to six years, although the ordinary maximum sentence for the offence concerned is less than four years' imprisonment.

Each of the five other paragraphs lists a dozen separate statutes from the Penal Code. No other provision in the code has been phrased in a style even remotely resembling this chaotic and illegible manner.

Section 114 a does not require that the perpetrator acted with specific terrorist intent, as that described in Section 114.

In itself, Section 114 a solely concerns harsher sentencing. However, since all the other statutes regarding the prevention of terrorism refer directly to Section 114 a, this provision actually creates several new criminal offences. It therefore also has a legal and practical impact in relation to which offences trigger the authority and powers of various government agencies. As such, the statute constitutes a link to other provisions, including the provision on support and funding (now Section 114 b), the special and very wide-ranging complicity rule (now Section 114 e), the new sections on recruitment and training for terrorism or terrorist-like acts (Section 114 c and Section 114 d, respectively), as well as the provision about public incitement or approval of the offences covered by Part 12 or Part 13 of the Penal Code (Section 136(2)).

In 2008, the Framework Decision on the Combat of Terrorism was amended to include provisions equivalent to those of the European Convention. No additional legislative initiative was needed under Danish law.

8. Recruitment and training for terrorism, etc.

A. Active recruitment or training for terrorism, etc.

A State that accedes to the 2005 European Convention on the prevention of terrorism must criminalise recruitment and training for terrorism. The 2006 anti-terror package contained two long-winded sections about this [38]. Both of these provisions relate not only to actions covered by the actual provision on terrorist acts in Section 114 but also to the additional provision on terrorist-like activities under the new Section 114 a [39]. Both Section 114 c and Section 114 d include activities that might lead someone to either *commit* or *facilitate* an as yet unspecified terrorist act or terrorist-like activity.

The provisions are subordinate to the aforementioned anti-terrorism statutes. The first sentence of the first subsections of each of the two provisions reads as follows:

> "*Section 114 c(1)*. Imprisonment of up to ten years shall be imposed on anyone who recruits another person to commit or facilitate acts covered by Sections 114 or 114 a or to join a group or association in order to facilitate that the group or association commits acts of this nature".

> "*Section 114 d(1)*. Imprisonment of up to ten years shall be imposed on anyone who trains, instructs or in any other way teaches another person to commit or facilitate acts covered by Sections 114 and 114 a, knowing that this person has an intention to use the skills to pursue such an aim".

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[38] See the amended statutes under Sections 114 c and 114 d PC.

[39] Both Section 114 c and Section 114 d authorise enhanced sentencing maxima: "Under particularly aggravating circumstances, the maximum sentence may be increased to imprisonment for up to 16 years. Particularly aggravating circumstances are considered to involve offences of a systematic or organised nature".

The *mens rea* requirement under both of the cited provisions is intent. However, it is uncertain what the requirement is with respect to the *concretisation* of such intent with regard to type of terrorism offence, location, time and method of perpetration in relation to the activities towards which the recruitment/training is aimed. Supposedly, the idea cannot be that a person who recruits/trains somebody will become criminally liable in instances where someone has been influenced to do something entirely non-specific within the rather broad scope of offences covered either by a definition of actual terrorist acts or any of the adjacent terrorism offences. If that were the case, it would be an offence to incite a person to – at one time or another, in some context, in some way and somewhere – commit, or in some way or other be complicit in the commitment of, one or other of the many possible forms of terrorism offences which in themselves can be very distant from actual terrorist acts. It makes little sense to assume that a person can incur liability without at least having envisaged one or more types of crime that could, in the line of actions, actually be committed.

Ostensibly, the offences criminalised under Section 114 d(1) might include training in skills that it, under certain circumstances, could be perfectly legal to acquire and practise, but which can also be used in connection with a terrorist or terrorist-like action. However, the *mens rea* requirement includes two requirements. Liability for a "teacher" requires that the "pupil" *intends* to use the acquired skills for the stipulated purpose, and that the former has *knowledge* of this, *i.e.* acts with direct intent.

B. Active recruitment or training for terrorism, etc.

The second subsections of Sections 114 c and 114 d ban recruitment and training to *commit* or *facilitate* acts covered by Section 114 b, which, as mentioned above, prohibits various forms of financial support for terrorists or terrorist organisations [40]. The wording is as follows:

> "*Section 114 c(2)*. Imprisonment of up to six years shall be imposed on anyone who recruits another person to commit or facilitate acts covered by Section 114 b or to join a group or association in order to facilitate the group or association to commit acts of this nature".
>
> "*Section 114 d(2)*. Imprisonment of up to six years shall be imposed on anyone who trains, instructs or in any other way teaches another person to commit or facilitate acts covered by Section 114 b, knowing that this person has an intention to use the skills to pursue such an aim".

Here too, the *mens rea* requirement is intent. The above ambiguity, concerning the requirements for *specification* of the involved parties' intent in relation to the offence(s) for which the recruitment/training is designed, is no less valid in this context.

As in relation to Section 114 d(1), criminal liability under 114 d(2) requires that the "pupil" *intends* to use the acquired skills for the specified purpose, and that the "teacher" has *knowledge* of this, *i.e.* acts with direct intent.

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[40] In Section 114 b there is, as mentioned, a reference to the terrorist acts and terror-like acts covered by Sections 114 and 114 a.

C. Passive recruitment or training for terrorism, etc.

The new provisions in the second anti-terrorism package also made it a criminal offence to "let yourself" be recruited or trained "to commit or facilitate" terrorist acts or terror-like acts [41]. The European Convention does not in any way oblige the signatory States to establish such criminalisation. In the preparatory comments by the Danish government to the bill, this spectacular legislative innovation was merely explained by a bland remark that, as a counterpart to the criminalisation of active recruitment and training for terrorism, it would allegedly be "natural" to also criminalise letting yourself be recruited or trained "to commit terrorist acts" and that this would be in line with the general trend to advance the boundaries for the use of criminal law to protect society against terrorism. The preparatory work does not explain what the new provisions require in order to impose criminal liability on individuals who cannot be held liable under the ordinary rules on criminal attempt in instances where the intent of the person concerned is not sufficiently specific. It is not easy to imagine how sensible boundaries of these extremely vague and far-reaching provisions can be construed in a manner that makes a rational handling of evidence possible. It is no coincidence that other European countries have refrained from introducing any such provisions.

9. Incitement to terrorism, etc., and expressions of sympathy

A. Public incitement to crime

The 2005 European Convention obliges signatories to criminalise *public provocation to commit a terrorist offence*. Under Danish law, this did not necessitate any criminalisation of new offences, as the Penal Code already contains a general provision on public incitement to "crime" [42].

Until the abovementioned 2007 judgement in the case against the Danish-Moroccan Said Mansour, this provision had not been used since 1938.

The preparatory work concerning Section 136 might be taken to support an exceedingly broad scope of application. The previously mentioned question of the requirements regarding the necessary specification of the culprit's intent is also relevant with respect to this provision [43].

B. Public approval of a crime against the State, etc.

Indirectly, the two anti-terrorism packages criminalised expressions of sympathy in relation to terrorism activity to a wider extent than was previously the case. An old provision regarding public approval of a crime against the State is contained in Section 136(2) PC. Technically, this statute is completed by a general reference to all offences under Chapters 12 and Part 13 of the Penal Code. As the statutes on terrorism offences are placed in Chapter 13, the anti-terrorism packages have endowed Section 136(2) with a broader range of application.

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[41] See Sections 114 c(3) and 114 d(3) PC, respectively.

[42] See Section 136(1) PC.

[43] The maximum punishment under Section 136(2) is imprisonment for up to two years.

10. Other issues

A. Territorial reach, etc.

1. Legislation

It is not only attacks on Danish national interests that are covered by Sections 114-114 e PC. The overall subject of protection can be "a country or an international organisation" and the territorial reach of the anti-terrorism provisions is not subject to limitations. The provisions also include acts that do not require force to be deployed in order to exert influence on Danish affairs or to undermine the Danish social order but that are directed against the fundamental interests of other countries or international organisations [44]. Thus, these provisions also serve to protect public affairs and social orders elsewhere, including from acts committed exclusively abroad. This is a consequence of a desire to better address terrorism's global reach, as required under UN Security Council Resolution 1373.

The abovementioned corps ban is, however, only directed against participation in or support for a group that aims at the use of force to exert influence on Danish public affairs or to destabilise the social order in Denmark. Support for a group whose militant activities are directed against other countries' interests can only be punished if the offence is covered by any of the preceding provisions in Sections 114-114 e.

It would, quite clearly, be excessive if the anti-terrorism provisions, with all their built-in weaknesses in terms of ambiguity and vagueness, were applied in such a wide-ranging manner that any State – including dictatorships and the most repressive regimes – were in principle protected by them. The previously mentioned Council statement and the Judiciary Committee's remarks in its preparatory report relating to the first anti-terrorism package help mitigate the risk of such an exaggerated application. However, also in this context, it is difficult to predict what will happen in practice. And, as demonstrated by the judgements in the abovementioned cases regarding support for the FARC and the PFLP, even oppressive regimes are protected in instances where the resistance victimises civilians.

2) Case law: Weapons for Bengal resistance movement [45]

In 2010, the Ministry of Justice decided to extradite a Danish citizen to India, where the individual concerned was accused of criminal offences committed in 1995. He acknowledged having participated in dropping weapons meant for a Bengal resistance movement from an aircraft. In 2002, Indian authorities had submitted a request for extradition subsequent to a change in Danish law that had made it possible to extradite Danish citizens for prosecution also to States outside the Nordic countries.

The ministry linked the conduct of the accused to the statute on terrorist acts, which in 2002 had been inserted into the Penal Code, i.e. Section 114 PC. Previously, equivalent rules had not existed. The ministry also cited Section 114 f PC with the aim of offering a subordinate response to the requirement regarding double criminality.

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[44] As far as Sections 114 b-e PC are concerned, this is made explicit by a reference to Sections 114 and 114 a.

[45] U 2011.2904 Ø.

The Hillerød Municipal Court overruled the administrative decision on extradition on the grounds that diplomatic assurances offered by the Indian government could not be taken at face value. This ruling was sustained by the High Court.

B. Corporate liability

As a kind of secondary effect, the 2002 anti-terrorism package considerably expanded the area in which penalties may be imposed on legal persons ("corporate liability"). Prior to this, such liability could only be incurred for a breach of the Penal Code if the offence was committed with a view to the legal person concerned making some form of profit. This condition was abolished by an amendment of the provision in Section 306 of the Penal Code. Hereafter, a legal person can now become criminally liable for any violation of a Penal Code statute if the general requirements regarding such corporate liability are met [46].

> "*Section 306*. Criminal liability can be attributed to companies, etc. (legal persons) under the rules contained in Chapter 5 for violation of this Act".

In this connection, too, the stated reason for the amendment was a reference to the requirements contained in the UN Convention on the Prevention of Terrorism Financing (1999). However, the scope of the Penal Code's provision on corporate liability is completely general in scope, as it does not merely include terrorism-related activities but any violation of a Penal Code statute.

C. Danish jurisdiction

The legislation based on the two anti-terror packages did not involve any amendments of the general rules on Danish criminal jurisdiction. However, the accession to a number of international conventions, most recently regarding terror bombing, funding of terrorism and nuclear terrorism, has been accompanied by particular legislation implying the establishment of universal jurisdiction, *i.e.* access to prosecute terrorists and their accessories regardless of where the offence was committed and regardless of the victim and the perpetrator's nationality. This is a consequence of the general scheme established in Danish criminal law according to which there is Danish jurisdiction if "the act is covered by an international provision under which Denmark is obliged to exercise jurisdiction" [47]. Furthermore, there is Danish jurisdiction in cases where Denmark refuses to extradite a suspect for

[46] Chapter 5 of the Penal Code contains the general condition required for imposing criminal responsibility on a legal person (see Sections 25-27 PC). The authorised sanction is a fine. The fact that Section 306 was amended under the first anti-terrorism package has given rise to the widespread misconception that the statute is an "'anti-terrorism provision". This was persistently claimed when the organisation Greenpeace was convicted "under anti-terrorism rules" when it was fined for breach of the peace under Section 264 PC after activists hung banners opposing genetically modified crops out of the windows of the Danish Agriculture and Food Council's offices.

[47] See Section 8(5) PC.

prosecution abroad if the offence under Danish law may incur a penalty of more than one year of imprisonment [48].

D. Freezing and confiscation of assets

The 2002 anti-terrorism package authorised the confiscation of money and other assets not linked to an offence that had already been committed if there is a risk that the funds may be used in connection with a criminal offence (see Section 77 a(2) PC). Previously, only material objects which, "due to their nature", gave rise to such a risk, could be confiscated. The amendment was justified partly by reference to requirements in the Terrorist Financing Convention according to which States must take appropriate steps to identify, detect and freeze or confiscate not just the proceeds of terrorist acts but also funds earmarked for use in connection with acts of terror. Reference was also made to UN Security Council Resolution 1373, which imposes on States stringent commitments to freeze assets linked to terrorism. However, the new provision's application is not limited to offences related to terrorism. The provision will not normally be invoked for amounts of less than €15,000.

Likewise, the provisions for seizure ("freezing") were extended with a view to providing a basis for subsequent confiscation; see the Administration of Justice Act Sections 802 (suspects) and 803 (non-suspects).

In a separate code on preventative measures against money laundering and terrorism, banks and other professionals have an obligation to report suspicious transactions related to money laundering to the police and to await further communication from them before any transaction may be completed. By temporarily making resources unavailable to a customer or client, a preliminary freezing of funds occurs. The circle of those required to provide notification as well as their commitments have been expanded due to anti-terrorism requirements and efforts to prevent money laundering [49]. This also came to include unusual transactions related to funding terrorism (*e.g.* the 'blackwashing' of lawful money).

E. The prosecutorial authority of the Minister of Justice

Traditionally, Chapter 13 of the Penal Code covers "crimes against the constitution and the supreme Government authorities, etc.", *i.e.* attacks on the State's internal security. The new provisions introduced by the two anti-terrorism packages form part of Chapter 13. The 2006 anti-terror legislation added 'terrorism' to the title of the chapter. As a matter of principle, offences referred to in Chapter 13 of the Penal Code are prosecuted only on the orders of the Minister of Justice [50]. This system relies on the fact that, in some instances, such offences are tainted by political components and are rather vaguely described and of uncertain scope. Actually, this system does not imply that the minister personally assesses whether an indictment should be made. In

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[48] See Section 8(6) PC.

[49] The new confiscation rules also entailed the implementation of changes to the EU's moneylaundering directive 2005/60/EC of 26 October 2005, see EP/Rdir 2001/97. The amendment widened the scope for the obligation to report suspicions about lawyers, accountants, etc.

[50] See Section 118 a PC.

practice, a recommendation to this effect is prepared and submitted by the Director of Prosecution (*Rigsadvokaten*), and the minister will normally follow the prosecutor's advice. All things being equal, however, the fluid state of the law in this area implies a significant risk of politicisation, arbitrariness and abuse of power in relation to intelligence gathering, investigation and the way in which the prosecution service exercises discretion.

F. Evidence problems

The cases that have led to criminal charges and subsequent prosecutions for violation of the terrorism provisions have been characterised by the severe difficulties involved in providing adequate evidence. However, none of the cases have concerned terrorist acts that have actually been completed. The charges have either focused on the preparation of terrorist acts or on the support for or facilitation of terrorism activities. Some cases relating to attempted terrorist acts have mainly been based on information derived from the surveillance of groups of people over considerable periods of time. If such intelligence or police information points to a significant risk of an imminent terrorist act, it will trigger immediate pre-emptive intervention. At this point, there is not necessarily sufficiently evidence to form a solid basis for an indictment, let alone a conviction. However, the risk of a terrorist act being committed may be considered serious enough that it would be irresponsible not to indict the suspect, even if an approach via continued surveillance could provide more clarity about how far the suspicions are justified.

The prosecutor's material has generally been quite complex and difficult to decipher as much of the information is characterised by a certain degree of ambiguity. The individuals monitored communicate – via telephone calls, internet chat, sms, etc. – in a particular jargon, which can either be construed as a form of subcultural dialect or as a code, possibly in languages other than Danish. This makes it difficult to determine exactly what the aim of the more or less suspicious behaviour and arrangements is, and whether specific terrorist intent can be proven. This has, for example, given rise to evidence being presented on whether the accused's attitude to society is characterised by ideological or religious "radicalisation". In cases of funding terrorism, it has been relevant to obtain information about conditions in faraway countries and this has posed particular difficulties in relation to obtaining reliable information from independent sources. So far, the acquittal rate has therefore been relatively high. In several cases, there has been considerable uncertainty as to the validity of both convictions and acquittals. This has attracted particular attention in cases where jurors and judges have reached different conclusions concerning the question of guilt or innocence.

11. Conclusion

This contribution has focused on the compatibility of recent anti-terrorism legislation in Danish criminal law with the basic principles of the rule of law and of due process. The packages of anti-terrorism legislation introduced in 2002 and 2006 include a range of rather uncertain and wide-reaching provisions that fundamentally challenge the principle of legality.

The basic provision in Section 114 of the Penal Code covers terrorist acts *per se*. This provision is construed as implementing the basic requirements of the 2002 Framework Decision on Combating Terrorism. The Framework Decision's terminology is applied directly, *e.g.* in the sense that the definition of a terrorist act has been transcribed literally into domestic law. Such a legislative technique causes substantial problems with regard to interpretation of the law by the national judiciary.

A vast number of supplementary statutes are characterised by a substantial widening of the scope of criminal law. These provisions are inchoate in the sense that they criminalise various activities that are more or less remote from actual or attempted terrorist acts as well as participation in such activities. They not only cover funding and other means of supporting terrorism but any conceivable kind of facilitation, incitement, training or recruitment. This method of criminal law has rightly been labelled "proactive". To a significant extent, the legislature has even over-implemented various legal instruments that are binding on Denmark by virtue of European Union law or other international obligations.

The anti-terror statutes have been drafted in a somewhat loose manner without sufficiently thorough legislative preparation.

The provisions in the Penal Code constitute a common point of reference for all of the other anti-terrorism legislation. The challenges regarding rule of law and due process therefore also relate to secondary legislation in fields such as law enforcement, criminal procedure, intelligence gathering, public law, the treatment of foreigners, etc.

In certain respects, the judiciary has acted as a deliberate backstop in order to avoid any interference with the rule of law.

Annex – Section 114(1) Penal Code [51]

A person who commits one or more of the acts listed below with an intent to seriously *intimidating* a population, or unduly *compelling* a Danish or foreign government authority or an international organisation to perform or abstain from performing any act, or to *destabilising* or *destroying* fundamental political, constitutional, economic or social structures of a country or an international organisation, is guilty of terrorism and shall be sentenced to a prison term of up to life imprisonment, when the act due to its nature or the context, in which it is committed, might cause a country or an international organisation grave harm:

1) Homicide according to Section 237 PC.
2) Aggravated assault according to Section 245 PC or Section 246 PC.
3) Deprivation of liberty according to Section 261 PC
4) Traffic sabotage according to Section 184(1) PC; unlawful disturbances in the operation of public means of communication, etc., according to Section 193(1) PC; or aggravated vandalism according to Section 291(2) PC; depending on the commitment of such offences in a manner which might cause danger to human lives or substantial financial losses.
5) Hijacking of public means of transportation according to Section 183 a PC.
6) Aggravated weapons law violations according to Section 192 a PC or the Weapons and Explosives Act Section 10(2).
7) Arson according to Section 180 PC; explosion, spreading of damage-inducing gasses, flooding, shipwreck, railway or other traffic-accident according to Section 183(1)-(2) PC; health-endangering contamination of the water supply according to Section 186(1) PC; health-endangering contamination of products intended for general distribution, etc., according to section 187(1) PC.
8) Possession or application, etc., of radioactive substances according to Section 192 b PC.
   (2) A person who, with the in para. (1) mentioned intent, transports weaponry or explosives shall be sentenced accordingly.
   (3) A person who, with the in para. (1) mentioned intent, threatens to commit one of the acts mentioned in paras. (1) and (2) shall also be punished accordingly.

[51] Translation by the author.

Anti-terrorism related criminal law reforms and human rights in Hungary

Katalin LIGETI

1. Introduction

Hungary has not, as yet, suffered from any terrorist attacks. It is neither considered as a target for international terrorism nor has it experienced domestic terrorist cases. Hungary probably had its longest exposure to international terrorism during the period of the Cold War. Before 1989, Hungary and other socialist countries actively supported plans that were being laid for terrorist acts against the West. The Hungarian security services were in contact with various terrorist groups in the 1970s and 1980s, mostly by providing them with logistical and training support to prepare the terrorist acts. It is also known that "[b]etween 1979 and 1985, the group led by the infamous Carlos visited Hungary on a number of occasions: they maintained an apartment, where they stored and probably received weapons, and it was in Budapest that they met the representatives of ETA, the IRA and the Italian Red Brigades. Officials of the Hungarian Ministry of Interior booked rooms for them in the Thermal Hotel on Margit Island, where Ulrike Meinhof, founder of the German Rote Armee Fraktion (RAF), also spent some time. Presumably it was also in Budapest that they plotted the 21 February 1981 attack against the Munich headquarters of Radio Free Europe, where eight persons were wounded" [1].

The role of the Hungarian secret service was scrutinised after the country's political transition away from communism in 1989 and the Hungarian Minister of Interior, Mr. Balázs Horvàth, revealed this information to the Hungarian parliament and to the public on 26 June 1990 [2]. The Prosecutor General has initiated an investigation

[1] F. KÖSZEGHY, "From the Cold War to the war on terrorism: Did September 11 have an impact on Hungarian law enforcement?", *Fundamentum*, 2005, 1, p. 94.

[2] See reference in F. KÖSZEGHY, "From the Cold War to the war on terrorism".

against the high-ranking officials in the Hungarian secret service who were allegedly responsible for organising contact with and support for the said terrorist groups. A criminal investigation was also launched against Carlos. The prosecution service, however, declared the investigation to be closed after one year as all the suspects made reference to professional privilege, which was not suspended by their superiors. The argument was that witness statements on the said classified information would raise the terrorist threat against Hungary.

One may certainly question the factual basis for this argument. It remains the case, however, that, since 1991, there has been no evidence of international terrorist groups being present in Hungary [3]. However, some people believe that Hungary could be being used as a transit country. So far, no evidence has been produced in support of this idea.

In sharp contrast to the low level of terrorism threat and to the fact that there were, practically speaking, no cases in the field of terrorism, the Hungarian legislator was very active in adopting anti-terrorism related criminal laws. This legislative activism covered both substantive and procedural criminal law as well as the establishment of various agencies engaged in counter-terrorism. In the following pages, I will highlight this transformation by first focusing on the substantive law definition of terrorist offences and the tendency to expand forms of participation and preparation. This will be followed by a discussion of procedural provisions related to counter-terrorism and an assessment of human rights. It will be argued that the overly broad definition of terrorist offences in the various international instruments leads to a situation in Hungary whereby people who obviously have nothing to do with terrorism are being convicted of terrorism.

2. Substantive criminal law in force

A. Some general remarks about Hungarian substantive criminal law

The reform of the criminal justice system is an important part of the overall reform that started in Hungary after the political transition away from communism in 1989. The overall reform was aimed at reinforcing the rule of law in Hungary and establishing the institutions of a democracy and a market economy. This general reform has not yet been finalised and one could reasonably estimate that, by the time it has been completed, it will have taken approximately 20 years.

Within this 20-year period of constant reforms, two different eras may be demarcated. One may describe the first era as the era of partial reforms. Focusing for now only on substantive criminal law, in this era whole chapters of the Hungarian Criminal Code [hereafter referred to as HCC] were redrafted at least once, such as, for example, the chapter on economic offences, on offences against state security and the one on offences against state property. Parallel to this, other provisions have also

[3] It should be mentioned that the only terrorist attack carried out on Hungarian territory took place in 1990, when a bomb attack was carried out on the airport motorway against Jewish people emigrating from Russia to Israel via Hungary. The remote-controlled bomb exploded sooner than planned, under the police car leading the convoy, and police officers were wounded instead of the Jewish migrants. By the time the police got over their surprise, the terrorists had left the country. They were identified by foreign secret services later.

been amended, for example the offences against the environment and sexual offences. Although amendments of this kind substantially changed the HCC, they did not aim at an all-encompassing reform of the country's criminal law. They introduced only partial changes.

By contrast to this first era, the ultimate purpose of the criminal justice reform that has been going on since 2001 is to re-codify substantive criminal law. The Ministry of Justice set up a committee in 2001 and entrusted it with the task of drafting the new criminal code. Academics, members of the judiciary, the prosecution service and the bar all took part in the work of the committee. Three proposals have been produced for a new general part [4] of the criminal code between 2001 and 2006, but the work on the new criminal code came to a halt in 2006. Between 2006 and 2010, Hungary endured a period that can only be described as featuring a lack of governance, where cause and effect are difficult to distinguish. The so-called 'lie speech' of former Prime Minister Gyurcsány of 2006 led to ongoing protests against the then ruling social-liberal coalition, which brought the work in the ministries and the parliament to a standstill. Finally instead of a new general part, an amendment [5] was adopted in 2009, which included a substantial reform of the system of punishments for crimes. The remaining work on the new criminal code was therefore left to the current government, which announced that it would table a new draft by the end of 2011. At the time of writing this article, the Draft Criminal Code is undergoing the administrative consultation procedure required before a draft law can be submitted to the parliament. According to the legislative schedule of the ministry, the draft should be adopted in 2012 and enter into force in 2013.

This article is based on the existing HCC. However, reference will be made to expected changes relating to terrorist offences indicated in the new Draft Criminal Code. As has been pointed out earlier, the 1978 socialist Criminal Code – still in force at the time of writing this article – underwent substantial changes [6]. Regardless of these modifications, the unified structure of the HCC and soviet concepts in describing criminal responsibility remained intact. This results in the fact that there are no extra statutes outside the HCC. Even in the field of international crimes or organised crime, all offences are contained in the HCC.

B. Incrimination of terrorist offences

The HCC does not distinguish between domestic and international terrorism and regulates offences related to terrorism in Section 261.

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[4] I.A. Wiener, *A Btk. Általános Része de lege ferenda* (*The general part of criminal law de lege ferenda*), Budapest, 2003, p. 195; A. Gál and K. Györgyi, *A Btk. Általános Része* (*The general part of criminal law*), manuscript; K. Ligeti, *Az új Büntető Törvénykönyv Álalános Részének Koncepciója* (*Commented draft of the General Part of the new Hungarian Criminal Code*), Büntetőjogi Kodifikáció, 2006, no. 1.

[5] Act no. LXXX of 2009.

[6] More than hundred laws have been adopted in order to modify the Criminal Code and there have been more than a dozen decisions of the Constitutional Court that declared criminal law provisions to be unconstitutional.

The 1978 socialist Criminal Code contained the offence of terrorism. The original offence description was based on two *actus reus*: the perpetrator deprived the victim of his/her liberty, or seized considerable assets or property in order to enforce an undue demand. The demand had to be addressed to a government agency or social organisation.

After the terrorist attacks of 11 September 2001, Section 261 HCC was modified [7] in order to criminalise the financing of terrorism. This amendment served to implement the UN Convention for the Suppression of the Financing of Terrorism and incriminates the provision or collection of funds to promote the commission of terrorist offences.

With the exception of the above-mentioned amendment, the original definition of terrorism of 1978 remained in force in Hungary for more than two decades. Due to a lack of practical relevance, the structure and the elements of the offence did not undergo any legislative scrutiny.

This relative disinterest of the Hungarian legislator in the provisions related to terrorism radically changed during Hungary's accession to the EU. As part of the *acquis communautaire*, Hungary had to implement the 2002 EU Framework Decision on Combating Terrorism [8] [hereafter referred to as the 2002 FD on Terrorism]. This was done by Article 15 of Act No. II of 2003 and resulted in the complete redrafting of the provisions related to terrorism. The new Section 261 HCC was then once again amended in 2009 in order to make some technical corrections to the norm and to raise the applicable penalty levels [9]. It is worthwhile to mention that Hungary did not formally implement the 2008 Framework Decision on Terrorism [10]. Preparatory acts of terrorism had been defined in Section 261 HCC so broadly that it did already include the preparatory acts to be incriminated under this new Framework Decision (see explanations Chapter C below).

These amendments resulted in a complex system of incriminations and a substantial expansion of criminal responsibility. The current version of Section 261 HCC is contained in the Annex at the end of this article. It contains the following incriminations:

- Subsections (1) and (2): definition of terrorist offences,
- Subsection (3): commutation of the punishment,
- Subsection (4): definition of *sui generis* preparatory acts of terrorism,
- Subsection (5): definition of offences related to organising or otherwise supporting a terrorist group,
- Subsection (6): abandonment of the terrorist offence,
- Subsection (7): definition of the offence of threatening to commit a terrorist offence,

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[7] Act no. LXXXIII of 2001.

[8] Council Framework Decision 2002/475/JHA on combatting terrorism, *OJ*, no. L 164, 22 June 2002, p. 3.

[9] Act no. LXXX of 2009.

[10] Council Framework Decision of 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combatting terrorism, *OJ*, no. L 330, 9 December 2008, p. 21.

- Subsection (8): incrimination of the omission to report an act of terrorism,
- Subsection (9): explanatory provisions listing the offences which may qualify as a terrorist offence if committed with a terrorist intent as well as definition of a terrorist group.

For a better understanding of the new version of Section 261 HCC, it is useful to recall that the 2002 FD on Terrorism includes three types of offences: terrorist offences, offences related to a terrorist group and offences linked to terrorist activities.

As far as the definition of a terrorist offence is concerned, the 2002 FD on Terrorism combines two elements: an objective element, as it refers to a list of nine types of serious criminal conduct, as defined by the laws of the Member States, and a subjective element, a special intent, which makes these types of conduct terrorist offences. This is implemented by Subsection (1) of Section 261 HCC verbatim. Subsection (1) of Section 261 HCC renders the offences listed in Subsection (9) punishable if committed in order to (i) coerce a government agency, another State or an international body into doing, not doing or countenancing something; (ii) intimidate the general public; (iii) conspire to change or disrupt the constitutional, economic or social order of another State, or (iv) to disrupt the operation of an international organisation.

Subsection (9) of Section 261 HCC lists those offences that qualify as a terrorist offence if committed with the special intent. It is worth mentioning that the Hungarian legislator considered the nine offences enumerated in Article 1 of the 2002 FD on Terrorism as criminological concepts rather than definitions of offences. In order to avoid any confusion and to assist the work of Hungarian practitioners, Subsection (9) of Section 261 HCC explicitly defines which offences of the HCC correspond to the nine offences listed in the 2002 FD on Terrorism. The evaluation report of the Commission of 2007 found that the abovementioned legislative technique resulted in a correct and full transposition of Article 1 of the 2002 FD on Terrorism [11].

In contrast, the Commission concluded that Hungarian criminal law was, in several instances, inconsistent regarding the two other offences contained in the 2002 FD on Terrorism. As to offences linked to terrorist activities, the Commission stated that there is no specific corresponding offence in the HCC. Nevertheless, the Commission found that Hungary will be able to achieve, in some cases, similar results by treating these offences as acts of collaboration with a terrorist group or as participation in specific terrorist offences.

With a view to the third group of offences – offences related to a terrorist group – the Hungarian legislator implemented the respective provisions of the 2002 FD on Terrorism in Subsection (5) and point b) of Subsection (9) of Section 261 HCC. Since these incriminations relate to participation in a terrorist act, I will study them in Chapter C.3 (see below).

Finally it should be mentioned that – although not specifically required by the 2002 FD on Terrorism – the Hungarian legislator declares punishable in Subsection (7) of Section 261 HCC a public threat to commit a terrorist act.

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[11] Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, Brussels, 6 November 2007, COM (2007) 681 final, p. 5.

C. Participation in terrorist acts

With regard to participation in terrorist criminal acts, two articles of the 2002 FD on Terrorism are of special interest: those regulating offences related to a terrorist group and inciting, aiding or abetting.

1. Offences related to a terrorist group

In conformity with the 2002 FD on Terrorism, point b) of Subsection (9) of Section 261 HCC declares that a terrorist group "shall mean a group consisting of three or more persons operating in accord for an extended period of time whose aim is to commit [terrorist offences]". According to the 2002 FD on Terrorism [12], a terrorist group is not a randomly formed group for the immediate commission of an offence and does not need to have formally defined roles for its members, continuity of membership or a developed structure.

Academic scholars in Hungary agree that a terrorist group is a special form of a criminal organisation, where the special feature of the group relates to its terrorist objective: the commission of terrorist offences [13]. However, it should be borne in mind that the definition of a criminal organisation in the HCC foresees a structured group with a hierarchy where the members of the group have attributed tasks [14]. This definition of a criminal organisation is not compatible with the definition of a terrorist group of the 2002 FD on Terrorism since the latter expressly does not require that the members of the group have a formally defined role or that the group has a developed structure. Due to the lack of any jurisprudence related to terrorist groups in Hungary, it is difficult to assess whether structured relations within the group are a prerequisite for a terrorist group or not. Such a criterion is not stated in point b) of Subsection (9) of Section 261 HCC and, in view of the *Pupino* jurisprudence [15], Hungarian courts interpreting this provision should, in conformity with the 2002 FD on Terrorism, not take account of such criteria in their deliberations.

The advocated *lex specialis* relationship with criminal organisations has the significant practical consequence that a terrorist group can always be regarded as a criminal organisation so that the criminal law consequences of criminal organisations deriving from the general part of the HCC would also apply to a terrorist group. This would result, on the one hand, in the mandatory increase of the maximum penalty up to 20 years of imprisonment according to Section 98 HCC. On the other hand, the confiscation of the assets obtained during membership of a terrorist group would be excluded only if the legal origin of the property is proven [16]. In other words, in cases of terrorist financing, the burden of proof would be shifted to the defendant to prove the legal origin of the assets.

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[12] Article 1(2) second sentence.

[13] A.V. Nepáráczky, *Die Vorverlagerung der Strafbarkeit am Beispiel der Terrorismusverfolgung aus ungarischer Perspektive*, Osnabrück, V&R unipress, 2011, p. 414.

[14] Point 8 of Section 137 HCC.

[15] ECJ, 16 June 2005, Judgement C-105/03, *Maria Pupino*, ECR, I-5285.

[16] Section 77/B (1) b), (4) and (5) c) of HCC.

Subsection (5) of Section 261 HCC incriminates two types of acts related to terrorist groups: the organising of a terrorist group and otherwise supporting the activities of the terrorist group. The first type of criminal acts relate to preparatory acts carried out for organising a terrorist group. Accordingly, the perpetrator instigates, suggests offers, undertakes to participate in the commission or agrees on joint perpetration in connection with the organisation of a terrorist group. The criminal acts listed in Subsections (4) and (5) have different objectives: whereas the perpetrator in Subsection (4) aims at preparing at least one terrorist offence in the sense of Subsections (1) and (2); the perpetrators of Subsection (5) organise a terrorist group in order to commit terrorist offences later on in the framework of this group. The *actus reus*, therefore, is not aiming at the planned act, but at the organisation of a terrorist group.

The second type of criminal act relates to any other form of support for the activities of a terrorist group. Whereas the first type of criminal act aims at organising the terrorist group, the second type of criminal act presupposes a terrorist group that already exists. Such others forms of support might be providing information, weapons or training to the members of the group. It follows, from the systematic analysis of Section 261 HCC, that, if a person provides means that are directly used for committing a terrorist offence in the sense of Subsections (1) and (2), such a person will incur accomplice liability under Subsections (1) and (2). In this case the person did not support the activities of the terrorist group as such but the commission of a particular terrorist offence.

As regards offences related to a terrorist group, the Commission concluded in its evaluation that "Hungary does not incriminate the direction of a terrorist group" [17]. Though directing a terrorist group is not explicitly mentioned in Subsection (5) of Section 261 HCC, one may certainly argue that the wording "any other form of supporting" also encompasses the direction of an already existing terrorist group. However, such an extended interpretation would cover direction only if it manifests itself in certain activities in support of the terrorist group. On the contrary, it does not incriminate the mere status of being the head of a terrorist group.

The 2008 FD on Terrorism further broadened the scope of preparatory acts of terrorism that should be criminalized. However, the existing incrimination of "any other form of supporting" is so broad that it also includes acts like those contained in the 2008 FD on Terrorism, *i.e.* recruitment and training for terrorism. Therefore, the 2008 FD on Terrorism was formally not implemented in Hungary.

2. Inciting, aiding or abetting

Section 261 HCC does not contain any specific provision on inciting, aiding or abetting in relation to terrorist offences. However, the general rules on participation apply also to Section 261 HCC.

Section 21 HCC regulates accomplice liability. Accordingly accomplices are the instigator and the abettor. Both forms are dependent on the principal perpetrator's

[17] Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, Brussels, 6 November 2007, COM (2007) 681 final, p. 5.

offence and require that the principal perpetrator attempted to commit or committed an international offence. An instigator is a person who intentionally induces another person to commit a criminal offence whereas an abettor is a person who intentionally grants assistance for the perpetration of the criminal offence [18].

3. Preparation of terrorist acts

In its general part, the HCC incriminates the attempt to commit a criminal act in relation to all intentional offences. According to Sections 16-17 of the HCC, attempt is criminalised if somebody intentionally initiated a criminal offence but did not complete it. It follows from Sections 16-17 HCC that criminal attempts at terrorism are punishable under Hungarian criminal law. The attempt carries the same level of sanction as the main offence.

As distinct from attempt, preparatory acts prior to criminal offences are not punishable as a rule. According to Section 18 HCC, preparatory acts are only punishable if expressly provided in criminal law, *i.e*. in the special part of the HCC. Section 18 HCC lists, in general terms, the most usual forms of preparatory acts. Accordingly, "if it is expressly prescribed by law, any person who provides for the perpetration of a crime the conditions required therefore or facilitating that, who invites, offers for, undertakes its perpetration, or agrees on joint perpetration, shall be punishable for preparation".

In relation to terrorist offences, the Hungarian legislator decided to set out, in Subsection (4) of Section 261 HCC, a whole list of preparatory acts. Subsection (4) constitutes an independent criminal act (so called *delictum sui generis*). Therefore the listed acts do not constitute preparatory acts in the sense of Section 18 HCC any longer but they are the *actus reus* of the *sui generis* terrorist offence as stipulated in Subsection (4). This *sui generis* offence is completed before the perpetrator initiates the terrorist offence of Subsection (1) of Section 261 HCC. It follows from the *sui generis* character of Subsection (4) that the attempt at committing a terrorist offence in accordance with Subsection (4) is also criminalised.

Since providing or raising funds to finance terrorist activities comes close to the scope of preparatory acts enumerated in Section 18 HCC, the legislator opted to include the criminalisation of terrorist financing in Subsection (4). In order to commit the offence of terrorist financing, it is sufficient that the perpetrator provides or collects funds to promote the commission of a terrorist offence. It is not required that the funds are actually used for the commission of terrorist offences. However, if the provision or collection of funds is inextricably connected in time with the commission of a terrorist offence, the person providing or collecting the funds will be prosecuted for aiding and abetting the terrorist offence. In the latter scenario the person will be considered as an accessory to the terrorist offence of Subsection (1) even if s/he did not participate directly in the commission of the terrorist act [19].

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[18] For details on accomplice liability see K. Karsai and Zs. Szomora, "Criminal Law in Hungary", in *International Encyclopaedia of Laws – Criminal Law*, The Hague, Kluwer Law International, 2010, pp. 255-257.

[19] A.V. Neparáczky, *Die Vorverlagerung der Strafbarkeit*, p. 412.

3. Criminal procedural law

A. Some general remarks on Hungarian criminal procedural law

After the political transition in Hungary away from communism, the reform of the soviet system of criminal procedural law was unavoidable. Several provisions were adopted in 1989 and 1994 in order to bring Hungarian criminal procedure into line with the requirements of the European Convention on Human Rights [20]. These amendments brought about substantial changes in three areas: the right to liberty and security [21], the right to compensation [22] and equality of arms [23].

Due to the introduction of amendments, a process that began in 1989, the Hungarian criminal procedure had been considerably transformed by the mid-1990s. However, it retained several features of soviet-type procedural laws. First of all, with regard to the allocation of competencies, Hungarian criminal procedural law differed from the western European model as it assigned a limited role to judges in the pretrial process while it guaranteed powers to the police that were reserved for prosecutors in the western-type continental mixed system. It is typical of soviet-type procedural laws that, with reference to the principle of substantive justice and by underestimating the requirement of legal certainty, they widely allowed the binding force of final court judgments to be lifted. Thus, the adoption of a new criminal procedural law was unavoidable.

The new Code on Criminal Procedure (Act XIX of 1998, hereafter referred to as HCCP) entered into force in January 2003 and introduced substantial changes [24]: the competence of the single judge was broadened, the principle of expediency gained more importance than hitherto and the number of special procedures was increased to allow for the speedy consideration of cases. The position of the victim was strengthened. Judicial competencies in the preparatory procedure were significantly broadened: the most serious coercive measures may be ordered exclusively by judges;

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[20] T. Bán and K. Bárd, "Az Európai Emberi Jogok Egyezménye és a magyar jog (*The European Convention on Human Rights and Hungarian Law*)", *Acta Humana*, 6/7, 1992, p. 1.

[21] In order to guarantee the right to liberty and security the new provisions prescribed that suspects might be kept in custody without a judicial decision only for 72 hours: if the judge were not to order pre-trial detention, the suspect was to be released. Moreover, the 1994 Act ensured that at the hearing held in the matter of the pretrial detention, the suspect and the defence counsel were to be presented with the prosecution's evidence and given an opportunity to reflect on it. Article 6, 17 of Act XCII of 1994.

[22] The rules on compensation for detention were also amended in line with the Strasbourg case law on the presumption of innocence. Article 21 of Act XCII of 1994.

[23] The 1994 Act contained several provisions that were meant to guarantee the equality of arms. It provided that, if the police or the prosecutor appointed an expert during the investigation, then – upon the request of the accused or defence counsel – the court was under the duty to appoint another expert for the same fact. The Act also guaranteed that the accused and the defence counsel were to be informed of the fact that the prosecutor had filed an appeal and of the content of the prosecutor's motion submitted on the appeal of the defence. Article 4, 14, 15 of Act XCII of 1994.

[24] See details in K. Bárd, "The development of the Hungarian criminal procedure between 1985 and 2005", in A. Jakab, P. Takács and A.F. Tatham (eds.), *The Transformation of the Hungarian Legal Order 1985-2005*, The Hague, Kluwer, 2007, p. 214-233.

the secret gathering of data and other secret policing methods are similarly bound to a judicial decision; the terminated investigation may be continued on a judicial order; in cases where the evidence cannot be examined at the trial or when this can be assumed, it is the judge who will examine the evidence in the investigation phase in order to ensure that the evidence can be considered by the trial court.

HCCP therefore clearly aimed at a separation of procedural functions and was characterised by a strong commitment to principles of a fair trial. Meanwhile, however, the legislator amended the HCCP and *e.g.* suppressed the judicial control over covert policing methods, reintroduced the use of evidence not directly examined or considered by the trial court and declared cross examination to be an exception instead of being the rule. Even though these amendments have been justified by the ever growing perils of organised crime and terrorism, Hungarian law enforcement and the judiciary have been unable to prove the existence of such organised crime. According to criminal statistics, hardly any offence is committed within the framework of a criminal organisation and there are no cases of terrorism. These facts certainly question the legitimacy of the latest legislative reforms.

The above mentioned recent amendments that also introduced new investigation methods for the prosecution and prevention of organised crime and terrorism are undermining the carefully built up balance between the competence of the police, the intelligence service and the prosecution as well as fair trial principles.

B. Criminal procedure applicable to organised crime and terrorism

The HCCP contains a set of covert investigation methods which are mainly relevant for the detection and investigation of organised crime and terrorism. These covert investigation methods are coupled with provisions on pro-active investigation stipulated in the Police Act [25] and the Act on the National Intelligence Services [26].

Consequently, currently there is a dual regime of covert methods in place in Hungary: pro-active investigation and covert investigation, which cover a plethora of criminal technical methods [27]. It is very important to note that pro-active forms of investigation may be used not only by the police and the intelligence services but also by the prosecution services [28]. The prosecution service may order the police to carry out pro-active forms of investigation in a given matter and circumvent the higher standards of covert investigation in this way. This anomaly was heavily criticised by the Hungarian Constitutional Court [29], leading to new rules on the evidentiary nature of secretly obtained information. Nevertheless, the law adopted pursuant to the decision of the Hungarian Constitutional Court did not abolish the possibility for the prosecution services to resort to pro-active investigation besides covert investigation.

In the following section, I will give a brief summary of the two regimes.

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[25] Act no. XXXIV of 1994 on the Police.

[26] Act no. CXXV of 1995 on the National Intelligence Services.

[27] F. Géza, *A rendészet elmélete*, 2005, KJK-OKRI, Budapest.

[28] Articles 63-69 of Act no. XXXIV of 1994 on the Police and Article 8(1) of the Act no. CXXV of 1995 on the National Intelligence Services, Article 9/A of Act. no. 189 of 2011 on the Prosecution Service.

[29] Decision of the Hungarian Constitutional Court 2/2007 of 24 January 2007.

1. Pro-active investigation methods

The Act on the National Intelligence Services stipulates that the fight against terrorism is one of the tasks of the intelligence services [30]. In order to fulfil this task, the intelligence service may resort to "covert information gathering" (*külső engedélyhez kötött titkos információgyűjtés*). Article 56 of the Act on the National Intelligence Services specifies the criminal technical methods that fall within the scope of covert information gathering.

Similarly, Article 69 of the Police Act enumerates which pro-active investigation methods may be employed by the police. These correspond to the ones regulated in Article 56 of the Act on the National Intelligence Services. These pro-active investigation methods comprise four covert investigation techniques:

- searching a private residence (clandestine house search) and recording the findings of the search by technical means,
- surveillance of a private residence and recording the findings by technical means,
- search of correspondence and other postal items and recording the findings by technical means,
- surveillance of telecommunication including telephone tapping and surveillance of email correspondence.

The rules of the application of such methods are not further detailed in the Police Act or in the Act on the National Intelligence Services. These rules are specified in the joint Ministerial Order no. 218 of 2006 of the Minister of Justice and the Minister of the Interior. The order is classified as being a professional secret. The content of the order is therefore not available to the public.

Common to all forms of pro-active investigation is that they may always be initiated if the interest of national security requires it. There are no further elements of the threshold for using pro-active methods. Therefore, pro-active investigation methods may be employed both for intelligence and crime detection purposes. All pro-active investigation methods may be performed only on the basis of a warrant. Such a warrant may be issued either by a judge or by the Minister of Justice.

2. Covert investigation methods

Covert investigation (*titkos adatgyűjtés*) is regulated by Section 200 HCCP as part of the investigation. Covert investigation may be performed by the prosecution services and the police and means the use of one or more of the following four investigation techniques:

- surveillance of private residences and recording the findings by technical means,
- search of correspondence and other postal items and recording the findings by technical means,
- surveillance of telecommunication including telephone and email,
- surveillance of computer systems.

[30] Article 4-6 of Act no. CXXV of 19.

Subsection (1) of Section 200 HCCP specifies the threshold for employing covert investigation. Accordingly, covert investigation may be initiated only against a given person and only upon reasonable suspicion that a serious crime has been committed [31]. Furthermore Section 201 HCCP sets out three general criteria to examine the legality of the covert method employed *in concreto*; namely that such method is (i) necessary; (ii) proportionate (least possible intrusion into the private sphere); (iii) and is likely to obtain the sought after result.

Covert investigation always requires judicial authorisation and may only be used for crime detection purposes. Judicial authorisation is granted by the pre-trial judge.

3. The use of secretly obtained information as evidence in the criminal procedure

The secrecy of the method employed in order to obtain certain information or data represents a major challenge from the viewpoint of human rights' guarantees. The HCCP therefore contains strict rules on the admissibility of such information and data as evidence in the criminal procedure. The present provisions on the admissibility of secretly obtained information and data entered into force as of 1 January 2011. Act CXLVI of 2010 modifying the HCCP proclaimed new rules on the principle of appropriation, which regulates the earmarking of information.

As described earlier, in order to initiate pro-active investigation or covert investigation, it is always necessary to obtain authorisation. The warrant authorising such a method specifies the aim of the covert method: intelligence purpose or crime detection purpose, and, more concretely, the detection of which particular crime.

In general, there are two problems linked to the use of secretly obtained information as evidence in the criminal procedure:

a) Under what conditions may information be used as evidence in the criminal procedure which was obtained either by pro-active investigation or by covert investigation authorised, however, only for the detection of a specific crime?
b) Under what conditions may information be used as evidence in the criminal procedure which was obtained by pro-active investigation authorised only for intelligence purposes?

Concerning the first question, Subsection (1) of Section 200 HCCP stipulates that data obtained as a result of the covert investigation may be used as evidence in the criminal procedure against the person and concerning the crime who and which were subject of the warrant authorising covert investigation. Problems arise if the prosecution service endeavours to introduce the data obtained by covert investigation as evidence in the criminal procedure:

− against an accused who was the subject of the warranted covert investigation, albeit for a different crime than the one the accused is charged for in the criminal procedure. According to Section 206 HCCP, such use is allowed if the requirements

[31] Such serious crimes are defined as all deliberate offences to be punished with imprisonment of at least five years; crimes committed in a businesslike manner; trafficking in human beings; child pornography, pandering and abuse of office. The latter four offences are enumerated in particular because they are not necessarily punished by five years of imprisonment, only in the aggravated form.

of covert investigation are also met in respect of that latter crime, which was originally not authorised by the judicial warrant;

- against an accused who was not subject of the warranted covert investigation. Subsection (5) of Section 206 HCCP stipulates that the result of covert investigation may be used against all perpetrators of the crime underlying the judicial warrant. A perpetrator must be understood as defined in substantive criminal law. Accordingly, all co-perpetrators as well as instigators, aiders and abettors are covered.

In respect of the second question Section 206/A HCCP stipulates that information stemming from pro-active investigation warranted for national security purposes may be introduced as evidence in the criminal procedure only if the criteria laid down in Section 201 HCCP are met. In this case, since the most recent reform of 2010, extended use is permitted (*i.e.* using the information for a crime or against a person different than the one specified in the warrant) [32].

C. Specialised law enforcement and administrative agencies in the field of counter-terrorism

Although Hungary is not a target of international terrorism, in order to allow efficient cooperation with other EU Member States and third countries in terrorism cases, Hungary has strengthened its law enforcement structure by setting up specialised police agencies in this field.

In particular two police agencies, the Anti Terrorism Unit and the Co-ordination Centre against Organised Crime, are involved in counter-terrorism work. The Anti Terrorism Unit is a police agency under the supervision of the Minister of the Interior and its role is proactive investigation of terrorist activities. Whereas the criminal investigation of terrorist acts is the duty of the police, who have an exclusive national competence and are empowered to exchange information directly with counter parts abroad.

The Co-ordination Centre against Organised Crime (hereafter referred to as CCOC) is a cooperative independent interagency body whose main role is not to fight against terrorism but it can contribute to this within the remit of its responsibility and support law enforcement bodies and intelligence agencies. The CCOC acts under the authority of the government through the Minister of the Interior. Law enforcement bodies and intelligence agencies as well as the prosecution are "providers" and "consumers" of the CCOC outcomes.

In order to guarantee efficient co-operation between Hungary and other countries, a national action plan against terrorism was adopted. An interministerial group has been set up to link the national action plan to EU and international counter-terrorism. The Inter-Ministerial Anti-Terror Task Force is a specific administrative body whose role is to monitor Hungarian counter-terrorism strategy in the light of the relevant policies of EU and international organisations.

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[32] Subsection 2 of Section 206/A of Act no. XIX of 1998 as amended by Act no. CXLVI of 2010.

4. Conclusion

As has been described above, Hungary has adopted a series of anti-terrorism related criminal laws from the mid 1990s onwards. They resulted in the substantially extended criminalisation of preparation of and participation in offences as well as in enlarged competences of the law enforcement authorities to use covert methods of information and evidence gathering.

This legislative activism, which was also motivated by the obligation to implement the respective EU and international instruments into Hungarian law, stands in sharp contrast to the lack of any relevant case law in Hungary.

Since 1989, there has been only one act of international terrorism in Hungary and this did not result in prosecution [33]. In the last decade, Section 261 HCC has been mainly used for prosecuting cases of hostage-taking. Since Section 261 HCC defines a terrorist offence, *inter alia*, as a violent crime against persons with the special aim of unduly compelling *any state organ*, it embraces cases like, for example, hostage-taking at police stations or in prisons where the perpetrator makes the release of the hostages dependent on fulfilling his/her demand by the respective state organ (policeman or prison guard). These hostage-taking cases have obviously nothing in common with the terrorist cases that the legislator had in mind when drafting Section 261 HCC. One may therefore conclude that the broad and unspecific definition of terrorist offences and aims in the various international instruments has led to a situation in Hungary in which perpetrators have been convicted as terrorists despite obviously have nothing to do with terrorism.

[33] See fn 3.

Annex– Section 261 CC

(1) Any person who commits a violent crime against persons or commits a crime that endangers the public or involves the use of a firearm referred to in Subsection (9) in order to (a) coerce a government agency, another State or an international body into doing, not doing or countenancing something; (b) intimidate the general public; (c) conspire to change or disrupt the constitutional, economic or social order of another State, or to disrupt the operation of an international organisation; is guilty of a felony punishable by imprisonment between ten to twenty years, or life imprisonment.
(2) Any person who seizes considerable assets or property for the purpose defined in Paragraph a) and makes demands to government agencies or nongovernmental organisations in exchange for refraining from harming or injuring said assets and property or for returning them shall be punishable according to Subsection (1).
(3) The punishment of any person who:
a) abandons the commission of the criminal act defined under Subsections (1) and (2) before any grave consequences are able to materialise; and
b) confesses his conduct to the authorities; in such a manner as to cooperate with the authorities to prevent or mitigate the consequences of such a criminal act, apprehend other coperpetrators and prevent other criminal acts may be reduced without limitation.
(4) Any person who instigates, suggests, offers, undertakes to participate in the commission, or agrees on joint perpetration of any of the criminal acts defined under Subsection (1) or (2), or in order to promote the commission of the offence ensures the conditions required therefore or facilitating that, or provides or collects funds to promote the commission of the offence is guilty of felony punishable by imprisonment from two to eight years.
(5) Any person who is engaged in the conduct referred to in Subsection (4) or in the commission of any of the criminal acts defined under Subsections (1) and (2) in a terrorist group, or supports the terrorist group in any other form is guilty of felony punishable by imprisonment between five to ten years.
(6) The perpetrator of a criminal act defined in Subsection (4) or (5) shall not be liable for prosecution if he confesses the act to the authorities before they become aware of it and reveals the circumstances of the criminal act.
(7) Any person threatening to commit the crimes specified in Subsections (1) and (2) is guilty of a felony punishable by imprisonment between two to eight years.
(8) Any person who has positive knowledge concerning plans for a terrorist act and fails to promptly report that to the authorities is guilty of a felony punishable by imprisonment for up to three years.
(9) For the purposes of this Section:
a) 'violent crime against a person and crime of public endangerment that involves the use of firearms' shall mean homicide [Subsections (1) and (2) of Section 166], battery [Subsections (1)-(5) of Section 170], willful malpractice [Subsection (3) of Section 171], violation of personal freedom (Section 175), kidnapping (Section 175/A), crimes against transportation safety [Subsections (1) and (2) of Section 184], endangering railway, air or water traffic [Subsections (1) and (2) of Section 185], violence against public officials (Section 229), violence against persons performing public duties (Section 230), violence against a person aiding a public official (Section 231), violence against a person under international protection (Section 232), public endangerment [Subsections (1)-(3) of Section 259], interference with public works [Subsections (1)-(4) of Section 260], seizure of an aircraft, any means of railway, water or road transport or any means of freight transport (Section 262), criminal misuse of explosives or explosive devices (Section 263), criminal misuse of firearms or ammunition [Subsections (1)-(3) of Section 263/A], criminal misuse of military items and services, and dual-use items and technology (Subsections (1)-(3) of Section 263/B), criminal misuse of radioactive materials

[Subsections (1)-(3) of Section 264], criminal misuse of weapons prohibited by international convention
[Subsections (1)-(3) of Section 264/C], crimes against computer systems and computer data (Section 300/C), robbery (Section 321), and vandalism (Section 324);
b) 'terrorist group' shall mean a group consisting of three or more persons operating in accord for an extended period of time whose aim is to commit the crimes defined in Subsections (1)-(2).

PART III

Harmonisation of terrorist offences and European cooperation

Impact de l'incrimination de terrorisme sur la coopération européenne en matière de lutte contre le terrorisme

Gilles DE KERCHOVE

Avant d'examiner l'impact que le rapprochement des incriminations et des sanctions réalisé par les décisions-cadres de 2002 [1] et 2008 [2] a pu avoir sur la coopération européenne en matière de prévention et de lutte contre le terrorisme (point 3), il convient de rappeler l'approche européenne en la matière (point 1) et de s'interroger sur l'adéquation de ces incriminations avec l'évolution de la menace terroriste (point 2).

1. L'approche européenne de la lutte contre le terrorisme

Contrairement à l'approche militaire qui a prévalu aux Etats-Unis au cours des deux mandats du président Bush et qui continue de prévaloir dans une certaine mesure sous le mandat du président Obama, l'Union européenne et ses Etats membres privilégient une approche judiciaire de la lutte contre le terrorisme. Selon cette approche, l'acte de terrorisme est considéré comme un crime, un crime certes particulièrement abject, qui doit faire l'objet d'enquêtes, de poursuites et de procédures de jugement comme toutes les autres formes de crime. Certes, dans le cadre des conflits armés à caractère international ou non international, il est permis d'avoir recours aux moyens militaires (utilisation de la force, détention militaire jusqu'à la fin des hostilités, recours aux juridictions militaires, etc.) selon les règles définies par le droit international humanitaire et le droit international des droits de l'homme. Certes, la plupart des Etats membres se sont dotés de techniques spéciales d'enquête (enquêtes sous couverture,

[1] Décision-cadre du Conseil du 13 juin 2002 relative à la lutte contre le terrorisme, *JO*, n° L 164, 22 juin 2002, p. 1.

[2] Décision-cadre du Conseil du 28 novembre 2008 modifiant la décision-cadre 2002/475/JAI relative à la lutte contre le terrorisme, *JO*, n° L 330, 9 décembre 2008, p. 21.

interceptions administratives, perquisitions informatiques, sonorisations de locaux, collectes de données sensibles, etc.) pour détecter de la manière la plus précoce possible des projets d'attentats. Il n'en demeure pas moins qu'aucun Etat membre ne s'est doté d'un droit pénal d'exception.

La volonté de traiter les auteurs d'actes de terrorisme selon les procédures ordinaires du droit pénal répond au souci d'assurer une justice sereine. La société le doit aux victimes des actes de terrorisme et à leurs proches. La société doit également réagir elle-même, parce qu'au-delà des victimes directes des attentats, c'est elle qui est visée. Elle répond aussi au souci de « déglamouriser » l'entreprise terroriste. En traitant les auteurs d'actes de terrorisme comme des criminels de droit commun et non comme des combattants d'une idéologie, la société développe un contre-discours très efficace. Dans sa propagande, Al Qaeda n'a par exemple jamais fait référence aux auteurs de l'attentat de Madrid en 2004 qui ont été jugés par les tribunaux ordinaires et, la plupart, condamnés au terme d'un procès équitable. Il n'a en revanche cessé d'encenser les détenus de Guantanamo, combattants d'une idéologie mortifère, dans l'espoir de convaincre des candidats au jihad de rejoindre ses rangs.

Il est à cet égard préoccupant de voir les efforts réalisés par l'actuel président américain pour abandonner le paradigme de la guerre contre le terrorisme (« *the global war on terror* ») qui a conduit aux excès que l'on sait (techniques d'interrogatoire « évoluées » comme le recours aux simulacres de noyade, programme de détention secret, vols secrets de la CIA, détention à durée illimitée sans procès, commissions militaires, etc.) neutralisés par le Congrès. Le vote par celui-ci en décembre 2011 du *National Defense Authorisation Act (NDAA)* [3] signe un retour très net à l'approche militaire. Cette législation impose en effet, entre autres dispositions, la détention militaire de tout suspect de complicité avec Al Qaeda ayant participé à la planification d'un acte terroriste qui serait arrêté sur le sol américain et qui n'aurait pas la nationalité américaine ou ne serait pas résident aux Etats-Unis. Elle consacre par ailleurs la politique actuelle du gouvernement qui se réserve le droit de choisir, au vu des éléments du dossier, l'une des quatre réponses suivantes : la détention de ce suspect dans une prison militaire jusqu'à la fin du conflit avec Al Qaeda, son jugement devant une commission militaire, son jugement devant une juridiction de droit commun ou son transfert dans un Etat tiers.

Sans aménagement, le NDAA risque de compliquer considérablement l'excellente collaboration policière et judiciaire qui s'est développée entre les Etats membres et les Etats-Unis depuis les attentats du 11 septembre 2001 et d'affaiblir la crédibilité du discours du président Obama qui s'est exprimé résolument en faveur d'un changement de paradigme, de l'approche militaire à l'approche judiciaire.

2. Une incrimination adaptée à la menace

L'approche judiciaire suppose que l'on dispose d'une incrimination bien adaptée aux comportements et modes opératoires des auteurs d'actes terroristes. Il n'est du reste pas impossible que la décision du président Bush de recourir à l'approche

[3] 112th Congress, 1st Session, H1540CR.HSE : « National Defense Authorization Act for Fiscal Year 2012 », Sections 1021 et 1022.

militaire tienne à la conviction, non corroborée par les faits, de son administration du caractère non adapté du droit pénal américain pour lutter contre un acteur non étatique comme Al Qaeda.

Au sein de l'Union européenne, la décision-cadre de 2002 doit beaucoup à l'action commune du 21 décembre 1998 relative à l'incrimination de la participation à une organisation criminelle [4] en ce qu'elle incrimine non seulement la commission d'un acte violent mais également la simple participation aux activités d'un groupe terroriste (pour autant que cette participation contribue aux activités criminelles du groupe terroriste). Comme pour la répression du crime organisé, il a été considéré nécessaire d'attaquer toutes les formes de collaboration et de contribution aux activités de l'organisation terroriste, qu'elles soient matérielles ou intellectuelles. La décision-cadre s'inspire également de l'incrimination française d'association de malfaiteurs en relation avec une entreprise terroriste dont la portée est particulièrement large.

Certes, la décision de rapprocher le droit pénal des Etats membres en la matière ne date pas des attentats du 11 septembre 2001, puisque la commande en a été faite par le Conseil européen lors de sa réunion de Tampere en octobre 1999. Mais elle s'inscrit bien dans le contexte de l'époque, celle de la lutte contre une organisation − Al Qaeda − dont la structure s'apparente à celle d'une entreprise multinationale (maison-mère, filiales, relations hiérarchiques, etc.).

En 2008, il a été jugé nécessaire d'enrichir l'incrimination pour couvrir de nouveaux modes opératoires : le recrutement, l'incitation à commettre un acte terroriste, surtout par le biais d'Internet, et l'entraînement.

Deux évolutions amènent à s'interroger à nouveau sur l'adéquation de l'incrimination de terrorisme avec la réalité du comportement criminel. Il s'agit d'une part du développement du phénomène des loups solitaires (« *lone wolves* ») et d'autre part du déplacement de candidats au jihad vers les zones de combat.

Comme l'ont montré les attentats commis par Breivik en Norvège le 22 juillet 2011, de plus en plus d'attentats ou de projets d'attentats sont le fait d'individus isolés. D'aucun se sont interrogés sur le point de savoir si les actes commis par Breivik relevaient du terrorisme, du nihilisme ou de la pure démence meurtrière en raison du fait qu'ils ne s'inscrivaient pas dans la logique d'une organisation poursuivant un but précis (l'instauration d'un califat pour Al Qaeda, l'autonomie du peuple kurde pour le PKK, l'autonomie du peuple tamoul au Sri Lanka pour le LTTE, etc.). Il ne fait aucun doute, même si les analyses psychologiques ont confirmé le dérangement mental de Breivik, que son acte relevait bien du terrorisme : il avait pour but de faire pression sur le gouvernement norvégien pour endiguer, selon son manifeste de 1 518 pages « 2083 − Une déclaration d'indépendance européenne », la progression de l'islam en Europe et préserver la suprématie de l'occident chrétien. Le fait d'avoir attaqué des bâtiments publics à Oslo ainsi qu'un camp de vacances de jeunes militants du parti du Premier ministre sur l'île d'Utoya confirme une certaine logique dans son délire meurtrier. Le fait qu'il n'appartenait à aucune organisation n'enlève rien au caractère terroriste de son entreprise.

[4] *JO*, n° L 351, 29 décembre 1998, p. 1.

L'affaiblissement d'Al Qaeda, l'accessibilité sur Internet des informations permettant d'accomplir un attentat de grande ampleur ainsi que le phénomène de mimétisme conduisent à penser que les actes terroristes seront demain de plus en plus le fait d'individus isolés incapables d'exprimer leurs griefs dans le cadre démocratique. D'autres attentats ou projets d'attentats récents au cours desquels des personnes radicalisées au terme d'un processus individuel, agissant de manière isolée voire s'associant de manière spontanée à d'autres terroristes, montrent que l'exigence de l'article 2 de la décision-cadre de 2002, selon laquelle l'association doit être structurée, établie dans le temps et agir de façon concertée en vue de commettre une série d'infractions terroristes risque de devenir moins pertinente qu'elle ne l'était au lendemain des attentats du 11 septembre 2001.

L'autre phénomène qui s'est développé considérablement depuis l'adoption de la décision-cadre de 2008 est celui du déplacement de jeunes occidentaux vers les zones de jihad que sont l'Afghanistan, le Pakistan ou la Somalie, pour s'y entraîner et y combattre. Seuls deux Etats membres (l'Allemagne et l'Autriche) ont incriminé de manière spécifique le fait de se rendre dans un camp d'entraînement à l'étranger pour y acquérir une expertise particulière. Il serait peut-être souhaitable d'amender une deuxième fois la décision-cadre de 2002 pour tenir compte de cette évolution.

3. L'impact de l'incrimination sur la coopération

Il ne fait aucun doute, comme le montrent Emmanuel Barbe et Roland Genson dans leurs contributions au présent ouvrage, que le fait que l'Union se soit dotée d'une incrimination commune de terrorisme a facilité ou est en voie de faciliter l'adoption de législations tendant à améliorer la prévention et la lutte contre le terrorisme, telles celles permettant le gel des avoirs des terroristes et organisations terroristes, la collecte d'informations sensibles comme le PNR ou l'imposition aux Etats membres d'une obligation d'informer Europol et Eurojust de toutes les enquêtes et poursuites entamées en matière de terrorisme ou l'imposition à une gamme assez large d'opérateurs (institutions financières, avocats, notaires, casinos) d'une obligation de déclarer des soupçons de financement de terrorisme. Ces législations imposent des obligations et établissent des mécanismes qui limitent l'exercice des libertés individuelles et ne sont acceptables que parce qu'elles permettent de prévenir et de lutter contre une des formes de criminalités les plus graves. Dans cette mesure, le fait de disposer d'une définition précise, d'un vocabulaire commun, contribue à forger le consensus tant au sein du Conseil que du Parlement européen.

Il est, par ailleurs, indéniable que la décision-cadre de 2002 a eu un impact réel dans les nombreux Etats membres (vingt et un) qui ne disposaient pas d'une législation spécifique incriminant, en tant que tel, l'acte terroriste.

Il est difficile de mesurer, en revanche, l'impact de cette incrimination commune sur la coopération concrète entre les Etats membres et entre ceux-ci et Europol et Eurojust. En l'état actuel de l'intégration européenne, les Etats membres ont, en matière de lutte contre le terrorisme, une préférence pour l'action bilatérale, voire le « bi-multi » ainsi qu'en témoigne le nombre insuffisant d'enquêtes conduites avec le support d'Europol et de poursuites coordonnées par Eurojust.

Il est cependant un domaine dans lequel l'incrimination commune a un impact opérationnel direct : il s'agit de la démarcation entre le champ d'action des services de renseignement et celui des services de police [5].

Traditionnellement, les services de renseignement agissent en amont de l'acte terroriste afin d'en déjouer la commission, la police intervenant dès lors que le crime est commis. Les décisions-cadres incriminant des comportements préparatoires à, voire distincts de, la commission de l'attentat en tant que tel (la participation à une organisation, le recrutement, l'entraînement), la police se voit contrainte d'agir beaucoup plus en amont en collectant des informations qui s'apparentent à du renseignement. Ceci contribue à faire bouger les lignes entre les responsabilités des uns et des autres.

[5] Voy, par exemple, en ce qui concerne l'Allemagne, l'article 4 a du Bundeskriminalamtgesetz du 7 juillet 1997 (*BGBl*. I S. 1650), tel qu'amendé par l'article 2 de la loi du 6 juin 2009 (*BGBl*. I S. 1226). L'article 4 a du Bundeskriminalamtgesetz a été introduit en 2009 afin d'élargir le champ de compétences du BKA à la prévention des risques en matière de terrorisme international.

How far do the new EU counter-terrorism offences facilitate police cooperation?

Roland Genson [1]

The approximation of criminal law within the EU has two main purposes. One is to eradicate safe havens for criminals and the other is to facilitate crossborder judicial cooperation. Under this second heading, criminal investigations clearly benefit *indirectly* from the approximation of criminal law. The question I wish to address here is whether or not the approximation of criminal legislation – especially through EU counter-terrorism offences – may also *directly* affect police cooperation instruments.

Cooperation between law enforcement authorities in the fight against terrorism started well before the 2002 Framework Decision introduced an EU definition for terrorism. In fact, the fight against terrorism was the first area related to internal security in which EC Member States decided to work together. Outside the EC institutional framework, TREVI cooperation was launched in the 1970s. It was practical and operational cooperation that was intended to tackle terrorism and prevent it from spreading across Europe. From a law enforcement perspective, terrorism was – and still is – a very sensitive offence! In the 1970s, definitions differed depending on the criminal legislation of a particular Member State. The differences in definitions between Member States may have made transnational cooperation more complicated. However, despite this obstacle, the law enforcement community has never explicitly called for the approximation of terrorist offences across Europe. Member States' services have managed to cooperate and to exchange information in the fight against terrorism on the basis of their respective national laws.

When Europol was set up under the Maastricht Treaty on the European Union, Member States also decided to give Europol a competence in the fight against

[1] The views expressed are the personal reflections of the author and not those of the Council or its General Secretariat.

terrorism. The Annex to the 1995 Europol Convention [2] listed all the possible areas of competence, including terrorism, but refrained from proposing any common definition for any one of those areas. Member States cooperate with Europol on all listed offences following the definitions provided by their national criminal legislation. During the negotiation of the Europol Convention, delegations did not consider it necessary to set up common definitions to allow Europol to function. Europol was considered to be a tool to enhance practical cooperation among law enforcement services and was designed so that it would not have an impact on national penal orders.

Terrorism and *Organised crime* offences can easily be compared when it comes to their complexity and sensitivity. A glance at criminal codes in the 1990s shows that some EU Member States have criminalised these offences as such, but have different understandings concerning their constituent elements, whereas others do not recognise *Terrorism* and *Organised crime* offences in their national criminal law.

But, clearly, developing common EU policies to fight organised crime and terrorism would be much easier if all the partners used the same concepts. This became quite clear in 1997 with regard to *Organised crime*. At that time, there was a considerable amount of political will within the EU to enhance in common the fight against organised crime. To achieve this, an up-to-date picture of the situation in Europe needed first to be put together through an annual EU organised crime threat assessment report. But how can such a report be drafted if the definition of a *Criminal Organisation* varies from one country to another? To respond to this concern, negotiations were set in motion and these led to the adoption of Joint Action 98/733/JHA of 21 December 1998 [3]. The purpose was to make participation in a criminal organisation a criminal offence in the Member States of the EU. Thus, since 1998, the law enforcement community has been able to share a common definition of *Organised Crime*, allowing for easier comparison and sounder cooperation based on such a common understanding. The approximation of criminal laws relating to *Organised Crime* can certainly be considered as a major step forward in the development of law enforcement cooperation in Europe. However, with regard to *Terrorism*, which can be considered as being just as sensitive as *Organised Crime*, the law enforcement community did not call for an approximation of definitions at EU level.

Would it thus be possible to conclude that, after 20 years of practical experience, multilateral EU police cooperation did not need such a common definition to be fully effective in the fight against *Terrorism*? Looking at one of the major police cooperation instruments negotiated at the end of the 1980s, the answer to this question cannot be a positive one. Articles 40 and 41 of the 1990 Schengen Convention, which implements the 1985 Schengen Agreement, provide rights for crossborder surveillance and hot pursuit. On the basis of Art. 40, in urgent cases, a police officer is allowed to continue a surveillance on the territory of another Schengen State, under certain conditions, and only if the observation relates to an offence listed in Art. 40 § 7. This list comprises 13 different offences, but no reference is made either to *Organised Crime* or to *Terrorism*.

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[2] Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office, *OJ*, no. C 316, 27 November 1995.

[3] *OJ*, no. L 351, 29 December 1998, p. 1.

This means that a police officer observing a person suspected of being a member of a terrorist organisation, for the purpose of obtaining evidence, was not allowed, under these Schengen rules, to continue his observation on the territory of another Schengen State in an urgent situation! Today, such a restriction is difficult to understand. There is no explanatory report to the Schengen Implementation Convention and the exact reasons for such an omission are not documented. But one may surmise that the Schengen negotiators did not want to consider these important types of offences as they did not exist in all criminal codes and, where they existed, the understanding of the offences was not necessarily the same from one Member State to another. For the application of Art. 40, the definition of the offence is the one given in the *requesting* State. It is therefore understandable that the Schengen partners tried to avoid situations where an observation on the territory of a Schengen State would take place for facts that would not necessarily be punishable in the *requested* State. The same reasoning may apply to the right of crossborder hot pursuit, provided for by Art. 41, in respect of those countries which only allowed such cross border hot pursuit in relation to offences listed under Art. 40. Again, it may seem strange today that these important crossborder police operation tools were not applicable to *Terrorism* and *Organised Crime* offences *per se*. But in my view, the most credible explanation for this omission was that there was no common definition and no common understanding amongst Schengen partners. This assessment may be confirmed by looking at Council Decision 2003/725/JHA [4].

The Schengen *acquis* – including Articles 40 and 41 of the Schengen Implementation Convention – was integrated into the EU's institutional framework through Protocol Number two, which was annexed to the 1997 Amsterdam Treaty. As of 1 May 1999, the provisions of the Schengen *acquis* are EU *acquis* and can be amended through Council acts. In 2003, the Council decided to amend Art. 40 of the Schengen Implementation Convention. More specifically, the list of § 7 mentioned above was modified and six new offences were added, *inter alia Participation in a Criminal Organisation* and *Terrorist Offences*. For both, they are defined as referred to in the relevant Council acts establishing common definitions. These modifications were proposed on the initiative of three Member States. Negotiations within the Council were rather straightforward and one may assume that the simple addition of *Participation in a Criminal Organisation* and *Terrorist Offences* was only possible thanks to the previous approximation of these offences at EU level.

Another example related to *Terrorism* can be identified at Europol level. Since 2007, Europol issues an annual EU Terrorism Situation and Trend Report in Europe, which is an assessment of the terrorist threat in Europe. Clearly, it would be possible to draft such a report based on terrorist incidents as witnessed in all Member States. But the fact that there is a joint definition allows Member States to have a common reference and to inform Europol about all the facts relating to this reference, thereby enabling Europol to draft a more complete and perhaps more coherent picture of the terrorist threat in Europe. Also, from this perspective, the existence of an approximated

[4] *OJ*, no. L 260, 11 October 2003, p. 37.

definition can be considered as adding value, facilitating law enforcement information-sharing and providing a common framework to assess the threat at EU level.

From this short assessment, one may already conclude, on the one hand, that the fact that there was no common definition of *Terrorist Offences* could have been a serious factor restricting crossborder police cooperation in some aspects. On the other hand, since a common definition now exists, it has been possible and easy to extend pre-existing parts of EU police cooperation to terrorism too. Moreover, I am convinced that the existence of such a definition facilitated the negotiation of a number of law enforcement instruments without having to raise the question as to whether or not they should also apply to terrorism or whether or not specific safeguards would be needed to make them applicable to terrorism. Thus, the so-called *Swedish Framework Decision* [5] and the *Prüm* [6] cooperation mechanism are very useful police cooperation tools and are fully applicable, without any exception, for *Terrorist Offences*. Had a common definition not existed, terrorist offences may have been covered by a more specific regime. The existence of a common definition of *Terrorist Offences* probably avoided a number of long and exhausting discussions on some law enforcement instruments within Council working structures.

Another example worth mentioning is Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences [7]. This Decision aims, *inter alia*, at organising information-sharing about terrorist offences between Eurojust, Europol and Member States, imposing a number of obligations on Member States. Again, *Terrorist Offences* are defined in Art. 1 by simple reference to the 2002 Framework Decision. Adopting such a Council Decision, which obliges Member States to transmit data on terrorist cases to Europol and Eurojust, would probably not have been possible without a common definition.

Moreover, the existence of a common definition also has a series of advantages in the area of practical police cooperation. These include setting up terrorist-related Analysis Work Files (AWF) at Europol, creating Joint Investigative Teams (JIT), running a 'Check-the-Web' project and the possible future use of common investigation techniques… All these actions are greatly facilitated if actors working on a joint project use the same counter-terrorism terminology and are able to refer to a common reference point.

As a final conclusion, we saw that, in the 1990s, the law enforcement community requested a common definition for *Organised Crime*. I am convinced that, sooner or later, the law enforcement community would have formulated a similar request for

[5] Council Framework Decision 2006/960 JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, *OJ*, no. L 386, 29 December 2006, p. 89 and *OJ*, no. L 75, 15 March 2007, p. 26.

[6] Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of crossborder cooperation, particularly in combating terrorism and crossborder crime, *OJ*, no. L 210, 6 August 2008, p. 1 – see especially Chapter 4, *Measures to prevent terrorist offences*, where reference is made to Articles 1 to 3 of the Council Framework Decision 2002/475/JHA on combating terrorism.

[7] *OJ*, no. L 253, 29 September 2005, p. 22.

Terrorist Offences. There is no doubt that the existence of a common definition since 2002 has avoided a lot of discussions during the negotiation of a number of police cooperation instruments and policies related to law enforcement.

A common definition of *Terrorism* facilitates joint assessments and allows for prevention activities. It facilitates crossborder police cooperation as well as information exchange. And it may also facilitate the use of coercive measures in transnational investigations.

Let me finish by setting out a brief outline of future developments. In November 2010, the EU launched an EU policy cycle for organised and serious international crime. This policy cycle consists of four steps:

– threat assessment;
– identification of priorities and development of strategic plans;
– implementation and monitoring of action plans;
– evaluation and preparation of the next policy cycle.

The EU's intention is to extend the policy cycle to other types of crime in the future. If it is to be extended to *Terrorism* as for *Organised Crime*, setting up such an EU policy cycle is very difficult to imagine without first having a common definition. In this respect, both the 2002 and the 2008 Framework Decisions will thus provide the indispensable basis on which to further develop operational EU policies in the fight against terrorism.

L'impact du travail de rapprochement des législations en matière d'infraction de terrorisme dans l'Union européenne en matière de lutte contre le terrorisme

Emmanuel Barbe

1. Introduction

Depuis le traité d'Amsterdam, l'Union européenne s'est livrée à un important travail de rapprochement du droit pénal des Etats membres, ayant conduit à l'adoption d'un grand nombre d'instruments [1], principalement des décisions-cadres. Depuis l'entrée en vigueur du traité de Lisbonne, il intervient dans le cadre de la procédure législative ordinaire et sous la forme de directives. En matière de terrorisme, ce rapprochement a principalement été accompli en décembre 2001, par l'adoption de la décision-cadre du 13 juin 2002 [2]. Si ce texte a par la suite été complété en 2008 [3], on peut cependant considérer que l'essentiel [4] des normes en matière de rapprochement des législations au sein de l'Union européenne pour ce qui concerne la définition du terrorisme a dix ans d'existence.

Que peut-on attendre d'une telle législation, spécialement en matière de terrorisme ?

Tout d'abord, et c'était sans doute l'aspect essentiel de la décision-cadre de 2002, un aspect de réprobation du terrorisme, qui est défini en tant que tel à travers son mobile. De ce point de vue, on peut considérer qu'il s'agit d'un succès. Les autres effets escomptés d'une législation spécifique aux infractions terroristes sont plus techniques, mais tout aussi importants :

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[1] Hans Nilsson a recensé vingt et un textes adoptés depuis le traité d'Amsterdam. Voir son article « How to combine minimum rules with maximum legal certainty », *Europarättslig Tidskrift*, 2011, p. 665.

[2] *JO*, n° L 164, 22 juin 2002.

[3] *JO*, n° L 330/21, 9 décembre 2008.

[4] Définition du dol terroriste et de l'organisation terroriste notamment.

- en matière transnationale, une telle législation permet de limiter les situations d'absence de double incrimination, lorsque les faits à l'origine d'une demande d'entraide judiciaire dans l'Etat requérant (ou Etat d'émission dans le système de la reconnaissance mutuelle) ne sont pas punissables dans l'Etat requis (ou Etat d'exécution), ce qui aurait pour conséquence un refus d'entraide (ou d'exécution d'un acte dans le système de la reconnaissance mutuelle) ;
- pour les pays qui disposaient d'une telle législation avant la décision-cadre de 2001 [5], son adoption a permis d'instaurer un régime procédural spécial, que ce soit en matière de compétence judiciaire, de règles d'enquêtes (régime de garde-à-vue, sur les perquisitions, sur les interceptions des télécommunications, etc.), de procédures de jugement, voire d'exécution des peines.

Nous nous proposons de rechercher dans quelle mesure le fait, pour l'Union européenne, de disposer d'une législation spécifique au terrorisme a eu un impact sur l'un et l'autre de ces aspects.

2. La législation de 2002 a-t-elle permis d'éviter les difficultés liées à l'absence de double incrimination ?

La réponse à cette question oblige dans un premier temps à s'interroger sur une question essentielle : quelle est la nature des obligations qui découlent des décisions-cadres adoptées en 2002 et en 2008 ? Les Etats membres doivent-ils adapter leur Code pénal national aux infractions prévues par la décision-cadre, et dans ce cas dépénaliser les comportements qui excéderaient ceux prévus par la décision-cadre, ou peuvent-ils au contraire incriminer plus largement que les textes de rapprochement ? Pour prendre un exemple en matière de terrorisme, un Etat membre peut-il par exemple posséder dans son code pénal plus « d'infractions liées aux activités terroristes » [6] que celles prévues par la décision-cadre de 2002 ? Un Etat membre peut-il disposer, dans son Code pénal, d'une incrimination de terrorisme dont le dol spécial (l'intention terroriste) se limiterait par exemple à la seule intimidation, sans que celle-ci soit grave, alors même que la décision-cadre prévoit explicitement une telle gravité [7] ?

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[5] Dans sa proposition de décision-cadre, la Commission indiquait que seuls six Etats-membres disposaient d'une législation spécifique pour le terrorisme, les autres le réprimant comme une infraction de droit commun, c'est-à-dire, sans prendre en compte le mobile de l'infraction, et partant, en poursuivant sur la base des infractions d'assassinat, de destruction volontaire de biens, etc.

[6] Article 3 de la décision-cadre 2002, dont la liste a été développée par la révision de 2008.

[7] Voir l'emploi du mot « gravement » dans l'article premier de la décision-cadre : « chaque Etat membre prend les mesures nécessaires pour que soient considérés comme infractions terroristes les actes intentionnels visés aux points a) à i), tels qu'ils sont définis comme infractions par le droit national, qui, par leur nature ou leur contexte peuvent porter *gravement* atteinte à un pays ou à une organisation internationale lorsque l'auteur les commet dans le but de :

- *gravement* intimider une population ou
- *(...)*

En effet, dans la première hypothèse, celle d'une obligation d'ajuster le Code pénal national aux seules incriminations prévues par la décision-cadre, la décision-cadre devrait faire automatiquement disparaître tout cas d'absence de double incrimination ; dans la seconde hypothèse, celle permettant à un Etat membre d'incriminer au-delà des obligations, alors minimales, la décision-cadre ne ferait que réduire le risque d'absence de double incrimination (pour tous les comportements visés par la décision-cadre), mais laisserait subsister, pour les comportements allant au-delà de la décision-cadre, un réel risque de défaut de double incrimination. Ce risque est d'autant plus réel que durant la négociation de la décision-cadre, tout le débat s'est précisément focalisé sur des comportements que certains Etats membres (on votait à l'unanimité sous l'empire des précédents traités) ne voulaient absolument pas incriminer, alors qu'ils l'étaient dans la législation d'autres Etats membres.

L'interprétation dominante, clairement traduite dans les législations nationales, est la seconde : les Etats membres restent libres d'incriminer au-delà des comportements prévus par la décision-cadre. Plusieurs éléments militent d'ailleurs en ce sens.

En premier lieu, c'est toujours ainsi qu'a procédé le droit international public pénal avant l'Union européenne : il suffit, pour s'en convaincre, d'examiner les principaux textes adoptés dans les organisations internationales productrices de telles normes : les Nations unies, le Conseil de l'Europe, l'OCDE, etc. C'est manifestement la même méthode qui a été reprise par l'Union européenne au moment de l'entrée en vigueur du traité de Maastricht, puis avec les traités d'Amsterdam et de Nice. Naturellement, c'est un argument qui a une portée relative, le système de l'Union européenne ne pouvant être assimilé au droit international classique. Si l'on examine les deux décisions-cadres sur le terrorisme, il ne semble cependant pas contestable que la même méthode a été utilisée : dans toutes leurs dispositions, les textes obligent les Etats membres à prendre « les mesures nécessaires pour que soit rendu punissable » tel ou tel comportement qu'ils définissent ensuite. Certaines dispositions sont même facultatives : ainsi, l'article 6 de la décision-cadre de 2002 offre-t-il la possibilité aux Etats membres de réduire certaines peines quand l'auteur de l'infraction collabore avec la justice. Enfin, les dispositions sur les peines encourues sont tout à fait explicites : si l'article 5 de la décision-cadre de 2002 comporte dans ses deux premiers paragraphes des obligations impératives pour quelques infractions (peines suffisantes pour entraîner l'extradition au paragraphe 1, sévérité majeure des peines encourues pour les « infractions terroristes » par rapport à celles prévues, dans le droit national, pour les mêmes infractions lorsqu'elles n'ont pas un but terroriste), il en va différemment pour d'autres – les infractions les plus graves – pour lesquelles les Etats membres doivent s'assurer que les peines encourues ne soient pas inférieures à certains seuils. Les Etats membres sont donc tenus de retenir un seuil de peines encourues supérieur.

Il est plus difficile de se référer, en revanche, au droit primaire. En effet, les deux décisions-cadres sur le terrorisme ont été adoptées sous l'empire de traités désormais remplacés par le traité de Lisbonne qui a profondément modifié les choses pour le

– *gravement* déstabiliser ou détruire les structures fondamentales politiques, constitutionnelles, économiques ou sociales d'un pays ou d'une organisation internationale (etc.).

domaine de l'ancien troisième pilier. C'est donc à la lumière du traité de Lisbonne que la question doit être appréciée, d'autant qu'à compter du 1er décembre 2014, les décisions-cadres adoptées avec le traité d'Amsterdam seront soumises au même type de contrôle que les directives adoptées en application du traité de Lisbonne, suivant l'article 10 du protocole 36 sur le droit transitoire.

Les règles relatives au rapprochement des législations pénales de droit pénal spécial [8] sont fixées par l'article 83 TFUE (ex-article 31 TUE), lequel dispose :

> « 1. Le Parlement européen et le Conseil, statuant par voie de directives conformément à la procédure législative ordinaire, peuvent établir des *règles minimales* relatives à *la définition des infractions pénales et des sanctions* dans des domaines de criminalité particulièrement grave revêtant une dimension transfrontière résultant du caractère ou des incidences de ces infractions ou d'un besoin particulier de les combattre sur des bases communes ».

Se pose évidemment ici la question de la définition de la notion de règles minimales. Ainsi que l'écrit Hans Nilsson [9], la notion de règles minimales est nécessairement une notion autonome du droit de l'Union européenne, puisqu'elle figure dans le traité et qu'il est exclu que chaque Etat membre puisse en avoir une définition propre. De notre point de vue, le traité n'aide que peu à définir une telle notion : en effet, contrairement aux dispositions du traité relatives au rapprochement des règles de procédure pénale des Etats membres [10], celles sur le rapprochement du droit pénal spécial n'indiquent pas une finalité particulière à l'élaboration de ces normes minimales visant au rapprochement des législations, à part le « besoin particulier de les combattre sur des bases communes ».

C'est finalement peut-être la notion de rapprochement (§ 3) qui pourrait constituer l'indice le plus important en faveur de l'interprétation dominante : en effet, dans cette hypothèse, la législation de l'Union européenne permet d'aboutir à un rapprochement des législations : celles-ci sont moins différentes après le processus de rapprochement qu'avant. Naturellement, il s'agit d'un rapprochement asymétrique, en ce sens que s'il peut obliger certains Etats membres à incriminer des comportements qui ne figuraient pas dans leur droit pénal, il ne contraint pas les autres à dépénaliser des comportements réprimés dans leur propre droit pénal qui iraient au-delà du texte de l'Union européenne.

Plusieurs arguments militent en faveur d'une telle interprétation. Tout d'abord, le traité ne permet pas, contrairement par exemple à la matière de l'entraide judiciaire en matière pénale [11] en matière de rapprochement des législations, d'utiliser l'instrument du règlement, applicable directement dans la législation des Etats membres. Ensuite, l'emploi du syntagme « règles minimales » ne figure certainement pas par hasard dans le traité. Si ses négociateurs avaient envisagé un rapprochement symétrique des législations, ils auraient eu l'opportunité de choisir une rédaction explicite ; on peut d'ailleurs s'y essayer : « Le Parlement européen et le Conseil, statuant par voie

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[8] Pour reprendre la terminologie française.

[9] H. Nilsson, *op. cit.*

[10] Article 82(2) TFUE.

[11] Article 82(1) TFUE.

de directives conformément à la procédure législative ordinaire, peuvent établir *des règles minimales relatives à la définition des infractions pénales et des sanctions* ».

Dans son récent article [12], Hans Nilsson soutient, de façon très argumentée, le point de vue inverse. Selon lui, les définitions adoptées, à partir du moment où elles le seront dans des directives (ce qui juridiquement sera le cas pour les décisions-cadres à partir de décembre 2014), obligent à un rapprochement symétrique, pour des raisons de prévisibilité juridique et d'unité du marché intérieur. Hans Nilsson indique qu'au demeurant, avec le traité de Lisbonne, les principes généraux du droit de l'Union européenne s'appliquent, ce qui milite encore plus fortement pour cette option : en matière de terrorisme, par exemple, il indique que la définition restrictive du dol terroriste résultait de la volonté du Conseil. Dans cette acception, le syntagme « règles minimales » indique que les règles de droit pénal général des Etats membres ne sont pas affectées, ce qui, dans certains cas pourrait malgré tout aboutir, en dépit de l'exercice de rapprochement, à des différences entre les législations des Etats membres.

Que dire à ce stade ?

Il semble absolument évident que l'intention du Conseil, même dans les directives adoptées depuis l'entrée en vigueur du traité de Lisbonne, n'est certainement pas de parvenir à des textes comportant également une obligation de dépénaliser pour un certain nombre d'Etats membres. Il est d'ailleurs frappant de constater qu'Hans Nilsson – peut-être déjà conscient du caractère « explosif » de ses propres conclusions et de la difficulté majeure qui pourrait en résulter dans les négociations actuelles et futures de textes de rapprochement du droit pénal matériel des Etats membres si la crédibilité d'une telle analyse se propageait dans les délégations – se garde bien de tirer une telle conclusion, qui découle pourtant logiquement de son argumentation. En dernière analyse, seule la CJ sera habilitée à dire le droit dans ce domaine. Qui sait quand elle aura l'opportunité de le faire ?

De fait, et dans l'interprétation dominante de l'effet pour les Etats membres des décisions-cadres, il est certain que l'adoption d'un texte de rapprochement des législations de droit pénal matériel n'aboutit que partiellement à l'effet d'évitement des cas de double incrimination.

Cependant, ce n'est pas par ce biais que la question de la double incrimination est traitée dans le droit de l'Union européenne, mais par le mécanisme inventé à l'article 2(2) de la décision-cadre instituant le mandat d'arrêt européen [13]. Celui-ci interdit le contrôle de double incrimination pour une liste de trente-deux infractions, définies dans le droit de l'Etat d'émission, dès lors que les faits poursuivis sont punis d'une peine d'emprisonnement d'au moins trois ans. La seconde infraction de cette liste est « le terrorisme ». On relèvera qu'il n'est pas fait référence, pour la définir, à la décision-cadre de 2002, pourtant adoptée en même temps ou presque. L'article 2

[12] H. Nilsson, *op. cit.*

[13] *JO*, n° L 190/1, 18 juillet 2002. Pour les instruments antérieurs, et tout particulièrement pour la convention d'entraide judiciaire en matière pénale du 29 mai 2000 et son protocole de 2001, où le mécanisme de vérification de l'absence de double incrimination joue encore pleinement pour l'exécution de mesures coercitives, le problème exposé ci-dessus reste donc entier.

ne fait pas plus référence à d'autres instruments adoptés antérieurement en lien avec d'autres infractions présentes dans la liste de l'article 2(2).

Cette absence de référence permet donc à l'autorité judiciaire d'un Etat membre, lorsqu'elle vise, dans un mandat d'arrêt européen, « le terrorisme », d'éviter tout contrôle de double incrimination, alors même que les faits poursuivis pourraient parfaitement se trouver dans la zone « asymétrique » de la décision-cadre, autrement dit, être punis dans l'Etat d'émission et pas dans l'Etat d'exécution. En d'autres termes, le système du mandat d'arrêt européen, lié à celui du rapprochement des législations pénales des Etats membres, aboutit à faire disparaître les problèmes de double incrimination pour les pays dont la législation en matière de terrorisme est la plus large ; en revanche, il n'a pas cet effet pour ceux des pays dont la législation est la plus limitative.

Certes, l'adoption de la décision-cadre sur le terrorisme n'a pas été pour rien dans la possibilité de faire adopter, en 2001, le système de la liste de l'article 2(2). Néanmoins, les limites de la méthode se sont retrouvées à plusieurs reprises dans la pratique, les juridictions de certains pays se trouvant confrontées à des incriminations existantes dans d'autres Etats membres et outrepassant largement les prévisions de leur législation nationale. Dans ces hypothèses, ce n'est certes pas par un contrôle de la double incrimination que les mandats d'arrêt européens ont été refusés – le texte l'interdit explicitement – mais par exemple par une application extensive de la clause dite de territorialité prévue à l'article 4(7) [14].

C'est certainement pour cette raison que, à l'occasion de la discussion sur le mandat d'obtention de preuves, qui a repris le mécanisme de l'article 2(2) du mandat d'arrêt européen, l'Allemagne a explicitement exigé, pour ce qui la concerne, un « *opt out* » [15] sur le mécanisme de non-vérification de la double incrimination, notamment en matière de terrorisme dans l'hypothèse où le mandat d'obtention de preuve prévoirait l'exécution d'un acte coercitif. Dans sa déclaration en annexe de l'instrument [16], elle subordonne en effet, comme l'y autorise le texte, l'exécution d'une telle mesure au fait que l'infraction à l'origine du mandat d'obtention de preuve soit, pour ce qui concerne le terrorisme, exactement celle prévue par certains instruments internationaux, dont la décision-cadre de 2002 : partant, elle refusera l'exécution dans l'hypothèse d'incrimination de comportements qui outrepasseraient notamment [17] les prévisions de la décision-cadre de 2002.

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[14] Article 4(7) : « 7) lorsque le mandat d'arrêt européen porte sur des infractions qui : a) selon le droit de l'Etat membre d'exécution, ont été commises en tout ou en partie sur le territoire de l'Etat membre d'exécution ou en un lieu considéré comme tel, ou b) ont été commises hors du territoire de l'Etat membre d'émission et que le droit de l'Etat membre d'exécution n'autorise pas la poursuite pour les mêmes infractions commises hors de son territoire ».

[15] C'est-à-dire le droit de ne pas appliquer ce mécanisme.

[16] *JO*, n° L 350/72, 30 décembre 2008.

[17] En effet, les autres instruments visés dans cette déclaration utilisent également la méthode du rapprochement asymétrique.

3. La législation antiterroriste comme base de mécanismes procéduraux dérogatoires ?

Depuis les attentats de 2001 aux Etats-Unis, mais également au Royaume-Uni et en Espagne, l'Union européenne, prenant la mesure des enjeux du terrorisme, a adopté toute une série d'instruments qui ont véritablement bouleversé les modes traditionnels de coopération policière ou judiciaire :

- le traité de Prüm (27 mai 2005) constitue la mise en œuvre, réalisée par un petit groupe d'Etats membres à travers une convention internationale, du principe de disponibilité des données établi par le programme de La Haye [18]. Il organise l'accès direct par la police d'un Etat membre à certains fichiers d'un autre, mais prévoit aussi d'autres formes de coopération entre Etats membres. Il a en partie été transformé en législation de l'Union européenne par la décision-cadre du 23 juin 2008 [19]. Si la législation Prüm ne naît pas spécifiquement en matière de terrorisme, c'est bien le terrorisme qui a donné l'élan nécessaire pour qu'elle puisse être adoptée. On n'y relève pourtant qu'une seule mention de la décision-cadre de 2002, à propos de la transmission spontanée d'information ;
- la décision-cadre 2005/671 du Conseil du 20 septembre 2005 relative à l'échange d'informations et à la coopération concernant les infractions terroristes [20]. Ce texte impose la nomination d'autorités centrales en qualité de correspondants « terrorisme » aussi bien en matière policière que judiciaire. Il crée aussi certaines règles de disponibilités des données. Cette directive fait explicitement référence à la décision-cadre de 2002 pour définir le terrorisme, et donc son champ d'application. En l'espèce, seules les infractions explicitement visées par la décision-cadre, et non celles qui pourraient être prévues au-delà par les Etats membres, semblent concernées. Ce texte confirme pleinement les effets possibles d'une législation définissant le terrorisme : il a en effet un impact sur l'organisation des Etats membres dans la lutte contre le terrorisme [21] ;
- la directive du 15 mars 2006 sur la rétention des données [22] : demandée par le Conseil européen dans sa « déclaration sur la lutte contre le terrorisme » du 25 mars 2004 consécutive aux attentats de Madrid, elle impose aux Etats membres d'instituer une obligation, pour les fournisseurs de service de télécommunications, de stocker les données dites de service [23], pour une durée non inférieure à six mois, mais pas supérieure à vingt-quatre mois. Cette directive ne mentionne jamais la décision-cadre de 2002 : de fait, la façon dont les Etats-membres peuvent utiliser les données n'est soumise qu'aux restrictions imposées par la loi

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[18] *JO*, n° C 53/1, 3 mars 2005.

[19] *JO*, n° L 210/1, 6 août 2008.

[20] *JO*, n° L 253, 29 septembre 2005.

[21] On notera que dans une note du 28 septembre 2010 (registre du Conseil n° 13318/1/10), le coordonnateur de l'Union européenne pour la lutte contre le terrorisme, Gilles de Kerchove, semble clairement indiquer qu'il considère que la centralisation et la spécialisation de lutte judiciaire contre le terrorisme sont un système préférable aux autres.

[22] *JO*, n° L 105, 13 avril 2006.

[23] C'est-à-dire, pour faire simple, l'enveloppe des messages et non les messages.

nationale de chaque Etat membre ; partant, elle n'est pas nécessairement limitée aux infractions terroristes ;

- la troisième directive relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux et du financement du terrorisme du 26 octobre 2005 [24], qui impose des obligations relatives à la traçabilité des opérations financières dans le chef d'un certain nombre d'opérateurs financiers, y compris depuis 2005 des conseils juridiques, recourt à la définition européenne du terrorisme. C'est sans doute en raison de l'existence d'une telle définition, précise et bien définie, qu'il a été possible d'étendre non seulement les obligations liées à la directive, mais surtout les professionnels qu'elle concerne ;
- la conclusion d'accords avec des pays-tiers, au premier rang desquels les Etats-Unis,
  - sur l'utilisation des dossiers passagers des compagnies aériennes (Passenger Name Records : PNR : accord du 26 juillet 2007 [25] conclu avec les Etats-Unis), notamment à des fins de lutte contre le terrorisme, ne donne aucune définition du terrorisme. La révision de cet accord rendue nécessaire par l'entrée en vigueur du traité de Lisbonne a été adoptée par le Conseil après un vote positif du Parlement européen, lors du Conseil JAI du 26 avril 2012. Il comporte une définition du terrorisme : celle de la législation américaine ; cela n'est pas illogique, dans la mesure où c'est ce pays qui utilisera ces données. On relèvera que la proposition de directive de la Commission européenne du 2 février 2011 pour un PNR européen [26], pour sa part, définit l'infraction de terrorisme par référence à la décision-cadre de 2002 ;
  - sur le transfert vers les Etats-Unis depuis l'Union européenne des données de messagerie financière de la société Swift (accord du 26 juin 2010 [27]). Cet accord, qui limite l'usage des données collectées au terrorisme, fait également référence à la définition américaine des infractions terroristes [28].

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[24] *JO*, n° L 309, 25 novembre 2005.

[25] *JO*, n° L 204/18, 4 août 2007.

[26] COM (2011) 32 déf. du 2 février 2011.

[27] *JO*, n° L 195/5, 27 juillet 2010.

[28] Article 2 de l'accord :

« Le présent accord s'applique à l'obtention et à l'utilisation de données de messagerie financière et de données connexes aux fins de la prévention, de la détection, des enquêtes ou des poursuites portant sur :

a) les actes d'une personne ou d'une entité qui présentent un caractère violent, un danger pour la vie humaine ou qui font peser un risque de dommage sur des biens ou des infrastructures, et qui, compte tenu de leur nature et du contexte, peuvent être raisonnablement perçus comme étant perpétrés dans le but :
   i) d'intimider une population ou de faire pression sur elle ;
   ii) d'intimider ou de contraindre des pouvoirs publics ou une organisation internationale, ou de faire pression sur ceux-ci, pour qu'ils agissent ou s'abstiennent d'agir ; ou
   iii) de gravement déstabiliser ou détruire les structures fondamentales politiques, constitutionnelles, économiques ou sociales d'un pays ou d'une organisation internationale ;

La décision instituant Eurojust, même après sa révision de 2008 [29], ne fait qu'une mention du terrorisme : celle de l'article 12 b) qui oblige les Etats membres à nommer un correspondant national pour Eurojust dans ce domaine, ce qui constitue bien un mécanisme, si ce n'est dérogatoire, au moins spécial au terrorisme. En revanche, pour ce qui concerne la compétence *rationae materiae* d'Eurojust, la décision renvoie aux compétences d'Europol, dont l'article 4, point a) ne fait pas référence aux décisions-cadres de 2002 et de 2008, alors même que la décision créant l'agence Europol (en reformatant la convention du 26 juillet 1995) a été adoptée en 2009 [30].

On peut donc constater que la référence à la définition européenne du terrorisme est pour le moins erratique dans les différents instruments qui, d'une manière ou d'une autre, constituent des réponses à la menace du terrorisme. Il n'est pas toujours facile d'en comprendre la raison. Deux explications peuvent être envisagées ; elles sont liées. D'une part, au niveau de la coopération policière, cette définition n'est pas toujours d'un grand secours. En effet, la définition choisie par le Conseil en 2002, puis en 2008, contient, ce qui est logique, un élément intentionnel qui est nécessaire au niveau des incriminations pénales, mais qui est moins utile très en amont d'une infraction, au stade des recherches policières. D'autre part, et précisément pour les raisons mentionnées dans la première partie, cette définition pourrait parfois constituer un handicap, en ce qu'elle ne recouvre pas exactement la même notion dans tous les Etats membres. Pour autant, on peut penser que le fait de disposer au niveau de l'Union européenne d'une décision-cadre définissant les infractions de terrorisme constitue un indéniable facilitateur pour adopter des instruments dérogatoires du droit commun, et permettre d'assumer qu'ils répondent à la proportionnalité nécessaire à des telles dérogations.

4. Conclusion

La méthode de rapprochement des législations actuellement suivie par l'Union européenne, en tant qu'elle ne permet pas de créer un code pénal européen, ne peut jouer totalement le même rôle que celui qu'elle assume dans le droit des Etats membres. Elle se révèle par ailleurs imparfaite pour véritablement faire disparaître d'éventuels problèmes liés à l'absence de double incrimination.

Pour autant, on ne peut que se réjouir que l'Union européenne dispose, à travers les décisions-cadres de 2002 et de 2008, d'instruments définissant, fût-ce de manière imparfaite, les infractions terroristes. En effet, en l'absence de telles définitions,

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b) une personne ou une entité qui facilite ou favorise les actes visés au point a), ou y contribue financièrement, matériellement ou techniquement, ou par des services financiers ou autres en leur faveur ;

c) une personne ou une entité fournissant ou collectant des fonds, par quelque moyen que ce soit, directement ou indirectement, en vue de les utiliser ou en sachant qu'ils seront utilisés, en partie ou dans leur intégralité, pour commettre tout acte décrit aux points a) ou b) ; ou

d) une personne ou une entité qui aide à commettre les actes visés au point a), b), ou c), qui s'en rend complice ou qui tente de les commettre ».

[29] *JO*, n° L 63, 6 mars 2002.

[30] *JO*, n° L 121/37, 15 mai 2009.

il est facile de mesurer les difficultés bien supérieures qui se poseraient à l'Union européenne dans l'élaboration d'une politique antiterroriste commune, qu'elle soit interne ou externe.

Part iv

The shift towards prevention in the fight against terrorism

Are we heading towards a European form of 'enemy criminal law'?

On the compatibility of Jakobs's conception of 'an enemy criminal law' and European criminal law

Stefan Braum

1. Introduction

Günther Jakobs's theory of an 'enemy criminal law' seems to be primarily a debate among German criminal law scholars although its paradigms, reasons and substance continue to be discussed throughout Europe and above all in South America [1].

Throughout this contribution, we would like to discuss this theory and analyse its basis whilst putting the German context to one side.

To what extent does the concept of enemy criminal law apply at the European level? Is it a typically German phenomenon that cannot be translated into the structures of an evolving European criminal justice system? Does it include both a proper empirical and normative analysis of Europe's legislative framework? Might someone argue that, with the ongoing transformation from nation state sovereignty to sovereignty based on a union of states, (or, perhaps, as some have suggested, a network of organs and institutions), this also dissolves the paradigms of theories deriving their sources from a focus on national criminal justice systems?

It cannot be denied that a theory based on the functions and legitimisation of criminal law cannot just be built on a national context, particularly if it claims universal validity. Thus, theory building has to be transversal. It must take into account a contingent process of constitutionalising at the transnational level [2], with the

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[1] Referring to the European and international context of the debate on Jakobs's conception see L. Greco, *Feindstrafrecht*, Baden-Baden, Nomos, 2010, p. 7.

[2] See R. Forst and K. Gunther, "Die Herausbildung normativer Ordnungen – Zur Idee eines interdisziplinären Forschungsprogramms", in R. Forst and K. Günther (eds.), *Die Herausbildung normativer Ordnungen, Interdisziplinäre Perspektiven*, Frankfurt am Main, Normative Orders, 2011, p. 11 and f., p. 22 and f.

European Union as the most prominent example [3]. The main problem connected with Jakobs's theory on 'enemy criminal law' is whether or not it still covers the empirical and normative situation of the current deficiencies in criminal justice systems, which go beyond national borders. One might make the following provocative statement: it would be good, if Jakobs was right. But unfortunately, things are even worse.

2. Counter-terrorist legislation and the 'shift' of criminal law

Ten years ago, terrorist attacks on the World Trade Centre and the Pentagon dealt a shattering blow to the world order. A widely used phrase has become a cliché: "After September 11, nothing will be the same as before". This is superficially true with regard to the development of, in particular, criminal law and, in general, of social control throughout Europe. There have undoubtedly been significant changes. However, there are existing structures of social control using criminal law with some political flexibility. These would appear to be sufficient to allow criminal law to be adapted to the political challenges of today's terrorism.

If one considers criminal policy patterns of the European Union, there has always been a range of risks and threats that demand more criminalisation and the extension of criminal law. First of all, legislative measures aimed at protecting financial interests against possible offenders and organised crime were launched, making criminal law related to economic and financial affairs more punitive. Secondly, a war has been declared on organised crime to improve police and judicial cooperation in Europe. At this stage, the phenomena of organised crime and terrorism were both used to provide arguments of substance backing up the tendency for fundamental rights to be watered down for security reasons. Even two years before September 11th, the Council recommendation of 9 December 1999 [4] included some essential measures aimed at thwarting the financing of terrorist groups. Intensifying cooperation, sharing intelligence and exchanging information on the risks of terrorism were regarded as crucial for the future. Last but not least, the idea of a European Arrest Warrant was waiting to be pulled out of the European institutions' filing cabinets.

The events of 21 September 2001 opened those filing cabinets. At an extraordinary meeting of the European Council, EU Member States agreed to a plan of action containing a whole catalogue of anti-terrorist measures [5]. Political decisions have been made to step up police and judicial cooperation by introducing the European Arrest Warrant and by adopting a common definition of terrorism. Focus has been laid on police cooperation so that the role and function of Europol could be strengthened. The flow of information between Europol and the Member States has therefore been expanded and a special anti-terrorist team has been set up at Europol. Moreover, it has not just been the flow of information that has been targeted but also the flow of

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[3] See J. Habermas, "Citizenship and National Identity", in J. Habermas, *Between Facts and Norms*, Boston, MIT Press, 1998, p. 491 and f.

[4] Council Recommendation of 9 December 1999 on cooperation in combating the financing of terrorist groups, *OJ*, no. C 373, 25 December 1999, p. 1.

[5] Conclusions and Plan of Action of the Extraordinary European Council Meeting on 21 September 2001.

financial assets. As a result, both the Framework Decision on money laundering [6] and the Regulation on the freezing of funds [7] were more extensively applied within the scope of counter terrorist measures. A series of legislative initiatives were initiated on this political basis. This had a major impact on the legislation of EU Member States in criminal law matters.

The following sectoral and specific instruments have been adopted to combat terrorism:

- Council Regulation of 27 December 2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism [8];
- Council common position of 27 December 2001 on the application of specific measures to combat terrorism [9];
- Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [10];
- Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism [11].

This legislation made use of different legal terms, which opened up a broad scope of application of anti-terrorist measures. It defined both the term *terrorist act* and *terrorist group* and established that certain offences of a minor nature at first sight can also be connected to a future terrorist threat.

The definition of a *terrorist act* includes a political phenomenon. Its description is global by nature. What defines terrorism as terrorism? The 2002 Council Framework Decision focuses on the macrostructures of States and political, economic and social systems. Terrorism is globally perceived as the permanent attempt to destabilise these macrosystems. Thus, the Council Framework decision of 13 June 2002, which implements the Council's common position, stipulates specified aims of deviant behaviour that may be considered as terror. Terrorism is characterised as a serious intimidation of the population, as unduly compelling a government or international organisation to do something and finally as the destabilisation and destruction of fundamental political, constitutional, economic or social structures of a country or international organisation.

Traditionally, criminal law has been based on principles of individual responsibility, which are expressed in clear rules of proof. Harm has to be precisely described, the causality must be well proven and established and *mens rea* has to be proven. These are requirements of the rule of law. By contrast, the elements of the definitions promulgated by the Council favour a global risk approach. They necessarily avoid these requirements because macrostructures cannot be translated into the established individual patterns of criminal law.

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[6] Framework Decision 2001/500/JHA, *OJ*, no. L 182, 5 July 2001, p. 1

[7] See Regulation (EC) 2062/2001 of 19 October 2001 and Regulation 2199/2001 of 12 November 2001, both amending Regulation (EC) 467/2001, *OJ*, no. L 277, 2001, p. 25.

[8] *OJ*, no. L 344, 28 December 2001.

[9] *Ibid.*, p. 93.

[10] *OJ*, no. L 164, 22 June 2002, p. 3.

[11] *OJ*, no. L 330, 9 December 2008, p. 21.

Counter-terrorist measures therefore make references to potential collective perpetrators. They do not focus on individuals as individual wrongdoing in relation to terrorist offences is very difficult to prove. Thus, the 2002 Council Framework Decision implemented the term *terrorist group*. Article 2 of this Framework Decision defines a terrorist group as a "structured group of two persons or more, established over a period of time and acting in concert to commit terrorist offences". This definition raises more questions than answers. One open question relates to the element of a "structured group". Article 2(1) provides further elements of an accessory definition. A structured group is "not randomly formed for an immediate commission of an offence" nor does it need "to have formally defined roles for its members, continuity of its membership or a developed structure". As criminal law instruments are meant to apply to new terrorist threats, the legal nature of these instruments must also change. The definition of a "structured group" contains the elements of an offence that seeks to include the typical network scheme of terrorist organisations. This inclusion poses a problem. It dissolves the elements of legality, which implicate the clarity of norms and the foreseeability of their application.

The transformation of criminal law into a counter-terrorist measure does not stop at offences considered as minor by nature. The demand for an overall reaction to terrorist risks also refers to offences such as theft or the falsification of documents. These offences are regarded as aggravated if they are committed with a view to committing terrorist acts. This criminalisation, required by Article 3 of the Council Framework Decision 2002/475/JHA, is mainly characterised by the malevolent intention of the offender, but above all, opens the door for an anti-terrorist investigation to be opened even if it relates to obviously minor offences.

The Framework Decision 2008/919/JHA sets down the last cornerstone of an extended form of social control built on the foundations of global terrorist threats. The new Article 3 now requires national legislatures to criminalise preparatory acts. Both public provocation to commit a terrorist offence and recruitment for terrorism should be regarded as terrorist offences. The criminalisation of "training for terrorism" is an addition to the catalogue of acts considered worthy of criminal sanctions.

This type of preparatory act goes far beyond the categories of attempt or instigation. These acts come under a scope of application which is not restricted to counter-terrorist risks but which is extended to the criminalisation of risks that have the potential to create terrorist threats. Thus, one should not just speak of preparatory acts in a traditional sense but of advanced preparatory acts. The objective of the criminalisation is not only prevention. Prevention requires the formulation of a clearly defined goal and needs the description of an instrument, which is suitable and necessary to achieve this goal.

The 2008 Framework Decision leaves this orientation behind, although it still affirms acting within the traditional prevention model [12]. Basically, it underlines the political need for a risk approach taking into account the change in "the modus operandi of terrorist activists" and for a risk approach reacting to the fact that terrorist activity is

[12] See Framework Decision 2008/919/JHA, Grounds 6 and 7.

about the interlinking of international networks [13]. This describes a political strategy of permanent control on structures regarded as risky. The criminalisation of these acts is not based purely on the need for more prevention. It seems to be politically justified as it entitles public authorities to launch investigations into possible terrorist threats even if there are cases where there is neither a danger of a terrorist act being committed nor serious grounds to believe that terrorist offences will be committed.

This type of criminalisation opens the door to an overall social control strategy. This strategy has led to essential changes within the criminal justice systems and their normative legitimisation. In substantial criminal law, one is faced with a permanent legislative drum beat of regulation blurring elements of an offence, replacing harm with danger and replacing danger with risks that may create a danger. In criminal procedure, the tendency goes from reasonable grounds that justify the launch of an investigation to preventive actions like undercover investigations and telephone tapping and ends up with overall control measures without any reference to empirically-based categories such as suspicion or concrete danger.

This criminal procedure is characterised by the dominance of executive powers. They have the right to conduct secret investigations. They decide on disclosure of information or evidence. They collect information and data, which are registered in computer systems, facilitating the exchange of information across borders. The core of these new executive powers is the merging of security activities with domestic police or prosecutorial investigations. Due to terrorist counter-measures, a set of rules has been established that can put the traditional norms of criminal justice systems on hold if a terrorist threat arises.

But it is also true that this is not a completely new development. Enhancing executive powers in criminal investigations belongs to the inherent logic of prevention strategies [14]. But now the quantity, range and variety of security legislation since September 11 have reached an unprecedented level [15]. On the one hand this entails the risk that security orientations will overwhelm the principles of a democratic state-like rule of law and fundamental and political rights [16]. On the other hand this entails a change of both the theoretical and practical understanding of criminal justice systems as such: there is a shift from legally bounded investigation to the general and flexible surveillance of potential risks. There is a shift from modern prevention to postmodern social control, which is meant to be overall social control [17].

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[13] *Ibid*., Ground 3.

[14] See for example P. ANDREAS and E. NADELMANN, *Policing the Globe – Criminalization and Crime Control in international relations*, Oxford, OUP US, 2006, p. 217 and f.

[15] Critical on this global development for example J. HOCKING and C. LEWIS, "Counter-terrorism and the rise of security policing", in J. HOCKING and C. LEWIS (eds.), *Counter-Terrorism and the Post-Democratic State*, London, Edward Eldgar, 2007, p. 138 and f.

[16] Referring to the situation in the UK GS GOODWIN-GILL, "Everyone and the citizen: the devaluation of principles and protection", in J. HOCKING and C. LEWIS (eds.), *Counter-Terrorism*, p. 101 and f. (p. 106 and f.). Referring to the German context P.-A. ALBRECHT, *Kriminologie*, 3. Auflage, München, Beck, p. 69 and f.

[17] *Ibid*.

Even if one does not agree on the extent of this 'shift', the fact that it exists cannot be denied. It is also difficult to ignore the increasing orientation of criminal law instruments towards risky structures instead of individual acts or persons. And it needs to be pointed out that the reason for this shift lies in the activities and legal initiatives of transnational institutions that go beyond national criminal justice systems.

Does an interpretation of the function of criminal justice systems using the patterns of 'enemy criminal law' correspond to both the pertinent empirical situation of Europeanised criminal justice systems and the normative erosions caused by postmodern social control?

We will consider the various paradigms of Jakobs's conception in order to give an answer to the question as to how adequately it analyses the process of the Europeanisation of criminal justice systems.

3. The Conception of enemy criminal law in the German scholar's debate

A. Between facts and norms

Jakobs develops this conception in the context of a theory of punishment based on a concept of law. The concept of law that Jakobs describes cannot be reduced to pure normative theory declaring law as something *purely epistemological*, valid at any time at any place, ignoring the fact of whether it is respected in reality or not. His references are facts nourishing this reality of law. Jakobs insists on the fact that the real world has limits to the officially declared concept of law, considered to be "politically correct" [18]. There is the rule of law but there are also conditions for implementing the rule of law.

Regarding the dualism between norms and facts, Jakobs prefers a theoretical approach based on facts. They decide which norms can effectively guarantee an orientation within a concrete existing social system [19]. On the other hand, facts can contradict norms without depriving them of their legitimacy if social systems insist on their factual validity. Thus, if a person violates a norm, by, for instance, committing an offence, it does not correspond to society's expectations for their norms to be respected and maintained. Society decides on their validity and not the offender [20]. A pronounced sanction related to an offence leads to a countermeasure to restore confidence in the further existence of the norm. It stabilises the norm by underlining that the expectations of its validity are still justified. If the offence is considered to be an offence and if the offender is treated like an offender by punishment, society proves the real factual validity of the norm [21].

Referring to Niklas Luhmann's theory of systems, Jakobs gives criminal law a systemic sense. Thus, by countermeasures (sentence and punishment) to maintain the norm, it can fulfil its goal of stabilising social expectations that given norms are still respected and continue to be respected. The role of punishment is therefore to

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[18] See G. Jakobs, "Feindstrafrecht ? – Eine Untersuchung zu den Bedingungen von Rechtlichkeit", *HRRS*, 2006, p. 289-297, at p. 289.

[19] *Ibid*., p. 290.

[20] *Ibid*., p. 291.

[21] *Ibid.*

safeguard the stability of social systems as such. Criminal justice systems serve as a tool to maintain the smooth functioning of a society and its subsystems.

B. Jakobs' concept of a moral person

1. Moral persons and enemies

Jakobs's understanding of the relationship between facts and norms, expressed by his theory on punishment, includes a specific concept of a moral person perceived as a concrete part of concrete social systems.

Rejecting a purely normative theory, Jakobs's concept does not accept a moral person as an epistemological category [22] demanding respect for its integrity regardless of whether and how the person integrates itself in a framework of realised mutual recognition. A moral person is defined by a set of rights and obligations [23]. Jakobs demands the moral person to perform and to be sufficiently willing to fulfil his obligations. In Jakobs's view a concrete moral person has to contribute to the social systems and to guarantee a minimum level of reliability to submit to social norms [24]. Only by presenting this minimum level of personal reliability can the expectations of other members of the social systems have a common basis. Otherwise, if this required minimum does not appear to be guaranteed, the person concerned loses his right to be treated like a full moral person. As a result, he will be deprived of his rights [25]. Thus, the person will not be treated within the framework of the law: he shall see himself as being excluded, as an enemy [26].

2. 'Enemy criminal law' – the starting point and end of normative disintegration

Thus, Jakobs's theory on punishment refers, after all, only to those citizens who are capable and willing of living within a framework of mutually shared expectations. The distinction made by Jakobs seems to be clear: Criminal law for citizens applies if both imputation of the offence to an individual perpetrator is possible and if the offence leaves a minimum of expectation of future behaviour that is compatible with social norms. The minimum level of reliability might be shattered but the validity of the negated norm can be maintained by some kind of sanction [27]. However, without a minimum level of loyalty to social norms, the role of punishment in stabilising social expectations cannot work. As a result, the enemy must be subjected to security measures in order to bring him physically under control [28].

Jakobs challenges the general legitimacy of his own theory of punishment, admitting that it is made for those situations that a social system still considers to be normal. Confronted with an extreme situation, Jakobs denies the paradigms of ordinary theories of criminal law. If countermeasures do not work and if security measures are needed, the social system, which has been undermined, consequently admits to

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[22] *Ibid*., p. 289.
[23] *Ibid*., p. 293.
[24] *Ibid.*
[25] *Ibid*., p. 294.
[26] *Ibid.*
[27] *Ibid*., p. 293.
[28] *Ibid*., p. 296.

having lost its capacity for normative integration. If a distinction is made between the punishment of an offender and a security measure with regard to an enemy, a dialectic process between both poles will have been launched. Social systems are then showing a lack of confidence in the proper functioning of their norms. They demonstrate that these norms are not made for situations defined as being exceptional or extreme.

Thus, not only are the offenders without minimum loyalty in the spotlight, but the norms themselves are being challenged. If punishment does not guarantee that confidence lost in the factual validity of social norms in extreme cases is restored, how can one still argue that it works in a normal situation? In the light of Jakobs's own theory, the tension between citizens and enemies, resolved by the exclusion of the latter, will lead to the normative disintegration of a society. Thus, the idea of an 'enemy criminal law' is equivalent to the idea of an authoritarian administration of a disintegrated social system.

Even Jakobs would not disagree with this point as the existing disintegration of social systems partly belongs to the real facts that have made him reflect on a specific criminal law related to enemies. Disintegration is the state of play. That is how Jakobs perceives the real existence of criminal justice systems [29].

The criticism of insisting on the authoritarian nature of Jakobs's conception will not make him change his paradigms either. On the contrary, Jakobs insists that the State has an obligation to protect its citizens' right to security, assuming that the rule of law is interpreted as something real and not considered as an abstract notion disproved by reality [30]. The issue is about finding the right balance between a criminal law applied to citizens and a law of security measures related to the enemy. The latter is necessary in order to prevent it from infiltrating the domain of criminal law, which is bound by the rule of law [31]. The dualism between both categories will not lead to a synthesis. If expectations about the loyalty of individuals are reviewed, the review includes the tendency to replace security measures on an individual with security measures applied on structures. Thus, 'enemy criminal law' is not at the end but at the beginning of the further normative disintegration of systems.

3. *Defining the 'enemy': individualisation of structural risks in the context of the German criminal justice system*

With regard to the concrete circumstances of criminal justice systems, the first essential question about Jakobs's theory is: who exactly is the enemy? He admits that these categories remain unclear: the part of a person considered to be hostile against norms can be merged with parts of a moral person that is well integrated within a social system. By referring to real facts, Jakobs tries to distil the model of an enemy out of existing legislative acts [32]. This distillation, however, derives primarily from the background of the history of German criminal law and makes reference to the

[29] *Ibid*., p. 293.
[30] *Ibid*., p. 297.
[31] *Ibid.*
[32] *Ibid*., p. 295.

recent and still ongoing German debate about the legitimacy of certain anti-terrorist measures.

a) Political connotations

One of the characteristic elements of the modern history of German criminal law consists of the individualisation of structural problems. Authorities have always used the political strategy of labelling individuals in order to demonstrate their capacity to resolve social problems. In the 19th century, Bismarck's social legislation was accompanied by an "act prohibiting activities of social democrats dangerous to public safety". The Nazi regime enforced an act on "dangerous habitual criminals", providing a legal basis for the deportation of opponents of the regime and both ethnic and religious minorities. One crucial element of this legislation was detention for the purposes of security. Individuals were excluded from society for political reasons. German political society in the 1960s and 1970s defined and labelled individual opponents to create justifications to extend criminal law. Opponents were painted as an abstract hypothetical threat to German society as a whole. The typology of these abstract threats changed from communists to terrorists and included members of the Baader-Meinhof-Group and the Rote Armee Fraktion (RAF) as well as organised criminals and fundamentalist Muslims [33].

Jakobs's definition of the enemy refers to this tendency to personalise structural risks. He derives his concept of an enemy inductively from legal texts both of substantial and procedural criminal law. In German criminal law, the offence of building a terrorist association sets out the range of sanctions from five years to ten years up to fifteen years of prison sentence [34]. The latter just applies to ringleaders and persons behind.

Jakobs argues that this cannot be justified by the pure infringement of the legal interest of public security but has come about because of political will and the need to submit those persons to security measures [35]. In terms of criminal proceedings, Jakobs considers pre-trial detention to be an example of enemy criminal law as persons suspected of intending to escape or suspected of being at risk of colluding with others cannot be recognised as moral persons but as excluded enemies [36]. In Jakobs's view, secret investigation methods deprive citizens of their rights to information. This indicates that they are treated as enemies and not as moral persons integrated into society [37]. The same indication is regarded as being pertinent in cases where defence lawyers' access to their clients is restricted in cases of counter-terrorist investigations [38].

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[33] See a short wrap-up of this development in the dissertation of M. RIECHMANN, *Organisierte Kriminalität und Terrorismus – Zur Funktionalisierung von Bedrohungsszenarien beim Abbau eines rechtsstaatlichen Strafrechts*, 2008, p. 41 and f.

[34] Paras. 129a, 129b of the German Criminal Law Code – 'Strafgesetzbuch'.

[35] G. JAKOBS, "Feindstrafrecht ?", p. 295.

[36] *Ibid*., p. 296.

[37] *Ibid.*

[38] *Ibid.*

Jakobs's definition of the enemy based on the wording of legal provisions rather insinuates the category of the enemy. However, it lacks a convincing, immediate conclusion from the analysed legal provision to the category in a logical sense. Even if a legal provision might incorporate a label relating to an individual considered as being a risk to society, this does not necessarily mean that this individual is regarded as being excluded from society as an enemy [39].

Thus, the conclusion drawn by Jakobs is only comprehensible if you put it in the abovementioned historical context. Apart from a lack of coherence in the chosen terminology, these historical aspects show two further problems with Jakobs's idea: first its political connotation and second the lack of an analysis of the empirical circumstances of criminal justice systems.

Jakobs insists that his conception includes a scientific balance between existing criminal law, which perceives itself as a weapon, fighting against individuals presenting a risk or a danger to an existing social system. He argues that he has not invented this concept but describes it correctly [40].

However, Jakobs cannot actually continue to affirm that his theory only describes the facts of a criminal justice system [41], underlining that the model of an ideal State bounded by the rule of law remains a political utopia [42]. Describing facts cannot ignore the fact that politics and its strategies are part of the concrete reality [43]. The expectations of a social system are necessarily politically defined. The stabilisation of the system is ultimately a stabilisation of expectations formulated by a political majority within a specific time and a specific situation. The label of the enemy is, in this context, not a scientific but a political label and is, last but not least, the final result of misleading societal communication. Thus, Jakobs cannot pretend to be politically impartial. On a theoretical level he seems to make an allusion to Hegel, affirming that reality and *ratio* are identical [44]. Thus, Jakobs's conception can also be interpreted as a scientific and theoretical conception, justifying the actual political state of play. This conception does not contain an argument on how to overcome the diagnosed normative disintegration of a society.

b) Normative erosions

The political nature of Jakobs's conception is underlined by the German debate both on torture and on the German air security act, authorising military forces to shoot down a passenger aircraft suspected of being used as a weapon against the lives of human beings [45].

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[39] See also F. Saliger, "Feindstrafrecht: Kritisches oder totalitäres Strafrechtskonzept", *JZ*, 2006, p. 756 and f. (p. 760).

[40] G. Jakobs, "Feindstrafrecht ?", p. 293.

[41] *Ibid*., p. 290.

[42] *Ibid*., p. 297.

[43] See J. Bung, "Zurechnen-Können, Erwarten-Dürfen und Vorsorgen-Müssen – Eine Erwiderung auf Günther Jakobs", *HRRS*, 2006, p. 317 and f., at p. 319.

[44] See F. Saliger , "Feindstrafrecht", p. 757.

[45] Former para. 14(3) Luftsicherheitsgesetz.

It follows from Jakobs's conception – without his own scientific responsibility – that the exclusion of the enemy justifies a partial withdrawal of the general and indivisible protection of human dignity. The loss of the status of a moral person opens a Pandora's box, unleashing the traditions of the authoritarian State that were thought to have been overcome and that are now disguised as *up to date* instruments to face the challenges of current problems relating to terrorism [46].

Referring to Luhmann's scenario of a ticking bomb [47], both politicians and academics argue that the human dignity of a suspected person knowing where the bomb is hidden can be relativised and entitles authorities to use any physical coercion necessary against the suspect [48]. According to this view, even the human dignity of innocent citizens can be sacrificed in order to save the lives of a larger number of people exposed to a concrete danger [49].

Both are logical consequences of Jakobs's conception. The loss of the status of a moral person and that person's shift to a status of an enemy is the characteristic element of war. This allows criminal law to be transposed as an instrument of combat [50]. Thus, citizens can be demanded to perform. Expectations formulated in this type of a situation with society at war can, from this perspective, include obligations for self-sacrifice.

Consequently, once labelled as an enemy, the person is at the entire disposal of the powerful State. Terrorists are regarded as being the enemy incarnate. This is the justification given for declaring a permanent situation of emergency, incorporated in the politically enhanced 'war on terror', for suspending the principles of criminal law, for destroying individual freedom and, to be clear, for betraying the heritage of freedom derived from the age of enlightenment.

The European Court of Human Rights in the *Gäfgen* case [51] and the decision of the Federal Constitutional Court on the air security act [52] show that – in Jakobs's words – there are norms that remain valid although there might be permanent counterfactual experiences. These norms are universal. They are valid apart from societal reality as they are the original source of any social integration. The message derived from these judgments consists of the indivisibility of human dignity. Normatively, there are no enemies. There are only citizens regardless of whether they do daily nine to five jobs or are suspected of terrorist acts.

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[46] See as a representative example M. Pawlik, *Der Terrorist und sein Recht*, München, Beck, 2008.

[47] See N. Luhmann, "Gibt es in unserer Gesellschaft noch unverzichtbare Normen ?", in *Heidelberger Universitätsreden*, Band 4, 1993, p. 27.

[48] M. Pawlik, *Der Terrorist*, p. 46.

[49] *Ibid*., p. 48.

[50] *Ibid*., p. 25 and f.

[51] Eur. Court HR, 1 June 2010, *Gäfgen v. Germany* (Application n° 22978/05).

[52] Bundesverfassungsgericht, 1 BvR 357/05, Urteil des Ersten Senats vom 15. Februar 2006.

4. Europeanisation of criminal justice systems: the way to postmodern social control and the position of the moral person

A. Moral persons absorbed by systems

As mentioned at the beginning when describing EU counter-terrorism measures, it now becomes clearer that Jakobs's conception of the enemy, which is essentially based on an individual typology, is not tailored to the process of the Europeanisation of criminal justice systems. It is a conception focusing on the Nation State regarded as the political sovereign in matters of criminal law. Confronted with the European framework, it ignores systems under construction that go beyond nationally oriented criminal law. These systems are based on the European principle of mutual recognition. They are composed of different, new actors and they are the basis for other transnational regimes of cooperation in criminal matters. Their goal is not to exclude but to be informed. This goal renders Jakobs's enemy criminal law an outdated conception.

In the EU's area of freedom, security and justice, the principle of mutual recognition provided by Article 82 §1 TFEU is the cornerstone of European legislation. The European Arrest Warrant, administrative and penal sanctions as well as possible rules on obtaining and using evidence are guided by this principle. This has replaced the traditional structures of bilateral cooperation in criminal law matters and has implemented a unique framework of European judicial decisions [53].

It is a way to connect criminal justice systems and to establish independent rules outside the Nation State. These rules can be formal, reviewed by the European Court of Justice, but also informal. This informality changes the structure of European criminal proceedings. They do not focus on the typology of individual offenders but on systemic problems, *e.g.* how to cope with overloaded criminal justice systems [54]. The main issue is about finding a rational method to live with the lacunae in the framework of mutual recognition and to lighten the case load of European prosecutors and judges.

The actors in the EU's area of freedom, security and justice are increasingly intra- and interconnected. Europol's data files are regularly and systematically transferred to national police authorities. They are at the same time the heart of any information exchange at the European level. Eurojust is the coordinator for cross-border investigations. Within the framework of Eurojust, joint investigation teams are put together to create task forces composed of police, prosecutorial and judicial authorities [55]. Their objective is to enhance mutual cooperation. The European anti-fraud office OLAF interacts with national prosecutors to enforce European control

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[53] See the transversal and comparative study from L. Surano, G. Vernimmen and A. Weyembergh (eds.), *The future of mutual recognition of criminal matters in the European Union*, Bruxelles, Editions de l'Université de Bruxelles, 2009.

[54] See M. Wade, "The Power to Decide – Prosecutorial Control, Diversion and Punishment in European Criminal Justice Systems Today", in J.-M. Jehle and M. Wade, *Coping with Overloaded Criminal Justice Systems*, Heidelberg, Springer, 2006.

[55] See A. Herz, "The role of Europol and Eurojust in Joint Investigation Teams", in C. Rijken and G. Vermeulen, *Joint Investigation Teams in the European Union*, London, Springer, 2006, p. 159 and f.

on the abuse of European subsidies and grants [56]. The operations of all these actors are oriented towards the exchange of information about structures that are considered to be at risk. For preventive reasons their goals lie beyond individual offences but include keeping a check on risky environments that may lead to deviant behaviour.

Finally, looking at cooperation with third countries, above all the US, the exchange of information focuses on discovering both patterns of financial activities [57] and patterns of travelling [58] which might establish a risk for transnational security. This pro-active approach goes far beyond concrete or abstract danger. It enforces a permanent social control on societal activities that may provide an environment for terrorism. In cooperation with third countries, widespread and broad competences to process, store and exchange personal data have become the overall political goal [59]. This objective is now underlined by a new principle pronounced by the European Union. Personal data should be available for a better targeting of risky societal patterns [60]. The Data Retention Directive [61] illustrates the dramatic shift: neither reasonable grounds to believe that an offence has been committed nor a concrete or abstract danger of such an offence is needed to store the data. There are extensive new prevention strategies. If it has to be perfectly effective, all of us have to contribute to save security interests.

Two aspects follow from this short overview

First of all, criminal law has definitively outgrown the shoes of national criminal justice systems. A new structure has been established in the meantime. Some describe it as the structure of transnational cooperation. But looking at the new actors and institutions of the EU itself and taking into account new institutionalised transnational interactions between the EU and third countries, we should rather talk of a network structure overlapping the traditional criminal justice systems [62]. Within this network structure, the individual, be it as a citizen or as an enemy, does not even appear anymore. Systemic interests of social control absorb the orientation on individuals.

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[56] See C. Stefanou, S. White and H. Xanthaki, *OLAF at the crossroads – Action against EU Fraud*, Oxford, Hart, 2011, p. 77 and f.

[57] See Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (so-called "SWIFT-Convention"), *OJ*, no. L 195/5, 27 July 2010.

[58] Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record Data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, COM (2011) 32 final.

[59] See Mitsilegas' analysis in *EU Criminal Law*, Oxford, Hart, 2009, p. 235 and f.

[60] See G. Vermeulen, T. Vander Beken and S. Van Malderen, *Availability of law enforcement information in the European Union*, Antwerp, Maklu, 2005; see also M. Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der strafrechtlichen Zusammenarbeit der Europäischen Union*, Bonn, Bonn University Press, 2007.

[61] Directive 2006/24/EC, *OJ,* no. L 105, 13 April 2006, p. 54.

[62] See for example I. Augsberg, T. Gostomzyk and L. Viellechner, *Denken in Netzwerken*, Tubingen, Siebeck, 2009.

The categories of guilt and responsibility are disconnected from the individual and are replaced by an orientation towards collective risks [63].

Secondly, the availability of data and the exchange of information throughout the world illustrates that we are all, in Jakobs's words, both *citizens* and *enemies* [64]. This is not the direct consequence of a particular criminal policy towards enemies but the immediate and long term consequence of the idea of prevention as such [65].

B. Moral persons – conception in a transnational context

Criminal law has shifted into a transnational context and demands for legitimation models that are different from those referring to the political sovereignty of the Nation State. Moral persons acting under the regime of mutual recognition and submitted to transnational law enforcement strategies find themselves in an ambivalent situation. They are still regarded as subjects of a constitutional order but are at the same time submitted to transnational regimes full of unresolved conflicts of law. Thus, moral persons in a transnational context are falling between different stools. On a transnational level, societal expectations cannot be homogenously defined. In terms of a person's societal performance that they are expected to maintain, this can have a very different content in very different cultural environments. In Europeanised and globalised criminal law, we are all regarded as strangers who are interconnected within an unusual context. As this context does not have clear and precisely defined expectations, we have to presuppose the individual autonomy of a person as part of a reciprocal relationship for allowing reasonable crossborder interaction.

Therefore, in a transnational context, the moral person is a stranger with indivisible fundamental rights at whose core are the principles of freedom and human dignity. Strangers, travellers, asylum seekers and defendants enjoy the label of freedom as world citizens. This label lies beyond any concrete system reality. Violations of another person's rights can, of course, justify a sanction. The answer to infringements of the rule of law is the law and nothing else. Exclusion, however, will not be a feasible concept as there is no coherent system that you can be excluded from.

The European Court of Justice pronounced, in the *Kadi* and *Al Barakaat* cases [66], that the European protection of fundamental rights must be regarded as universal. Kadi had his funds frozen as he was considered to be a possible member of a terrorist organisation. This measure was unlawful. An already 'excluded enemy' regained his status as a moral person. These European judgments would not have been possible if Jakobs had been a member of the Chamber of the Court of Justice of the European Union. European criminal law and Jakobs's conception of 'enemy criminal law' are not compatible either in an empirical or in a normative sense.

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[63] See P.-A. Albrecht, *Kriminologie*, p. 111 and f.

[64] See also L. K. Sander, *Grenzen instrumenteller Vernunft im Strafrecht*, Frankfurt am Main, Peter Lang, 2007, p. 270 and f.

[65] See W. Naucke, Review of José Luis González Cussac, "Feindstrafrecht. Die Wiedergeburt des autoritären Denkens im Schoβe des Rechtsstaats", *Journal der Juristischen Zeitgeschichte*, 2008, p. 32 and f., at p. 34.

[66] *Kadi I*: CFI, 21 September 2005, Judgement T-315/01 and ECJ, 2 December 2008, Judgement C-402/05; *Kadi II*: CFI, 26 October 2010, T-85/09.

Risk prevention by means of criminal law
On the legitimacy of anticipatory offenses in Germany's recently enacted counter-terrorism law*

Ulrich Sieber

1. Introduction

A. The challenges of terrorism in the risk society

Terrorism gives rise to complex new *threats* in the modern risk society. Perpetrators make use of their enemies' legally existing infrastructures to carry out attacks. Fuel, fertilizer, chemical raw materials, airplanes, computer networks, and other everyday objects are turned into effective weapons in an asymmetric conflict. As a result, the logistics of terrorism are often simple and easily overlooked. The period of time between identifiable preparation and the actual commission of an attack is, in many cases, short. Thus, the time-frame within which security agencies must act in order to prevent terrorist attacks from taking place is frequently narrow. The scope of possible future threat-scenarios extends all the way to the deployment of biological or nuclear materials of mass destruction. Potential perpetrators act in organized groups as well as in loosely structured cells that are only tangentially influenced by information disseminated on the Web and by foreign training camps. Religiously-motivated suicide bombers are not effectively deterred by secular penalties. These new developments and threats account for the interest of security agencies, if they believe an attack is imminent, in intervening in the *run-up to* the consummation of the act and, when warranted in individual cases, in imposing liberty-depriving measures [1].

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* This paper is based on the advisory opinion of the author delivered at the hearing of the German Bundestag's Committee on Legal Affairs on the "Statute for the Prosecution of the Preparation of Serious Violent Offenses Against the State" on 22 April 2009. The original opinion was published in German in *Neue Zeitschrift für Strafrecht* (*NStZ*), 2009, p. 353-364. Special thanks to Emily Silverman for translation and invaluable editing assistance.

[1] On this point, see U. Sieber, "Grenzen des Strafrechts – Grundlagen und Herausforderungen des neuen strafrechtlichen Forschungsprogramms am Max-Planck-Institut für ausländisches

At the same time, the changed perception of risks on the subjective level as well as a fear of crime that does not accord with the actual (objective) security situation lead to an *increase in the need for security* on the part of citizens in the modern risk society [2], a development that creates a climate conducive to the creation of new criminal provisions and places security interests over liberty interests. Individuals and institutions tend to have irrational reactions to rarely occurring "dread risks". For example, studies show that in the aftermath of the attacks of September 11, 2001, large numbers of Americans chose to travel by car rather than by air because they thought they would be safer that way. More cars on the roads means more accidents, however, and the number of ensuing traffic fatalities far exceeded the number of fatalities in the airplanes hijacked on September 11 [3]. This example clearly shows that irrational human reactions to serious risks can lead to significant indirect damage (*i.e.*, damage brought about by the reactions of victims). The dismantling of civil liberties and constitutional guarantees – a result of the security policy pursued in the United States – is another example of indirect harm.

Given this background of new risks on the objective level, increased security needs on the subjective level, and the temptation to attract voters by pandering to security-related expectations, law-makers developing the security law of the future must avoid making mistakes that, despite the best of intentions, bring about more damage to the rule of law than benefits to security. Thus, intrusive measures designed to contribute to the prevention of terrorism must be subject to an *impact assessment* that includes the careful balancing of security and liberty interests.

B. The German "Statute for the Prosecution of the Preparation of Serious Acts of Violence Endangering the State" of 2009

The German "Statute for the Prosecution of the Preparation of Serious Acts of Violence Endangering the State" enacted in 2009 (hereinafter the "Statute") [4] responds to terrorist threats and the security needs of society primarily by creating *new criminal offenses*. These offenses include the criminalization of the preparation of serious violent offenses endangering the State, the establisment of contacts for the purpose of committing serious acts of violence endangering the State, and the

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und internationales Strafrecht", *Zeitschrift für die gesamte Strafrechtswissenschaft* (*ZStW*), 119, 2007, p. 22 and f., 37 and f., 45 and f. with additional references.

[2] H. Kury, M. Brandenstein and T. Yoshida, "Kriminalpräventive Wirksamkeit härterer Sanktionen – Zur neuen Punitivität im Ausland (USA, Finnland und Japan)", *ZStW*, 121, 2009, p. 192, 214 and f.; H. Schöch, "Kriminalpolitik in Zeiten komplexer Bedrohungsformen", in F. Lösel, D. Bender and J.-M. Jehle (eds.), *Kriminologie und wissensbasierte Kriminalpolitik*, Mönchengladbach, Forum Verlag Godesberg, 2007, p. 45 and f.

[3] G. Gigerenzer, "Out of the frying pan into the fire: Behavioral reactions to terrorist attacks", *Risk Analysis*, 26, 2006, 350.

[4] *Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten* (GVVG of 30 July 2009), published in Bundesgesetzblatt I 2437. See also Government draft, *Bundestags-Drucksache* (BT-Drs.) 16/12428 of 25 March 2009, identical with draft CDU/CSU and SPD, BT-Drs. 16/11735 of 27 January 2009. See also Bundesrat draft, *Bundesrats-Drucksache* (BR-Drs.) 16/7958 of 30 January 2008.

dissemination of relevant instructions. Excerpts from the three main offense definitions read as follows [5]:

§ 89a StGB

Preparation of a serious violent offense endangering the State

"(1) Whosoever prepares a serious offense endangering the State shall be liable to imprisonment from six months to ten years. A serious violent offense endangering the State shall mean an offense against life under Sections 211 or 212 or against personal freedom under Sections 239a or 239b, which under the circumstances is intended to impair and capable of impairing the existence or security of a State or of an international organization, or to abolish, rob of legal effect, or undermine constitutional principles of the Federal Republic of Germany.

(2) Subsection (1) above shall only be applicable if the offender prepares a serious violent offense endangering the State by

1. instructing another person or receiving instruction in the production or the use of firearms, explosives, explosive or incendiary devices, nuclear fuel or other radioactive substances, substances that contain or can generate poison, other substances detrimental to health, special facilities necessary for the commission of the offense or other skills that can be of use for the commission of an offense under Subsection (1) above,
2. producing, obtaining for himself or another, storing, or supplying to another weapons, substances, or devices, and facilities mentioned under no. 1 above,
3. obtaining or storing objects or substances essential for the production of weapons, substances, or devices and facilities mentioned under no. (1) above, or
4. collecting, accepting, or providing not unsubstantial assets for the purpose of its commission.

…

(7) The court in its discretion may mitigate the sentence (Section 49(2)) or order a discharge for the offense under this provision, if the offender voluntarily gives up the further preparation of the serious violent offense endangering the State, or averts or substantially reduces a danger caused and recognized by him that others will further prepare or commit the offense, or if he voluntarily prevents the completion of the offense. If the danger is averted or substantially reduced regardless of the contribution of the offender or the completion of the serious violent offense endangering the State prevented, his voluntary and earnest efforts to achieve that object shall suffice".

§ 89b StGB

Establishing contacts for the purpose of committing a serious violent offense endangering the State

"(1) Whosoever, with the intention of receiving instruction for the purpose of the commission of a serious violent offense endangering the State under Section 89a(2) no. 1, establishes or maintains contacts to an organization within the meaning of Section 129a, also in conjunction with Section 129b, shall be liable to imprisonment not exceeding three years or a fine.

(2) Subsection (1) above shall not apply if the act exclusively serves the fulfilment of lawful professional or official duties.

...

[5] Neither the reference to § 89a StGB (*Strafgesetzbuch*, Criminal Code) in § 138 para. 2 StGB nor the other amendments in the Statute (primarily procedural in nature) will be discussed. The English translation of the Statute as codified within the StGB – used here in slightly modified form – is by M. Bohlander; it is available on the Web site of the German Ministry of Justice. See http://www.gesetze-im-internet.de/englisch_stgb/index.html (last visited March 2012).

(5) If the degree of guilt is of a minor nature, the court may order a discharge for the offense under this provision".

§ 91 StGB

Encouraging the commission of a serious violent offense endangering the State

"(1) Whosoever

1. displays or supplies to another written material (Section 11(3)) which by its content is capable of serving as an instruction to the commission of a serious violent offense endangering the State (Section 89a(1)), if the circumstances of its dissemination are conducive to awakening or encouraging the willingness of others to commit a serious violent offense endangering the State,
2. obtains written material within the meaning of No. 1 above for the purpose of committing a serious violent offense endangering the State

shall be liable to imprisonment not exceeding three years or a fine.

(2) Subsection (1) no. 1 above shall not apply if

1. the act serves the purpose of citizenship education, the defense against anti-constitutional movements, arts and sciences, research or teaching, reporting about current or historical events, or similar purposes or
2. if the act exclusively serves the fulfilment of lawful professional or official duties.

(3) If the degree of guilt is of a minor nature, the court may order a discharge for the offense under this provision".

These offenses are designed to enable investigation authorities to intervene already during the preparation of terrorist attacks, even if only individual perpetrators can be identified and even if the requirements of § 30 StGB (attempted complicity) and § 129a StGB (forming a terrorist organization) are not fulfilled. Thus, the goal of the "prosecution" is not only the investigation of conduct carried out in preparation of terrorist acts, which could be undertaken by means of police and intelligence law; rather, a vital element of the security advantage aspired to by the Statute lies in arresting, trying, and convicting offenders and, ultimately, in sentencing them to prison.

As a result, the term "prosecution" as it appears in the title of the Statute aims less at atonement and retribution than at *prevention*, which the Statute seeks to attain by means of the additional ground for arrest based on the likelihood of repeated offending and by means of statutory punishment ranges that allow for the imposition of lengthy prison terms [6]. The aim of detaining potentially dangerous terrorist offenders by means of custodial sentences imposed for the criminally punishable act of preparation – detention that is, however, of preventive nature with regard to the consummation of the act and to additional attacks – is expressed as follows in the Statute's explanatory memorandum: "The grave threats posed in particular by Islamic terrorism necessitate the earliest possible intervention also of the criminal law. It would be difficult to explain why law enforcement authorities would initially have to refrain from arresting a person who had already engaged in concrete preparations for an attack (for example, obtained explosive materials in large quantities), simply because the stage of a punishable attempt had possibly not yet been reached, thus rendering a

[6] § 112a para. 1 no. 2 StPO (*Strafprozessordnung*, Code of Criminal Procedure), § 89a StGB.

conviction, should authorities choose to intervene, uncertain" [7]. The instruments of preventive detention foreseen by the Statute have also become a central issue in the efforts of other countries to prevent future attacks – for example, control orders in the UK [8] and the internment camp at Guantanamo – and have caused serious legal controversies.

Along with its goal of providing security benefits, preventive criminal law – which includes the authority to detain persons considered dangerous – poses a *categorical challenge* to the classical concept of criminal law, namely, criminal law as the protector of civil liberties: punishment for *past* wrongdoing is increasingly being replaced by prevention of *future* harm (traditionally a function of preventive police law). Thus, the preventive paradigm is leading criminal law away from its traditional goals and limits and turning it into a sub-discipline of a broader security law within which the distinctions between criminal law and police law threaten to blur [9]. Under the Statute, neutral, everyday activities may serve as objective nexuses for criminal law intervention when they are accompanied by certain intentions; under these circumstances, the activities become offenses punishable by up to ten years' imprisonment. The volatility of this development is apparent in the fact that preventive thinking combined with the unrestrained use of criminal law in the run-up to criminal acts beyond what is contained in the Statute could lead to an even further-reaching criminalization of offense-planning, up to and including even the punishment of mere thoughts. Thus, the Statute raises central questions regarding the limits of the criminal law and, with its new approach, has consequences far beyond the concrete legislation at issue.

C. The central questions

An assessment of the Statute requires the analysis of important and fundamental questions. A conception of the *legitimacy and limits of the new preventive criminal law* in the run-up to threatened harm is necessary. Thus, the first step taken here will be to address the three questions central to the Statute, questions that must be answered before the Statute can be evaluated.

- In light of the divergent approaches adopted abroad, the first question examines the options for alternative legal solutions: can the goals of preventive – even liberty-depriving – measures be better (or also) achieved by means of legal measures outside the criminal law than by means of criminal law?
- The second question addresses the aspired-to preventive "security criminal law": are the aforementioned, criminal law-based preventive measures in the run-up to criminal activity compatible with the aims and concepts of criminal law?
- The third question pertains to the legitimacy and limits of criminal law protection in the run-up to criminal activity: on what grounds and how early in the events

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[7] Bt-Drs. 16/12428 of 25 March 2009, p. 9.

[8] Prevention of Terrorism Act 2005 of 11 March 2005; on this point, see C. Walker, "Keeping control of terrorists without losing control of constitutionalism", *Stanford Law Review*, 59, 2007, p. 1395 and f.

[9] W. Hassemer, "Sicherheit durch Strafrecht", *Strafverteidiger* (*StV*), 2006, 326; U. Sieber, *ZStW*, 119, 2007, p. 34 and f.

prior to a violation of a protected legal interest or other actual harm can criminal law protection attach before a falsely-labeled police law for the prevention of danger ensues or a covert preventive security detention is created?

The results of the discussion (Part 2) of these three fundamental questions pertaining to "the criminal law of the risk society" make possible an evaluation of the Statute (Part 3). Part 3 also contains concrete suggestions as to how the legitimate goals of the Statute can be made more compatible with fundamental principles of criminal law and thus capable of withstanding challenges based on constitutional law.

2. Basic principles and their consequences

A. Alternative approaches

The challenges of terrorism briefly outlined above raise the question of whether the aim of the Statute to establish measures of preventive detention in the run-up to criminal activity could also be achieved – perhaps even more successfully – by means of regulations *outside the criminal law* rather than by means of the criminal law itself. The answer to this question falls squarely within the tenor of the Statute: given the current situation in Germany, the goal of establishing a means of preventive detention for the purpose of averting terror attacks can only be realized in a manner compatible with the rule of law if the instruments – and the restrictions – of the criminal law are utilized.

As a legal consequence of an international armed conflict, the *law of war* as used in the United States to combat terrorism enables the detention of enemy combatants and, in certain cases, the internment of civilians for security reasons. The treatment of persons who have been deprived of liberty is also regulated in the law of non-international armed conflict. This kind of armed conflict – at first international and then national – exists in the sense of international humanitarian law on the battlefield in Afghanistan. The Geneva Conventions do not, however, permit this conflict to be expanded into a "war", unlimited in time and space, against worldwide terrorism and all terrorists. The interpretation of the United States of international humanitarian law, according to which the newly defined "illegal combatant" is not entitled to the protections of this law, should also be rejected [10].

To be sure, *police law* – like *intelligence law* – can play a significant role in the surveillance and investigation of potential perpetrators. Preventive police law is not, however, suited for – sometimes long-term – detention in cases of danger, be it abstract or concrete: police custody under the police law of the German *Länder* requires a concrete and imminent danger and is limited in the various *Länder* to a maximum duration of two weeks [11]. An expansion of police custody or other form

[10] M. Sassòli, "Transnational Armed Groups and International Humanitarian Law", *Humanitarian Policy and Conflict Research Occasional Paper Series* (Harvard University), Winter 2006, no. 6; C. Kress, "Völkerstrafrecht der dritten Generation gegen transnationale Gewalt Privater?", in G. Hankel (ed.), *Die Macht und das Recht*, Hamburg, Hamburger Edition, 2008, p. 323 and f.

[11] *E.g.*, § 21 sen. 2 SOG (Law on Security and Order) (Lower Saxony); § 17 para. 2 sen. 2 POG (Law of police and regulatory authorities) (Rhineland-Palatinate); § 28 para. 3 sen. 5 PolG

of police law-based curtailment of liberty along the lines of English legislation would, without an announcement of derogation, violate Article 5 of the European Convention on Human Rights (ECHR) [12].

Measures available under the *laws concerning foreign nationals* are also not generally applicable for the objective stated above: Section 58a of the German *Aufenthaltsgesetz* (Residence Law) allows an order of deportation "against a foreigner on the basis of a prognosis supported by facts to avert a special danger to the security of the Federal Republic of Germany or a terrorist threat without previous notice of expulsion" [13]. If this order cannot be executed immediately, to enforce the deportation, the foreigner, in accordance with § 62 para. 2 no. 1a *Aufenthaltsgesetz*, may be taken into custody on the basis of a judicial order. This requires, however, that the deportation order be executed within three months. Attempts to extend the use of such provisions run up against human rights limits [14]. In addition, given the fact that they apply only to foreigners, they offer no viable alternative to criminal law – even in the States where denaturalization is a possibility. For example, under amendments made by the Immigration, Asylum and Nationality Act of 2006, British nationals can be deprived of their citizenship if the Secretary of State is satisfied that "deprivation is conducive to the public good". This represented a toughening up of previous provisions that permitted British nationals to be deprived of their citizenship only for acts "seriously prejudicial to the vital interests of the United Kingdom or an Overseas Territory" [15]. Even the preventive, police law-like provisions of the German *law of measures* (*Maßregelrecht*), located in the criminal code, cannot realize the goals of the Statute. Preventive detention under §§ 66 and f. StGB requires not only at least one pertinent triggering offense but also – as shown by numerous decisions of the Federal Constitutional Court – rigorous procedures to establish the prognosis of the offender [16]. Furthermore, a law of measures against dangerous terrorist offenders that is independent of the commission of a serious offense would be incompatible with the European Convention on Human Rights [17].

(Police Law) (Baden-Württemberg).

[12] House of Lords, Secretary of State v. JJ and others (2007) UKHL 45, 31 October 2007; ECtHR, *A. and others v. United Kingdom* (Appl. no. 3455/05), 19 February 2009.

[13] On this point, see A. Erbslöh, "Bestenfalls überflüssig – Überlegungen zur Abschiebungsanordnung (§ 58a AufenthG)", *Neue Zeitschrift für Verwaltungsrecht* (*NVwZ*), 2007, 159.

[14] See Article 5 para. 1 lit. f ECHR as well as ECtHR, *A. and others v. United Kingdom* (Appl. No. 3455/05), 19 February 2009; *Saadi v. Italy* (Appl. no. 37201/06), 28 February 2008.

[15] L. Zedner, "Security, the State, and the Citizen: The Changing Architecture of Crime Control", 13 *New Criminal Law Review* 379, 382, n. 10, 2010.

[16] E.g., *Bundesverfassungsgerichtsentscheidung* (BVerfGE) 109, 190 and f.; BVerfGE 109, 133 and f.; *Bundesverfassungsgericht* (BVerfG) *Neue Juristische Wochenschrift* (NJW), 2006, p. 3483 and f.

[17] ECtHR, *Guzzardi v. Italy* (Appl. no. 7367/76), 6 November 1980, paras. 102f.; *Jéčius v. Lithuania* (Appl. no. 34578/97), 31 July 2000, para. 50.

Similar constraints apply to *newly defined legal regimes*, such as "enemy criminal law" or "law of war", that are developing in various – equally vague – forms [18]; clearly, however, these regimes must all be rejected. In the course of an analysis of the criminal law system as a whole and its human rights protections, no benefit is to be had from establishing broad swaths of "private areas" that are not subject to criminal regulation and at the same time creating vague clauses to make way for an "enemy criminal law" or a "law of war-like preventive law" [19].

Thus, the following can be stated: except for armed conflict (which is narrowly defined by international humanitarian law), short-term preventive police measures (also narrowly defined), and measures of improvement and security located in the StGB, preventive liberty-depriving measures in the area of terrorism can, at this time, only be realized by means of the *criminal law*. The German legislature is thus acting correctly in not pursuing alternative liberty-depriving measures outside the criminal law.

B. Legitimacy of a "prevention-oriented criminal law"

The rejection of alternative, extra-criminal approaches to measures of preventive detention does not, taken alone, justify the criminal law model put forward by the new German statute. Instead, as shown in the introductory remarks, an evaluation must be undertaken of whether and to what extent prevention-oriented, criminal law-based deprivation of liberty in the run-up to criminal offenses is legitimate.

The answer to this second fundamental question is also positive and supports the approach taken by the Statute, with the proviso that the *constitutive requirements* and elementary guarantees of the criminal law be upheld in all criminal law interventions. In other words, the prevention of future crimes as aspired to by the Statute is only appropriate when undertaken in response to past wrongdoings that are attributable to blameworthy offenders. It is, however, not appropriate if undertaken as an exercise of purely preventive police law that has simply been labeled "criminal law".

The primary reason for the focus on this – narrow – preventive goal is as follows: The absolute goals of punishment (such as retribution and atonement) and the principle of culpability place an *upper limit* on the various criminal law-based modes of restraining liberty but do not provide them with a general constitutional legitimation. Constitutional legitimacy is provided by the relative goals of punishment, such as the prevention of future crimes [20].

These *preventive goals* include – as illustrated by § 2 sen. 2 *Strafvollzugsgesetz* (Law on the execution of criminal penalties) – not only the stabilization of the general

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[18] For a discussion of "law of war-oriented preventive law", see M. Pawlik, *Der Terrorist und sein Recht*, Munich, Verlag C.H. Beck, 2008, p. 38 and f., who characterizes war as a preventive tactic raised to the level of "existential monumentality" (p. 25).

[19] See G. Jakobs, "Kriminalisierung im Vorfeld einer Rechtsgutsverletzung", *ZStW*, 97, 1985, p. 750 and f.; M. Pawlik (n. 18, *supra*), p. 26 and f., 38 and f.

[20] See *Entscheidungen des Bundesgerichtshofs in Strafsachen* (BGHSt), 24, 40 (42); W. Hassemer, "Strafrecht, Prävention, Vergeltung", *Zeitschrift für Internationale Strafrechtsdogmatik* (*ZIS*), 2006, p. 268 and f.; C. Roxin, *Strafrecht AT*, vol. 1, 4th ed., Munich, Verlag C.H. Beck, 2006, § 3 margin no. 14.

awareness of norms (positive general prevention), a goal that dominates punishment theory, but also public deterrence (negative general prevention) as well as the impact on the individual criminal offender (special prevention). Special prevention, in turn, encompasses both the resocialization of the offender (positive special prevention) as well as the protection of the general public achieved by means of the offender's detention (negative special prevention). This is in accordance with the fact that the Federal Constitutional Court has recognized the use of custodial punishments as a means of preventing harm to the public [21].

While it is thus permissible to take security into consideration, doing so in the context of a purely preventive criminal law harbors *the danger of a lack of limits*. Preventive aspects could, for example, justify the imposition of security measures to prevent mere "thought crimes". Thus, the categorical limitation of the criminal law lies in the restriction of its application to culpably committed wrongdoing: prerequisite to the intervention of the criminal law is a past wrongdoing that is attributable to an offender who acted culpably. Taken together, the wrongfulness of the offense and the culpability attributable to the offender establish the – constitutionally supported and in § 46 para. 1 StGB anchored – upper limit of punishment [22].

As the preparation of offenses in the early planning stages bears a *smaller degree* of wrongfulness than an attempt (defined as the taking of steps that will immediately lead to the consummation of the offense) or the consummation of an offense, the legislature should not entertain exaggerated expectations of the effect on security of long-term custodial sentences imposed for preventive purposes on the occasion of a preparatory act. Insights from the field of criminology also show that negative special prevention has its limits if one does not wish – as is permissible in various foreign jurisdictions – to punish minor wrongdoing (*e.g.*, conspiracy) with long custodial sentences that are unjustifiable and incompatible with § 46 I StGB [23].

Punishment cannot be justified solely on the basis of the claim that the actor appears to be dangerous – even if the actor has engaged in readily apparent external conduct; rather, only a culpably committed, wrongful criminal offense attributed to the offender can be a triggering act for an assessment of dangerousness. The criminal law should not check the actor's thoughts but rather only the actor's externally perceivable actions. Thus, it is only legitimate as act-based criminal law and not as actor- or attitude-based criminal law – as illustrated by the nexus to an *act* expressed in Article 103 para. 2 GG (*Grundgesetz*, German Basic Law) [24].

It is in this limitation of the criminal law to culpably committed, criminally wrongful acts that the essential ground is found for the singular role described above

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[21] BVerfGE 45, 256; 64, 271.

[22] BVerfGE 45, 227; BGHSt 30, 116 f.; *Hassemer* (n. 20, *supra*), *ZIS*, 2006, p. 268 and f.

[23] On the limited degree of wrongfulness and blameworthiness associated with anticipatory offenses, see M. Pawlik (n. 18, *supra*), p. 28 and f., for information concerning empirical findings, see H. Kury, M. Brandenstein and T. Yoshida (n. 2, *supra*), *ZStW*, 121, 2009, p. 195 and f., 229.

[24] P. Rackow, *Neutrale Handlungen als Problem des Strafrechts*, Frankfurt am Main, Verlag Peter Lang, 2007, p. 114 and f.; C. Roxin (n. 20, *supra*), § 6 margin no. 1-2. For additional references, see n. 49, *infra*.

of the criminal law in the context of liberty-depriving measures characterized by socio-ethical condemnation. In addition, this unique role is also justified by the broader *protections and guarantees* that distinguish the criminal law from all other measures of State intervention. These guarantees include not only the limitation of criminal law to culpably committed wrongdoing but also the principle of act-based criminal law, the principle of clarity or void-for-vagueness doctrine as applied to criminal offense definitions, the prohibition of the *ex post* legislation of criminal offenses, the presumption of innocence, the principle "*in dubio pro reo*", the leadership by a neutral prosecuting authority of the criminal investigation, the strict requirements regarding judicial authorization, as well as numerous other constitutional and criminal procedural guarantees. In this context, for example, the relevance to the criminal law of activities carried out in the run-up to crime makes compulsory the leadership role of the office of the prosecutor over the police. These categorical requirements and protections are also a decisive substantive reason for why the preventive, liberty-depriving measures contained in the Statute must be located in the criminal law.

The "unique role" of the criminal law in the context of liberty-depriving measures that can be imposed on terrorist offenders determines not only the formal locus of these measures in the criminal law but also the *content* of the regulations, since the choice of a legal regime determines both the prerequisites for application of that regime as well as the guarantees it provides. For example, activities that justify preventive actions permitted by police law do not automatically justify the imposition of liberty-depriving measures that are available to the criminal law. Such measures can only be imposed if, among other things, the culpability requirements of the criminal law have been met. Thus, laws that permit intervention for preventive purposes cannot serve as the basis for repressive criminal law reponses – even if they have been labelled as criminal law [25].

Even if the constitutional dimension of substantive criminal law has not yet been sufficiently developed by the courts [26], criminal law categories correspond at least to some extent to the *constitutional criteria*. For example, the criminal law principle of culpability is constitutionally recognized, and the constitutional principle of proportionality limits all criminal law-based interventions [27]. Thus, it is unlikely that the European Court of Human Rights and the German Federal Constitutional Court would accept the circumvention of their jurisprudence concerning Article 5 ECHR or the constitutional prerequisites for preventive detention simply because the

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[25] On the commitment to categorical prerequisites of criminal law, see C. Mylonopoulos, "Internationalisierung des Strafrechts und Strafrechtsdogmatik – Legitimationsdefizit und Anarchie als Hauptcharakteristika der Strafrechtsnormen mit internationalem Einschlag", *ZStW*, vol. 121, 2009, p. 69 and f., 92; M. Pawlik (n. 18, *supra*), p. 39 and f.; U. Sieber, "Blurring the Categories of Criminal Law and the Law of War – Efforts and Effects in the Pursuit of Internal and External Security", in S. Manacorda and A. Nieto Martín (eds.), *Criminal Law Between War and Peace*, Cuenca, Universidad de Castilla-La Mancha, 2009, p. 35-79.

[26] For a recent decision on point, see BVerfGE 120, 241.

[27] For an overview of the constitutional basis of criminal law, see I. Appel, *Verfassung und Strafrecht*, Berlin, Duncker & Humblot, 1998; O. Lagodny, *Strafrecht vor den Schranken der Grundrechte*, Tübingen, Mohr Siebeck Verlag, 1996.

corresponding offenses triggering intervention are labeled as criminal law and placed in the criminal code. As the Federal Constitutional Court has held that a computer-aided "dragnet" investigation (*Rasterfahndung*) – a comparatively small intrusion into an individual's right to informational self-determination – is impermissible in cases involving merely abstract dangers [28], it would seem likely that, in situations displaying similar dangers, the court would find against criminal provisions providing for up to ten years' incarceration if they are not based on criminal wrongdoing.

Thus, the question becomes more important of whether the criminal offense definitions contained in the Statute embody criminal wrongdoing or whether they are simply an expression of security-based law. This leads to the third fundamental question mentioned above, namely, the question as to the *legitimacy of and limits on criminal offenses* in the run-up to harm: specifically, to what extent and, most importantly, on what basis and in what case-scenarios can criminal law-based protection be "preponed" to the run-up to harm or – in the terminology of the criminal law – activated prior to the causation of harm to a protected legal interest [29].

C. The legitimacy of anticipatory offenses

1. Basic principles

According to the dominant view in criminal law, criminal wrongdoing is characterized primarily by the harm to or endangerment of *protected legal interests*, that is, of especially important and vulnerable goods or "functional units" of the individual or the community (*Rechtsgüter*) [30]. In order for wrongdoing to be criminally punishable, another additional criterion must be fulfilled. There must be a special relationship or *offense structure* (*Deliktsstruktur)* between the punishable conduct of the offender and the protected legal interest: the punishable conduct must create a condemned and forbidden risk to the protected legal interest that is attributable to the offender [31].

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[28] BVerfGE 115, 363and f.

[29] "Prepone" is defined in the Oxford English Dictionary as: "To bring forward to an earlier time or date. Opposed to *postpone*".

[30] On the concept of the "Rechtsgut", see W. Hassemer and U. Neumann, in U. Kindhäuser, U. Neumann and H.-U. Paeffgen (eds.), *Nomos Kommentar*, Baden-Baden, Nomos Verlag, 3rd. ed. 2010 – prior to § 1 margin no. 108 and f.; C. Roxin (n. 20, *supra*), § 2 margin no. 1-122. For different approaches, see, *e.g.*, G. Jakobs, *StrafR AT*, 2d ed., Berlin, New York, de Gruyter, 1993, Section 2 margin no. 1-6; M. Köhler, *Strafrecht AT*, Berlin, Heidelberg, Springer, 1997, p. 22 and f.

[31] For a discussion of the "Rechtsgut", see C. Roxin, "Das strafrechtliche Unrecht im Spannungsfeld von Rechtsgüterschutz und individueller Freiheit", *ZStW*, 116, 2004, 931. See also W. Frisch, "Faszinierendes, Berechtigtes und Problematisches der Lehre von der objektiven Zurechnung des Erfolgs", in B. Schünemann, H. Achenbach, W. Bottke, B. Haffke and H.-J. Rudolphi (eds.), *Festschrift für Claus Roxin* (hereafter: Roxin-FS), Berlin, New York, de Gruyter, 2001, p. 232 and f. For discussions of *Deliktsstruktur*, see the papers in R. Hefendehl, A. von Hirsch and W. Wohlers (eds.), *Die Rechtsgutstheorie*, Baden-Baden, Nomos Verlagsgesellschaft, 2003, in particular A. von Hirsch and W. Wohlers, "Rechtsgutstheorie und Deliktsstruktur – zu den Kriterien fairer Zurechnung", p. 198 and f., and W. Frisch, p. 227 and f. See also the following footnotes.

Consequently, an *"anticipatory" criminal law-based protection* that goes beyond the injury to protected legal interests of the individual can be justified on the basis of two lines of argument [32]: First, criminal wrongdoing can be recognized as occurring already when *legal interests are endangered* by risky conduct and not only later when injury actually occurs. In the case of these so-called "endangerment offenses", the criminally punishable, harmful act is repositioned and the act itself rather than the result is emphasized. Second, *collective legal interests* can be recognized that only indirectly protect individual interests (also referred to as supraindividual legal interests, social legal interests, and intermediate legal interests). These collective legal interests lead to an anticipatory protection by shifting the legal interest in the direction of the injurious conduct; in this context, the protection of the individual legal interest is only the motivation of the legislature for the independent protection of collective legal interests (primarily on the basis of individualistic, monistic theories of legal interests). The two justifications of punishing the creation of risks to individual legal interests and of punishing the creation of harm to social legal interests are to some extent functionally equivalent and can be combined.

The following remarks, which pay special attention to the criminal offenses contained in the Statute, first examine the "preponing" of criminal liability as achieved by means of endangerment offenses. Subsequently, anticipatory protection by means of supraindividual legal interests will be addressed.

2. "Preponing" criminal liability by means of endangerment offenses

a) Legitimation and systematization

The requirement that all punishable conduct represent a *condemned and forbidden risk* to a protected legal interest *that is attributable to the offender* is a consequence of the aforementioned definition of criminal wrongdoing [33]. This linkage of criminal "preponement" to fundamental categories of criminal law provides the grounds for establishing the legitimacy of all endangerment offenses on the basis of generally applicable criteria, namely, criteria that can be tailored to the special requirements of each individual type of endangerment offense. In the course of evaluating conduct prohibited by endangerment offenses, the criterion of *prohibited risk* – central to such offenses – makes it possible to engage in a balancing test involving the value of the protected legal interest and the threat to it, on the one side, and the competing liberty interests restricted by the prohibited act, on the other. Thus, when evaluating the anticipatory offenses contained in the Statute, both the restriction of the new criminal offenses to the most serious crimes as well as the limited degree of danger to these legal interests posed by preparatory conduct in the planning stages are relevant from the perspective of security. On the other side, namely, from the perspective of restrictions on liberty interests, it is necessary to differentiate: the "liberty interest" in the collection of assets as addressed in § 89a para. 2 no. 4 StGB is doubtless of greater

[32] See n. 30, 31, *supra*, and n. 64, *infra*.

[33] See n. 31, *supra*. For one approach to the requirement of a disapproved, prohibited danger, see C. Roxin, *ZStW*, 116, 2004, 931; for another approach, see W. Frisch, *Roxin-FS* (n. 31 *supra*), p. 232 and f.

import than the interest in the collection of radioactive materials encompassed by § 89a para. 2 no. 2 StGB.

Causing a prohibited risk to a legal interest is not sufficient, however, to establish criminal wrongdoing. In the case of mere *endangerment* of legal interests, an additional criterion of legitimation is necessary to establish punishable wrongdoing – one whose basic principles have not yet been clarified in the criminal law literature [34]. Something more than just the attribution of the danger to the offender's sphere of responsibility is required. Since punishment is distinguishable from other sanctions primarily in the ethical disapproval associated with it, another justification – as a functional equivalent to harm causation in the context of result crimes – is necessary as to why the offender's conduct is condemned and punishable despite the lack of harm to the object of the offense or to a legal interest. The attribution of criminal responsibility and the legitimacy of criminal law are based on different principles than public nuisance liability (police law) or civil anti-trust law.

The additional *criteria necessary to establish the legitimacy* of endangerment offenses are categorized and understood by different authors in different ways [35]. The approach presented here is based on the grouping of offenses according to their attributes of wrongfulness. Thus, the following discussion will distinguish between *three major types* of endangerment offenses, each with its own criteria of legitimacy: In the first group, the "objective danger-creating offenses", the danger is based primarily on the objectively dangerous situation that the offender creates – intentionally or negligently – but no longer controls (below b). The second group deals with "planning offenses". Here, in contrast, the danger stems from the offender's intention – which is documented by an external manifestation – to commit an offense (below c). The third group involves "cooperation offenses" and is characterized by a combination of the two foregoing attributes, namely, the decision to commit an offense and the objective manifestation of the decision, with the – danger-increasing – participation of more than one offender (below d).

b) Endangerment through the creation of uncontrolled, objectively dangerous situations

Existing academic discussion of endangerment offenses has concentrated primarily on offenses involving *dangerous situations* that are caused by the offender, that are *objectively identifiable*, and that require intention or negligence – as defined by general principles of criminal law – on the part of the offender. Individual scholars categorize endangerment offenses according to their own precepts, with no consensus as to systematization or conceptualization [36]:

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[34] See W. Frisch (n. 31, *supra*), in Hefendehl *et al*. (eds.), p. 222 and f.

[35] See W. Frisch, *Tatbestandsmäßiges Verhalten und Zurechnung des Erfolgs*, Heidelberg, Verlag C.F. Müller, 1988, p. 230 and f.; R. Hefendehl, *Kollektive Rechtsgüter im Strafrecht*, Köln, Heymanns Verlag, 2002, p. 147 and f.; W. Wohlers, *Deliktstypen des Präventionsstrafrechts*, Berlin, Duncker und Humblot, 2000, p. 281 and f.; F. Zieschang, *Die Gefährdungsdelikte*, Berlin, Duncker und Humblot, 1998, p. 52 and f.

[36] See references at n. 35, *supra*.

(1) The so-called *concrete endangerment offenses* require a concrete danger to a specific protected object (*e.g.*, danger to "life or limb of another person or property of significant value belonging to another" in the context of "endangering road traffic" under § 315c StGB). In contrast, the "*abstract endangerment offenses*", the "*abstract-concrete endangerment offenses*", and/or the so-called *capability offenses* (*Eignungsdelikte*), *i.e.*, offenses that criminalize conduct capable of causing a particular harm, involve the general dangerousness of the act and the likelihood that harm will be caused (*e.g.*, drunk driving under § 316 StGB). For these offenses, legitimacy and grounds for criminalization are based primarily on the fact that the offender has created a dangerous situation, has "released it into the world" in an uncontrolled state, and has left up to chance whether the endangered object or legal interest will in fact be harmed: it does not, for example, exonerate the offender in a case of § 315c StGB that his or her dangerous driving causes no damage, thanks to the successful defensive maneuver of an oncoming vehicle. The fortuitous outcome changes nothing with regard to the condemnation of the offender's conduct [37].

(2) Special problems arise when the danger and the potential harm to a legal interest are not a result of the offender's conduct alone but rather arise due to a combination of the offender's conduct and the *independent criminal acts of a third person or persons*. This type of situation can arise, on the one hand, in so-called cumulation cases in which, for example, an offender releases certain substances into a waterway, an action that, taken alone, would not pose a danger to the protected legal interest, but, in combination with similar actions undertaken by others leads to substantial pollution of the waterway. In the context of "*cumulative offenses*", the claimed criminal wrongfulness of the minimally harmful conduct may be justified under certain circumstances on the basis of the fact that the protected legal interest would be harmed if the same conduct were to be undertaken by numerous persons. The offender should not escape liability as a "free rider" for actions that must be prohibited for the rest of society in order to prevent the harm that – due to the cumulative effects of the activity – would otherwise result [38].

(3) A third subgroup of endangerment offenses, offenses characterized by the creation of objective danger, confronts the difficult problems associated with *independent, illegal acts committed by third-parties*. These so-called *affiliated offenses* (*Anschließungsdelikte*) [39] involve an actor providing a third person with potentially dangerous objects (such as weapons) or information (*e.g.*, how to use weapons), which are then used by this third person to commit an offense. The principle of personal

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[37] W. Wohlers (n. 35, *supra*), p. 286.

[38] See L. Kuhlen, "Umweltstrafrecht: Auf der Suche nach einer neuen Dogmatik", *ZStW*, 105, 1993, 716; W. Wohlers (n. 35, *supra*), p. 318 and f.; critical W. Frisch (n. 31, *supra*), in Hefendehl *et al.* (eds.), p. 235 and f.

[39] The term used here emphasizes the necessary affiliated nature of the conduct of another person and should not be confused with the so-called connected or "adhering" offenses (*Anschlussdelikte*) of §§ 257-261 StGB. W. Wohlers (n. 35, *supra*), p. 328, refers to these offenses as "preparatory offenses" (*Vorbereitungsdelikte*), a term that should, however, be reserved for the offense group dealt with at point c), *infra*.

responsibility vis-à-vis the third-party "affiliated" offender [40] and the principle of reliance (*Vertrauensgrundsatz*) [41] argue against the attribution of the illegal affiliated offense to the original actor. In many cases, the exploitation by an affiliated offender for criminal purposes of the original actor's conduct cannot be foreseen, especially if the original actor's conduct is neutral, that is, noncriminal (*e.g.*, selling a bread knife in a department store). In the case of conduct with a clear relationship to criminal activity, however, special grounds for attribution and legitimacy are possible [42]. These play a role when the actor violates a *duty of care* designed to prevent illegal affiliated conduct (*e.g.*, in the context of weapons law), as when the object provided or the information delivered can *only be used (or is used almost exclusively) for illegal purposes* or is *especially dangerous*. The attribution of the wrongful third-party conduct to the original actor is also unproblematic if the original actor and the affiliated offender collude with one another, if the conduct of the original actor displayed *specific characteristics of incitement* – as in the case of public incitement to crime under §§ 111, 130a StGB – or when the original actor knows for certain that his or her conduct supports an illegal affiliated offense [43]. The methods of making available written material that can serve as incitement to a serious act of violence endangering the State listed in § 91 StGB belong to this category [44].

c) Endangerment caused by the planning of illegal activity

The general literature tends to neglect a second group of "endangerment offenses" that are referred to in Anglo-American criminal law as inchoate offenses and that are an important part of the new Statute. The endangerment of the legal interest in the context of these "*planning offenses*" (*Planungsdelikte*) – also known as "attempt and preparatory offenses" or "endangerment offenses with the actor's supplementary internal processes" [45] – has less to do with an externally perceivable, objective danger caused by the offender and more to do with endangerment due to the subjective intentions, plans, or other notions of the offender. These plans must, however, be manifested objectively in a criminal act (whose connection to wrongfulness will be

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[40] On this point, see H. Schumann, *Strafrechtliches Handlungsunrecht und das Prinzip der Selbstverantwortung der Anderen*, Tübingen, Mohr Siebeck Verlag, 1986.

[41] See, generally, G. Duttge, *Zur Bestimmtheit des Handlungsunwerts von Fahrlässigkeitsdelikten*, Tübingen, Mohr Siebeck Verlag, 2001, p. 468 and f. with additional references.

[42] *BGH* NStZ 2000, 34; *BGHSt* 46, 107; *BGH* NJW 2001, 2409; H. Kudlich, *Die Unterstützung fremder Straftaten durch berufsbedingtes Verhalten*, Berlin, Duncker und Humblot, 2004, p. 439 and f.

[43] See G. Duttge, "Vorbereitung eines Computerbetruges: Auf dem Weg zu einem 'grenzenlosen' Strafrecht", in B. Heinrich, E. Hilgendorf, W. Mitsch and D. Sternberg-Lieben (eds.), *Festschrift für Ulrich Weber* (hereafter: Weber-FS), Bielefeld, Gieseking Verlag, 2004, p. 285 (294 and f.); A. von Hirsch and W. Wohlers (n. 31, *supra*), in Hefendehl *et al*. (eds.), p. 204 and f.

[44] For more on this point, see 3.C, *infra*.

[45] Crimes with an "actor's supplementary internal processes" refer to offenses that not only require the perpetrator's *mens rea* with respect to the objective elements of crime but demand an additional element of intent (especially with respect to certain aims of the crime).

discussed in detail below) in order to prevent criminalizing mere "evil thoughts" within the *forum internum* of the offender. Unlike the first group mentioned above, namely, the group of endangerment offenses defined (primarily) in terms of objectivity, the offender's intent in these cases goes beyond his or her objectively realized conduct.

(1) *Attempt* is correctly considered part of this group of offenses [46]. With regard to the subjective requirements of the offense, a criminal attempt requires the decision to commit a – particular, concrete! – crime. As far as the objective requirements of the offense are concerned, to be guilty of criminal attempt, the offender must be on the verge of taking steps to realize the crime on the basis of the offender's offense plan, thereby manifesting his or her determination to carry out the offense and his or her dangerousness (in the case of "possible" attempts, this typically means causing a concrete threat to the object protected by the offense or to the protected legal interest). The objective requirement of criminal attempt as defined in § 22 StGB, namely, the imminent taking of steps toward realization of an offense, not only prevents the criminalization of purely subjective offense planning and evil thoughts; rather, at the same time it illustrates the non-punishability of mere offense preparation. Thus, preparatory activities such as scoping out the crime location, procuring the weapon, traveling to the crime location, and lying in wait for the victim usually do not suffice for attempt liability. As a rule, offense planning is not criminalized because in the planning stage the offender must still overcome the last of his or her inhibitions toward the offense (if he or she has them), and a relevant threat to the object protected by the offense or to the protected legal interest ensues only when the offender is on the verge of taking steps to realize the offense.

(2) For some offenses, however, criminal law protection is "preponed" to preparatory activity. In such cases, punishability – in contrast to instances of attempt liability – attaches early, long before the offender reaches the stage of being on the verge of taking steps leading to the realization of the offense.

For the offenses created by the new Statute, this "preponement" of punishability by dint of preparatory offenses is of central importance. Like attempt, these offenses require the intention to realize the offense, but – unlike attempt – a step toward commission taken in the early planning stage will suffice, as will, in some circumstances, an offender's not entirely concrete vision of the offense.

The legislature frequently uses the (objective) concept of "*preparation*" (*Vorbereiten*) to express the subjective side of these offenses, as, for example, in the preparation of a war of aggression (§ 80 StGB), an undertaking of high treason (§ 83 StGB), the counterfeiting of money or postage stamps (§ 149 StGB), data espionage (§ 202c StGB), human trafficking (§ 234a StGB), computer fraud (§ 263a StGB), falsification of identity documents (§ 275 StGB), and data tampering and computer

[46] Another view considers attempt punishable not because of the danger it poses but rather (also) because of the impression and bad example caused by the offender. For a discussion of the justification of the criminal punishment of endangerment, see H. J. Hirsch, "Vorbereitung eines Computerbetruges: Auf dem Weg zu einem "grenzenlosen" Strafrecht", in C. Roxin-FS (n. 31, *supra*), p. 716 and f.; see also C. Roxin, *Strafrecht AT*, vol. 2, 2003, § 29 margin no. 10-24.

sabotage (§§ 303a and 303b StGB). Any form of intent (including *dolus eventualis*) will satisfy the "preparation" requirement of these offenses [47]. This group of preparatory offenses also includes the preparation of a serious violent offense endangering the State under the new § 89a StGB, for which, on account of the wording of the provision and an analysis of the structurally similar preparatory offenses, *dolus eventualis* with respect to the preparation of an attack could also be considered sufficient [48].

Tougher requirements with regard to the level of mental fault apply (but the demands with regard to the manifestation of preparation might be less stringent) when the legislature makes use of the subjective concept of "preparation" (in order to prepare) – "*zur Vorbereitung*" the main offense, as in the cases of the preparation of explosion or radiation offenses (§ 310 StGB) or of an attack on air or maritime traffic (§ 316c StGB). The same is true when the law describes conduct (especially dangerous conduct) that the offender must commit "in order to" ("*um... zu*") achieve the illegal goals established in the offense definition. This is the case, for example, in the offense prohibiting the acquisition of a State secret "in order to" betray it (§ 96 StGB) and the offense prohibiting certain actions involving an insured object "in order to" commit insurance fraud (§ 265 StGB). This is also true when the offense definition requires an "intention" ("*Absicht*") to commit a certain offense. This approach to offense definitions was taken in the new § 89b StGB: "Entering into relationships in order to commit a serious act of violence endangering the State". This provision encompasses the establishing of contact with a terrorist organization as defined in § 129a StGB "with the intention of obtaining instruction in the commission of a serious act of violence endangering the State under § 89a para. 2 no. 1".

Since these offenses "prepone" punishability to early phases of the planning stage and replace objective offense elements with subjective attitudes, their legitimacy is open to two – interrelated – criticisms: that of *attitude-based criminal law* and that of the *lack of an attributional connex*: The first point of criticism is that the recognition in *subjective* plans of a threat to a protected legal interest is impermissible because mere plans are at issue here. These offenses, so the claim, are nothing other than the punishment of mere thoughts and the criminalization of the individual's private space, an impermissible actor- and attitude-based criminal law. The second point of criticism is that any threat or danger posed by *objectively* defined, act-related conduct "preponed" to early phases of the planning stage would be, at most, minimal. As criminalization is "preponed" to ever earlier stages, the actor, so goes the argument, may have inhibitions regarding the criminal act that have yet to be overcome, and the possibility still exists that the actor will change his or her mind about committing the offense. The argument continues: since the actor must still make additional decisions

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[47] On the subject of *dolus eventualis*, see A. Schönke, H. Schröder (eds.), *Strafgesetzbuch, Kommentar*, 28th ed., München, Beck Verlag, 2010, § 80 margin no. 8; § 83 margin no. 9; § 149 margin no. 8 (*Sternberg-Lieben*); § 234a margin no. 14 (*Eser/Eisele*); § 275 margin no. 5a (*Cramer/Heine*); § 303a margin no. 9 and § 303b margin no. 14 *(Stree/Hecker)*.

[48] *Dolus eventualis* need not necessarily be eliminated as an option simply because the violent conduct required by para. 1 must be "intended to and capable of" endangering the State. See BGHSt 46, 252. For a discussion of the intent requirements of § 89a StGB, however, see directly following remarks.

regarding the commission of the target offense and/or since the consummation of the attack is still dependent upon the activities of third persons, the planned violent act cannot be attributed to the original actor as punishable wrongdoing [49].

Criticisms of the criminalization of mere thoughts as well as related criticisms of actor- and attitude-based criminal law are correct since a justification of punishment on purely subjective grounds would be impermissible and in the case of the criminalization of the human *forum internum* would also be unconstitutional as an intervention in the core area of private conduct. These criticisms do not apply, however, when the offense definitions at issue – for example, various older preparatory offenses in the StGB as well as those stemming from the new statute – in addition to their subjective requirements also require objective, offense-related conduct with which the offender emerges from his or her *forum internum* or private internal area, enters the external world, and causes a danger there [50]. The combination of an objectively manifested act and a more far-reaching subjective plan can thus suffice to legitimate criminalization.

The legislature can respond to the issue raised in the second point of criticism, namely, the reversal of the decision to commit an offense, as an "abandonment" of a plan to commit an attack by including – as it did in the new § 89a(7) StGB – an "active remorse" provision. The *possibility* that an offender will give up an illegal plan to commit an offense does not reduce the original threat to the point where a relevant and attributable risk no longer exists. In any event, a significant level of danger exists, as a rule, when the offender acts intentionally or knowingly with regard to the attack, and the goal of his or her planning is to inflict serious damage. The same is true when the offender does not seek to realize a crime of his or her own but rather deliberately or knowingly supports the crime of another. These kinds of planning can be proven by means of covert investigation measures employed in the area of terrorism. The condemnation of the creation of risk can be supported by these aggravated intent requirements in combination with an objectively manifested preparatory act even if, at a later point in time, the offender cannot carry out the violent act and as a result there is no injury to the protected legal interest.

Thus, the lack of "proximity to the attack" in the planning stage, the intermediate steps that are still necessary, and the possibility of the renunciation of the plan to commit the crime can be compensated for to some degree – as shown in the balancing process outlined above – by aggravated intent and risk requirements [51]. The

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[49] See K. Gierhake, "Zur geplanten Einführung neuer Straftatbestände wegen der Vorbereitung terroristischer Straftaten", *ZIS*, 2008, 402; M. Pawlik (n. 18, *supra*), p. 35 and f.; T. Walter, "Der Rechtsstaat verliert die Nerven. Zum Referentenentwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren Gewalttaten (RefE)", *Kritische Justiz* (*KJ*), 2008, 446 as well as the references at n. 24, *supra*.

[50] The expansion of the *forum internum* and of the punishment-free private sphere is taken too far in G. Jakobs, *ZStW*, 97, 1985, p. 753 and f., and M. Pawlik (n. 18, *supra*), p. 27 and f. On this point, see also n. 19, *supra*.

[51] On the effects of the interactions of objective and subjective act-elements on the condemnation of conduct, see H. Kudlich, "Objektives und subjektives Handlungsunrecht beim Vorsatzdelikt – zugleich Überlegungen zum Verhältnis zwischen Vorsatz- und

prerequisites and results of such a "compensatory model" with minimum subjective and objective requirements can be illustrated on the basis of the corresponding offense definitions in the Statute:

As far as some of the aforementioned preparatory offenses are concerned, the prohibited acts – or their more precise interpretation in the case law – pose a *significant threat* to valuable protected legal interests. This degree of – objectively clear – wrongfulness is present in many of the prohibited acts introduced in § 89a StGB that are associated with firearms, explosives, and radioactive substances. Thus, many of the prohibited acts clearly fulfill the abovementioned general requirements of criminal risk creation for important protected legal interests and – even without the requirement of preparatory intent – are already punishable.

In contrast, from the perspective of punishable risk creation and also from the perspective of proof, those offense alternatives of the Statute are problematic in which a "preponement" to the offender's early offense planning stages is combined with a neutral everyday activity that exhibits *no objective link to a prohibited activity and no objectively measurable threat level* [52]. The subjective offense element does not limit nor does it concretize wrongfulness in these cases, rather it creates it. This cannot be justified especially when a neutral act constituting the offense is only an opportunity to treat a subjective idea as a criminal act. While this kind of combination does not go far enough to be labeled thought crime, it comes uncomfortably close to doing so [53].

Offense definition alternatives should be viewed especially critically if, on account of their vagueness, the extent to which they apply to everyday activities is unclear. For example, it is not sufficiently clear whether the collecting of assets as described in the new § 89 a para. 2 no. 4 StGB applies only to the collecting of donations or whether it applies to the accumulation of savings as well. The English-language version of the

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Fahrlässigkeitsunrecht", in L. Kotsalis, N. Chorakis, C. Mylonopoulos and I. Giannidis (eds.), *Theorie und Praxis, Festschrift für Anna Benakis*, Athen, Sakkulas, 2008, p. 265 and f.; P. Rackow (n. 24, *supra*), p. 121 and f.

[52] For another critical voice, see H. Radtke, M. Steinsiek, "Bekämpfung des internationalen Terrorismus durch Kriminalisierung von Vorbereitungshandlungen? – Zum Entwurf eines Gesetzes zur Verfolgung der Vorbereitung von schweren Gewalttaten (Referentenentwurf des BMJ vom 21.4.2008)", *ZIS*, 2008, 388. The German criminal law does, however, recognize as punishable acts whose only specific, objective relationship to the offense lies in the subjective view of the offender (*e.g.*, certain constellations of attempt or neutral acts of aiding and abetting). See H. Kudlich (n. 42, *supra*), p. 458 and f.; P. Rackow (n. 24, *supra*), p. 94 and f.; W. Wohlers, "Gehilfenschaft durch "neutrale" Handlungen – Ausschluss strafrechtlicher Verantwortlichkeit bei alltäglichem bzw. berufstypischem Verhalten?", *Schweizerische Zeitschrift für Strafrecht* (*SchwZStr*), 117, 1999, p. 433 and f.

[53] For criticism of the Statute on this point, see O. Backes, "Der Kampf des Strafrechts gegen nicht-organisierte Terroristen", *StV*, 2008, 658; R. Deckers and J. Heusel, "Strafbarkeit terroristischer Vorbereitungshandlungen – rechtsstaatlich nicht tragbar", *Zeitschrift für Rechtspolitik* (*ZRP*), 2008, 171; K. Gierhake (n. 49), *ZIS*, 2008, p. 400 and f.; H. Radtke, M. Steinsiek (n. 52, *supra*), *ZIS*, 2008, 387, 392 and f.; B. Weisser, "Über den Umgang des Strafrechts mit terroristischen Bedrohungslagen", *ZStW*, 121, 2009, 154. See also n. 24, *supra*.

United Nations Security Council resolution upon which the provision is based [54] can be understood as referring to the collecting of donations. The English Terrorism Act of 2000 shows, however, that a broader regulation, one that also covers the accumulation of assets (savings), is possible [55]. Under this interpretation – which should be rejected – a youth who decided to begin saving money and to use the accumulated savings to become a terrorist after a few years would be punishable.

These thoughts serve as the basis of a more precise definition of the criteria that legitimate the "preponement" of attempt liability to include the so-called "preparatory offenses" [56]. The preparatory offenses found in the StGB, including those introduced by the Statute, indicate that for these offenses the legislature sees grounds for "preponement" in the extreme dangerousness of the target offense and in the necessity of early intervention in order to prevent such acts [57]. This risk assessment does not, however, suffice to justify wrongfulness (discussed above), as wrongfulness for these preparatory offenses requires additional functional equivalents to the "imminent taking of steps" found in the traditional definition of criminal attempt. These functional equivalents include a clear, objective manifestation of the preparation of the act, a special creation of danger, and special mental fault elements.

– Due to the need to justify the designation of an act as wrongful, the need to keep a critical distance from "thought crime", and the need to have clear evidence of the preparatory offense, the "preponement" of attempt liability must establish the following requirements on the objective level of the prohibited act: First, there must be a clear relationship between the prohibited act and the offense, a requirement that cannot be fulfilled by harmless, everyday activities. A clear, objective manifestation of the decision to prepare, one that confirms the decision in an objectively recognizable way, is necessary – such as, for example, the manifestation of the appropriation in the offense of misappropriation [58]. This kind of relationship to an offense can be seen, for example, if an actor acquires certain raw materials in an amount that – absent a plan to carry out an attack – makes no sense for his or her private or professional life [59].
– In addition, a significant danger must be created, a danger that can be assessed objectively on the basis of the offense plan (just like the "imminent taking of steps" in the attempt context). The restriction on liberty associated with "preponement"

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[54] See n. 74, *infra*.

[55] Sections 15-18 Terrorism Act 2000 of 20 July 2000.

[56] On this point, see I. Anastasopoulou, *Deliktstypen zum Schutz kollektiver Rechtsgüter*, München, C.H. Beck Verlag, 2005, p. 252 and f.; G. Jakobs, *ZStW*, 97, 1985, p. 753 and f.; G. Stratenwerth and L. Kuhlen, *Strafrecht AT*, 5th ed., Munich, Vahlen Verlag, 2004, p. 231 and f.

[57] See also S. Kauder, "Strafbarkeit terroristischer Vorbereitungshandlungen", *ZRP*, 2009, 21; G. Stratenwerth and L. Kuhlen,, *Strafrecht AT*, 5th ed., 2004, p. 231 and f.

[58] For a discussion of misappropriation, see A. Schönke, H. Schröder (n. 47, *supra*), § 246 margin no. 10 (*Eser/Bosch*).

[59] On the "adaptation" (*Anpassung*) of the conduct to the criminal planning and on the lack of a non-criminal explanation, see H. Kudlich (n. 42, *supra*), p. 184 and f. See also G. Jakobs, *ZStW*, 97, 1985, p. 762 and f.

is only appropriate when experience shows that this danger can no longer be countered at a later point in time [60].

– Since the realization of this threat depends on additional acts of the offender or of other persons, the offender must have taken an unconditional decision to commit the criminal offense, both as far as the special risk is concerned as well as with regard to the attribution and condemnation of his or her act. In many cases, the lack of "proximity to the act" (common in the context of preparatory offenses) and the corresponding smaller degree of concretization of the planned act can only serve as the basis for a sufficient amount of subjective wrongfulness if an aggravated form of mental fault, such as purposefulness or knowledge with respect to the future crime, is also present [61].

d) Endangerment by means of cooperation

A third and special category that justifies endangerment offenses is characterized by a *combination* of *offense planning* with an *objective threat* based on the common planning of several persons. In this context, it is necessary to distinguish between conspiracy offenses – prominent in Anglo-American criminal law – and offenses of association – dominant in continental European law.

The objective dangerousness associated with these *cooperation offenses* is seen – in the so-called *conspiracy offenses* – in the mutual bonding of the offenders as well as – in the so-called *offenses of association* – in the danger associated with specialization based on the division of labor among offenders, the momentum, and the neutralizing effects of group processes, etc. The former offenses include the conspiracy offenses of the Anglo-American criminal law, counterparts of Germany's – controversial – conspiracy offense (§ 30 StGB) [62]. The latter group consists of the offenses of association found in §§ 129, 129a StGB. These offenses are also seen as offenses for the protection of social (supraindividual) legal interests in the area of public security [63]. These cooperation offenses will not be discussed here in more detail because the justification for their existence is not relevant to the Statute (not even with regard to the offense of establishing contact with terrorist organizations).

3. "Preponement" of criminalization by means of supraindividual legal interests

The legitimacy of "preponed" criminal law protection on the basis of public, supraindividual ("social") legal interests will not be addressed here in detail [64]. The protection of (collective) social processes (not directly based on individual interests)

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[60] W. Frisch, in C. Roxin-FS (n. 31, *supra*), p. 223 and f.

[61] See discussion of proposed amendments to the Statute at 3.A., *infra*.

[62] On German law, see U. Fieber, *Die Verbrechensverabredung*, Frankfurt am Main et al., Verlag Peter Lang, 2001, p. 105 and f.

[63] See, *e.g.*, H. W. Laufhütte, R. Rissing-van Saan and K. Tiedemann (eds.), *Leipziger Kommentar zum Strafgesetzbuch*, § 129 margin no. 1, vol. 5 (*Krauss*), 12th ed., Berlin, de Gruyter, 2009; M. Hofmann, "Urteilsanmerkung zu OLG Düsseldorf vom 15.09.1997, VI 2/97", *NStZ*, 1998, 250.

[64] In addition to the references at n. 31, 32, 36, *supra*, see M. Krüger, *Die Entmaterialisierungstendenz beim Rechtsgutsbegriff*, Berlin, Duncker & Humblot, 2000, p.

that are essential for the functioning of the community can be justified on the basis of these supraindividual legal interests. *Vague legal interests* such as the protection of the public order or of the social climate are rightly rejected in this context [65].

This is also true of the legal interest in public security when this interest is not focused and concretized on the basis of a specific protected object [66]. Such a concretization would have to analyze the security-related expectations of the population, which can be disturbed by unmanageable risks or by risks whose results cannot be controlled. The identification of intolerable risks could lead to results similar to those reached in the risk analysis within the framework of the endangerment offenses studied here but, in light of the subjective security expectation of the public, would be less clear. Since the problematic issues raised by the Statute have to do with the "preponement" of the prohibited act, it is – incidentally – also not determinative for the justification of criminalization whether the threat is associated with the individual interests mentioned in the criminal offense definition or whether the threat relates to interests in State security – interests that are also mentioned in the criminal offense definition and that (given the location of the norm in the portion of the Criminal Code entitled "Endangering the Democratic Rule of Law (Rechtsstaat)") are the primary targets of protection. Thus, a legitimation of the proposed offenses derived specifically from the perspective of the protection of public security would not lead to more convincing results than the general comments presented here on the impermissible creation of risk.

3. Evaluation and reform of the new offenses

The above analysis of fundamental questions and criteria of legitimacy not only provides objective criteria for the evaluation of preventive criminal law and the newly created offenses, it also identifies the changes necessary for their legitimation. The above analysis has already highlighted those aspects of the Statute that are in need of amendment. The consequences are clear and will be summarized and illustrated in the following on the basis of the three most important aspects of the Statute.

A. Preparatory activity under § 89a StGB

The offenses introduced in § 89a paras. 1 and 2 StGB fall within the category of *preparatory offenses*, analyzed above, which "prepone" criminalization to a point far before the attachment of attempt liability – as do numerous other criminal offenses in the StGB. On the subjective side, the offenses are limited to the preparation of the most serious criminal acts for which, given the need to prevent potential threats, early intervention is necessary. Many of the acts described in § 89a para. 2 nos. 1-3 StGB

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119 and f.; B.J.A. Müssig, *Schutz abstrakter Rechtsgüter und abstrakter Rechtsgüterschutz*, Frankfurt am Main et al., Verlag Peter Lang, 1994, p. 149 and f.

[65] For comments critical of the vague legal interest in public security, see G. Duttge, in Weber-FS (see n. 43, *supra*) p. 289 (295); C. Roxin (n. 20, *supra*), § 2 margin no. 75-79. On the necessary concretization, see U. Sieber, *Computerkriminalität und Strafrecht*, 2d ed., Köln, Heymanns Verlag, 1980, p. 251 and f.

[66] For discussion of the legal interest of public security, see R. Hefendehl (n. 35), p. 288 and f. (controversial). In this context, see also K. Gierhake (n. 49), *ZIS*, 2008, 402.

are covered by other criminal provisions, such as the laws on firearms or explosives. Due to the statutorily required intention to commit an attack, the offenses in § 89a StGB represent aggravated forms of these traditional offenses. To the extent that the acts are traditionally criminalized even in the absence of an intention to commit an attack because the prohibited activity exhibits a clear, objective relationship to wrongfulness as well as a significant potential threat, criminalization according to the principles developed above is legitimate. Criminalization is also legitimate, as the acts prohibited in these cases do not involve any fundamental liberty interests worthy of protection. Since these offenses also apply to cases that pose a significant threat (*e.g.*, collected explosives), to cases shortly before the attachment of attempt liability, as well as to recidivists, serious punishment can be justified [67].

Some offenses introduced in § 89a paras. 1 and 2 StGB, however, also pose a significantly smaller threat, especially when they address an early, indistinct planning stage (that is not limited by the offense definition) or apply when notions of the offense are still vague. They exhibit a blurred boundary area especially when they apply to acts that, taken objectively, are socially acceptable, when they apply to neutral, non-punishable conduct, or when they apply in the context of acts that do not pose a (significant) threat. This is true specifically for the vaguely described "unnamed" cases and general clauses of § 89a para. 2 nos. 1 to 3 StGB (*e.g.*, "other skills", "special facilities"). The activities of collecting, accepting, and providing not unsubstantial assets as described in § 89a no. 4 StGB often represent socially acceptable conduct. On this basis, these instances still do not represent "thought crime" but can be seen as functioning within a critical distance thereof [68].

In order to establish a sufficiently objective nucleus of wrongfulness, § 89a para. 2 StGB should be amended to include the requirement that the listed acts pose a certain *danger* or *threat*. This threat can also be determined in connection with the offender's plan – comparable to the "imminent taking of steps" when attempt liability attaches. In this process, an attempt should be made to determine how to define the degree or extent of danger more precisely. Examples of this kind of limitation can already be seen in the interpretation of various preparatory offenses when case law and literature have refused to recognize as criminal the acts of limited importance or the acts that are far away from the harm to the protected interest [69]. As far as the Statute is concerned, the requirement of this kind of threat or threat level can either

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[67] Whether the ten-year maximum punishment for all offense alternatives is appropriate given other punishments foreseen by the system is, however, debatable. For a critical view on this point, see H. Radtke and M. Steinsiek (n. 52, *supra*), *ZIS*, 2008, p. 391 and f.; H. Radtke and M. Steinsiek, "Terrorismusbekämpfung durch Vorfeldkriminalisierung? – Das Gesetz zur Verfolgung der Vorbereitung schwerer staatsgefährdender Gewalttaten", *Juristische Rundschau* (*JR*), 2010, p. 107 and f.

[68] For criticism of the Statute, see Deckers and Heusel, *ZRP*, 2008, 171; K. Gierhake (n. 49), *ZIS*, 2008, p. 400 and f.; H. Radtke, *ZIS*, 2008, 387. On this point, see also S. Kauder (n. 57), 21.

[69] A. Schönke, H. Schröder (n. 47, *supra*), § 80 margin no. 6 and § 83 margin no. 8 (*Sternberg-Lieben*); W. Joecks and K. Miebach, *Münchner Kommentar, Strafgesetzbuch*, München, C.H. Beck Verlag, 2006, vol. 4, § 330d margin no. 19 (*Schmitz*).

be added for the individual prohibited acts or introduced in general form by means of the legislative technique employed in § 80 StGB, which requires the (admittedly quite indeterminate) "danger of a war".

Another issue that must be studied is how best – by means of an amendment to the Statute or a note in the explanatory memorandum – to insure that neutral conduct with no inherent, objectively recognizable *relationship to an offense* is placed outside the reach of the offense definition. As in the case of misappropriation, where the "manifestation of the appropriation" requires that the actuation of the intention to appropriate be "objectively recognizable" [70], a manifestation of the decision to prepare must also be included in the context of § 89a StGB (and other preparatory offenses) [71].

Finally, as far as the indefinite *mental fault requirement* of "preparation" is concerned [72], the law must be clarified: the offender must act willfully or (especially with regard to the financing of terrorism under § 89a para. 2 no. 4 StGB) knowingly with regard to the serious violent offense endangering the State [73]. With respect to the financing of terrorism, the international requirements of United Nations Security Council Resolution 1373 would still be fulfilled [74].

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[70] A. Schönke, H. Schröder (n. 47, *supra*) § 246 margin no. 10 (*Eser/Bosch*).

[71] The initial sentence of § 89a para. 2 StGB could, for example, require, that the offender "manifest (in objectively recognizable fashion) the preparation of a serious violent offense endangering the State" by undertaking the subsequently listed activities.

[72] On this point, see n. 47-48, *supra*. The policy solution suggested here could be effectuated with the help of both discussions concerning the need for punishment as well as explanations from legislative bodies during deliberations of the draft statute or in the *travaux préparatoires*. On the corresponding interpretation oriented to the "structure of the offense", see n. 82, *infra*.

[73] On this point, see text accompanying n. 55, *supra*. The initial sentence of § 89a para. 1 StGB could, for example, cover those who "intentionally or knowingly prepare a serious violent offense endangering the State". In contrast, changing the description of the prohibited act to include the phrase "in order to prepare" (a serious violent offense endangering the State) (as in §§ 310, 316c StGB) cannot be recommended since this would thwart the call for an objective manifestation of the preparatory act. For an interpretation limited to *knowing* conduct based on considerations of the need for punishment, see U. Sieber, *NStZ*, 2009, 353, 362, n. 69 (*deliktsstrukturorientierte Auslegung*); see also N. Gazeas, T. Grosse-Wilde and A. Kiessling, "Die neuen Tatbestände im Staatsschutzstrafrecht – Versuch einer ersten Auslegung der §§ 89a, 89b and 91 StGB", *NStZ*, 2009, 593, 602.

[74] No. 1(b) UN Security Council Resolution S/RES/1373 of 28 September 2001 and Article 2, para. 1 UN Convention for the Suppression of the Financing of Terrorism (UN Treaty Series no. 38349) cover practically word-for-word the same conduct: "the wilful provision or collection… of funds… with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts". As can be seen from a comparison with the equally authoritative French and Spanish versions, the parallelism of intention and knowledge indicates that subjective *dolus directus in the first or second degree* should be a requirement of criminal liability for terrorism financing; correspondingly, *dolus eventualis* does not suffice. An analysis of Article 2, para. 2 lit. b) Council Framework Decision on combating terrorism leads to the same conclusion.

B. Establishing contacts under § 89b StGB

Section 89b StGB also falls within the category "preparatory offenses". It criminalizes the establishing or maintaining of contacts with a criminal or terrorist organization with the intention of receiving instruction for the purpose of committing a serious violence offense endangering the State pursuant to § 89a para. 2 no. 1 StGB. With the reference to §§ 129a and 129b StGB, the provision has an objective connection to wrongfulness, but one that transplants the structural problems encountered when trying to identify a criminal organization into the new regulation. The "preparation of a preparatory act" required on the subjective side of this provision, however, moves criminal liability to an extremely early point in the run-up to the offense: between the attachment of criminal liability and before the attack is consummated, the offender and/or other persons must take numerous intermediate steps [75]. The Statute should thus at least be brought into conformity with the general principles that govern the limits of "preponement", in that the prohibited act of establishing contacts should be combined not only with the intention of receiving instruction (*i.e.*, the commission of the preparatory act) but also with the intention of committing an attack as required by § 89a StGB. It is clear from the remarks of practitioners who testified before the German Bundestag's Legal Affairs Committee that proving this intention to commit an attack should not cause any problems [76]. In addition, the goal of timely intervention by investigation agents should also be attainable when – as in the draft of the Bundesrat – the provision is linked to the completion of training and not to the establishing of contact. This kind of act requirement would do a great deal more justice to the criteria of a legitimate "preponement". It would still go far beyond the requirements of the EU and the Council of Europe. With the reference to "training for terrorism", the latter do not cover the (passive) experiencing of training but rather only the (active) providing of instruction to others in certain skills with the goal of committing a terrorist offense "knowing that the skills provided are intended to be used for this purpose" [77].

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[75] In contrast, the draft of the Bundesrat, BT-Drs. 16/7958 of 30 January 2008 for a new § 129a para. 5 StGB would also criminalize the taking advantage of training programs offered by terrorist organizations. For criticism of the extreme "preponement" proposed by the draft, see K. Gierhake (n. 49), *ZIS*, 2008, 403 f.; for criticism of the Statute, see W. Joecks and K. Miebach, *Münchner Kommentar, Strafgesetzbuch*, München, C.H. Beck Verlag, 2012, vol. 3 § 89b margin no. 3 (*Schäfer*); M. A. Zöller, *Terrorismusstrafrecht*, Heidelberg, C.F. Müller Verlag, 2009, p. 581 and f.; for a different opinion, see S. Kauder (n. 57), 21.

[76] See also D. Wasser and A. Piaszek, "Staatsschutzstrafrecht in Bewegung?", *Deutsche Richterzeitung* (*DRiZ*), 2008, 319; for a different opinion, see W. Joecks and K. Miebach (n. 75, *supra*), § 89b margin no. 4 (*Schäfer*).

[77] Article 3, para. 1(c) Council Framework Decision on combating terrorism in the version of 28 November 2008 (Council Framework Decision 2008/919/JHA, *OJ*, no. L 330/21, 9 December 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ*, no. L 164/3, 22 June 2002); Article 7 Council of Europe Convention on the Prevention of Terrorism of 16 May 2005 (Council of Europe Treaty Series no. 196). See also Explanatory Report to the Council of Europe Convention on the prevention of terrorism, margin no. 116 to Article 7: "This provision does not criminalise the fact of receiving such know-how or the trainee".

C. Instruction in the commission of a serious act of violence endangering the State as defined by § 91 StGB

Section 91 para. 1 no. 1 StGB – unlike the preparatory alternative in § 91 para. 1 no. 2 – introduces an *endangerment offense defined in terms of objective elements*. The provision's object of protection is defined – broadly – as written material "which by its content is capable of serving as an instruction to the commission of a serious violent offense endangering the State (§ 89a para. 1)". This definition encompasses numerous offense-neutral passages (*e.g.*, excerpts from a chemistry textbook). The offense prohibits activities including the promotion and the making available of such written material with a minimally substantiated risk description, namely, "when the circumstances of its dissemination are conducive to awakening or encouraging the willingness of others to commit a serious violent offense endangering the State".

Since the commission of a serious violent offense endangering the State in the case of § 91 para. 1 no. 1 StGB depends upon the autonomous decision of an affiliated offender, the risk of an attack foreseen by the criminal offense definition can only be attributed to the original actor (who, for example, disseminated the information in the Internet) in accordance with the principles of legitimacy described above if there is a *nexus* between the protected object or the prohibited act *and the offense*. Such a linkage to the offense is extremely remote and, especially in the case of "making available", insufficient, since both the prohibited act and the protected object rely on a suitability of the material for purposes of instruction or encouragement and not (also) on whether it was meant for these purposes.

As a result of this suitability clause, the entire preparatory offense alternative is not only very broad but also extremely *vague*. The vagueness of the norm's applicability is also due to the fact that the required suitability to encourage the third-party commission of a crime must derive from the "circumstance(s) of its dissemination". The relevant consideration of the context of the dissemination of the written material is correct, to be sure, with regard to the legitimacy of anticipatory criminalization. But since the connections between data in the Internet (*e.g.*, through links and the indices of search machines – including those that are added subsequently) are complex, this leads to significant uncertainties. For example, the text of the offense leaves open the question of whether already the very general dissemination in the Internet is sufficient or whether rather only the dissemination in a particular area (which one?) of the Internet. The posting of written material in the Internet advertisement of a terrorist organization is covered according to the Statute's explanatory memorandum [78]. Whether the posting in a critical discussion forum on questions of terrorism also suffices is, in contrast, still an open question. Similar hard-to-solve boundary problems arise, for example, when an international mail-order bookstore markets the chemistry textbook mentioned above in countries of the Middle East. While the inclusion of the broad social acceptability clause in para. 2 is essential in order to limit the norm, the clause does not mitigate the vagueness of the provision but rather aggravates it.

[78] See the explanation in the government draft BT-Drs. 16/12428 of 25 March 2009, p. 10.

As § 91 StGB encompasses not only instructions for the commission of serious crimes but even applies to written materials that are *suitable* for that purpose, interest in the exchange of information involving "dual-use products" cannot simply be deemed unjustified, even when the social acceptance clause of § 91 para. 2 StGB makes allowances for the most important interests in information. The vagueness of the norm is thus a serious problem from the perspective of constitutionality also because it can lead to a chilling effect on the free expression of opinion and, potentially, to pressure not to publish certain information. Due to its vagueness, the provision limits not only the free communication of Internet users but also leads to difficult assessments on the part of Internet providers as to the breadth of their "professional responsibilities". Thus, the norm must be limited and made more precise. Possibilities include a stronger connex between the object protected by the provision and the offense (*e.g.*, with a requirement that the written materials be "intended by their content" to achieve a specific purpose, as in § 130a StGB), a limitation of the prohibited act (*e.g.*, with the requirement of a specified conduct of encouragement), an objective danger or endangerment requirement (as in § 80 StGB) [79], or a specification as to the mental fault requirement (such as the knowing or willful encouragement of violent acts). This also applies to the offense alternative "obtaining for oneself" (§ 91 para. 1 no. 2 StGB). The need to make the norm more precise is all the more pressing because it not only intervenes in areas of liberty but also because (due to its serious control and implementation problems) it would have only a very limited effect in the global Internet [80]. In its current form, the provision also goes much further than the corresponding international requirements and recommendations [81]. The combination in the Statute of a high degree of vagueness, an unjustifiable additional "preponement" of criminalization, the limited effectiveness of the norm, and the aforementioned chilling effect on freedom of opinion provides fuel for the argument that the norm is unconstitutional.

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[79] This suggestion was made by Sieber already at the hearing of the German Bundestag's Committee on Legal Affairs. See U. Sieber, *NStZ*, 2009, 353, 363. On the unconstitutionality of § 91 para. 1 no. 2 StGB due to the failure of the legislature to include additional, objective elements in the criminal offense definition, see W. Fischer, *Strafgesetzbuch und Nebengesetze*, 59th ed., München, C.H. Beck, 2012, § 91 margin no. 19; N. Gazeas, T. Grosse-Wilde and A. Kiessling, (n. 73, *supra*), 593, 602.

[80] For a discussion of this point in the context of child pornography, see U. Sieber and M. Nolde, *Sperrverfügungen im Internet*, Berlin, Duncker & Humblot, 2008.

[81] Article 3 para. 1(a) Council Framework Decision on combating terrorism in the version of 28 November 2008 as well as Article 5 Council of Europe Convention on the Prevention of Terrorism of 2005 (both international instruments cited in n. 77, *supra*) encompass as "public provocation to commit a terrorist offence" only "the distribution, or otherwise making available of a message to the public, *with the intent* to incite the commission of a terrorist offence, where such conduct… causes a danger" that a terrorist offense "may be committed". See F. Zimmermann, "Tendenzen der Strafrechtsangleichung in der EU – dargestellt anhand der Bestrebungen zur Bekämpfung von Terrorismus, Rassismus und illegaler Beschäftigung", *ZIS*, 2009, 1 and f., who also considers these proposals too far-reaching.

4. Summary

These findings can be summarized as follows. The potential danger of terrorist attacks justifies the criminalization of preparatory activities as long as they are linked to already committed wrongdoing and not only to the dangerousness of persons. Within these limits, criminal law enables the deprivation of liberty – limited by the already committed wrongdoing and the culpability of the offender – that is imposed repressively as the consequence of the punishable preparation of an offense and that, with a view toward the consummation of the planned violent offense and additional attacks, has a preventive effect. Furthermore, the criminal law is the only instrument in the current legal landscape that (within the limits of wrongfulness and culpability) can justify a – not only short-term – deprivation of liberty for potentially dangerous terrorist offenders. Thus, the Statute's prevention-oriented, criminal law-based approach is, in principle, correct and is preferable to all alternative approaches, including "a preventive law oriented on the law of war", a longer-term deprivation of liberty based on police law, and an expanded (civil) preventive detention of potential terrorists.

Also positive is the reliance on special endangerment offenses, which the Statute chooses as justification for criminal wrongfulness. Thus, the core area of the preparatory offenses in § 89a StGB is justified, both from the perspective of security and from that of liberty. The Statute expands criminalization with these types of offenses – which are not a novum – however, too far back in time in the run-up to the injury to legal interests. It covers not only punishable wrongdoing but also to some extent dangerous or suspicious conduct that only justifies intelligence or police surveillance or investigation. In addition, individual provisions are vague. Furthermore, the negative effect on freedom of information due to § 91 StGB is serious. In all areas, the Statute goes far beyond existing international requirements concerning the criminalization of preparatory terrorist activity.

Thus, the legislature must undertake amendments to the Statute in order to include the necessary limits and to make the Statute more precise. Should the legislature fail to take this step, case law and academia should undertake the suggested limitations, derived to some extent from general principles of criminal law. They should utilize the justification for criminalization of abstract endangerment offenses (especially planning offenses) described here for an "offense structure-oriented" interpretation (similar to the interpretation oriented to protected legal interests) [82]. In addition, the Federal Constitutional Court should evaluate the constitutionality of § 91 StGB in light of its "vague" endangerment of freedom of opinion [83]. It could also address the question of whether some aspects of the new offenses no longer implicate criminal wrongdoing but rather function as liberty-depriving measures of police law or as a kind of preventive detention mislabeled as criminal law [84].

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[82] This is especially true for the limitation of § 89a StGB to intentional or knowing conduct characterized by a significant degree of danger as well as an objectively recognizable nexus between the offender's prohibited act and the offense.

[83] See 3.C, *supra*.

[84] See 2.A and B, especially text accompanying n. 27 and 28, *supra*.

Impact des nouvelles infractions terroristes quant à la qualification de participation à un groupe terroriste et à l'usage d'une preuve secrète devant le tribunal

Commentaires d'un avocat

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1. Introduction

La présente contribution [1] s'articule autour de deux questions fréquemment rencontrées dans la pratique.

Primo, il s'agit de l'impact de la nouvelle législation anti-terroriste belge, et plus particulièrement de deux éléments constitutifs de l'infraction terroriste. Il me semble que la nouvelle loi belge présente le risque d'amoindrir la rigueur de la loi pénale en ce qui concerne tant la preuve de l'élément matériel que celle de l'élément moral de l'infraction. D'une part, la notion de participation à un groupe terroriste reste particulièrement floue et pose des interrogations relativement aux conditions nécessaires pour la mise en œuvre de la répression. D'autre part, j'évoquerai l'élément intentionnel spécifique des nouvelles infractions, et plus particulièrement la problématique du moment à partir duquel l'intention délictueuse est présente. En effet, peut-on considérer que l'intention de « peut-être commettre un jour » un crime est suffisante pour une condamnation ? Ces problématiques sont évoquées à travers les deux premières affaires qui ont donné lieu en Belgique à la mise en œuvre de la nouvelle législation : les affaires dites du GICM (Groupe islamique des combattants marocains) et du DHKPC (un mouvement révolutionnaire turc).

Secundo, la présente contribution s'attache à montrer les problèmes que l'usage d'une preuve secrète peut révéler. Je tenterai de définir succinctement ce qu'est une preuve secrète, notamment en rapport avec les techniques particulières d'enquête. A travers un exemple concret de coopération entre la Belgique, l'Italie et l'Espagne, je

[1] La présente contribution n'a pas d'ambition scientifique mais se veut le reflet d'une expérience de praticien.

dénoncerai les risques que comporte l'usage d'une telle preuve quant au respect du procès équitable, mais également les moyens d'y remédier.

2. L'impact des nouvelles infractions

Le problème de base des nouvelles législations anti-terroristes réside dans la question du respect du principe de légalité de la loi pénale. Le principe de légalité exige que chacun d'entre nous soit capable de savoir quel comportement est pénalement répréhensible et dans quelle mesure [2].

Les nouvelles législations à propos de la lutte contre le terrorisme ont adopté une méthode particulière en vue d'incriminer au mieux ce phénomène complexe.

a) Certaines infractions du droit pénal général sont identifiées comme par exemple le meurtre, la possession d'armes, l'usage d'explosifs.
b) Ces infractions doivent avoir été réalisées avec une intention particulière, c'est ce que nous pouvons appeler « l'intention terroriste en temps de paix ».
c) Cette législation définit le groupe terroriste, c'est-à-dire cette organisation criminelle particulière qui agit pour réaliser les actes mentionnés ci-dessus avec une intention terroriste.

A. La définition des actes terroristes

Le Code pénal belge [3] a utilisé l'approche en trois temps, bien connue, de la décision-cadre européenne de 2002 [4].

a) Une définition des actes qui sont considérés comme des actes terroristes (meurtre, etc.).
b) Les actes sont terroristes s'ils sont commis avec une intention terroriste.
c) L'incrimination du groupe criminel terroriste, c'est-à-dire les personnes qui sont organisées et qui commettent les actes terroristes.

B. La critique de l'« intention terroriste »

Le caractère vague de la définition de l'intention terroriste donnée par la décision-cadre de l'Union européenne de 2002 a été fortement critiquée. Après la convention des Nations unies de 1997 [5] sur les explosifs et celle de 1999 [6] sur le financement du terrorisme, la décision-cadre a inventé une troisième intention terroriste très « politique ». En effet, à côté des deux intentions « classiques » que l'on retrouve dans les traités onusiens, à savoir l'intention d'« intimider gravement une population » ou de « contraindre indûment un gouvernement ou une organisation internationale

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[2] A ce sujet, voir Réseau de l'Union européenne d'experts indépendants sur les droits fondamentaux, *L'équilibre entre liberté et sécurité dans les réponses de l'Union européenne et de ses Etats membres à la menace terroriste*, 31 mars 2003, p. 11 et s.

[3] Voy. annexe.

[4] Décision-cadre du Conseil du 13 juin 2002 relative à la lutte contre le terrorisme, *JO*, n° L 164-3, 22 juin 2002.

[5] Convention internationale pour la répression des attentats terroristes à l'explosif, adoptée par l'Assemblée générale des Nations unies le 15 décembre 1997.

[6] Convention internationale concernant la suppression du financement du terrorisme, 9 décembre 1999.

à accomplir un acte », l'infraction visée à l'article 137 du Code pénal belge vise également à « gravement déstabiliser ou détruire les structures fondamentales politiques, constitutionnelles, économiques ou sociales d'un pays ». Cette troisième intention est très vague et englobe, par exemple, l'objectif de transformer un Etat libéral en un Etat socialiste ou de démanteler un Etat national par des sécessions.

C. Critique à propos de la participation à une organisation terroriste

Pour illustrer ce sujet, je souhaiterais mentionner des décisions judiciaires récemment rendues en Belgique relativement au GICM, le Groupe islamiste des combattants marocains [7]. Les personnes poursuivies ont été condamnées à des peines d'emprisonnement allant jusqu'à huit ans.

Il est intéressant de se pencher sur les concepts de l'« intention terroriste », d' « organisation terroriste » et de « membre du groupe terroriste » tels qu'ils ont été définis par la Cour d'appel de Bruxelles.

En effet, une des personnes poursuivies, Lahoussine El Haski, a été condamné et privé de sa liberté sur le fondement des dispositions pénales belges réprimant l'appartenance à un groupe terroriste – le « GICM » – *qui aurait eu pour objectif de renverser le régime marocain* au moyen d'actions violentes.

Ce groupe, tel que défini par la Cour d'appel de Bruxelles, est un groupement d'opposition à un régime tyrannique d'Afrique du Nord, qui envisage un jour de renverser celui-ci, le cas échéant en usant de violence. On le voit, ce groupe serait avant tout une sorte de mouvement d'opposition politique et éventuellement armée au gouvernement marocain. La répression d'un tel mouvement politique emporte des restrictions importantes aux principes de liberté d'expression et d'association. On sait que ces libertés sont protégées par la convention européenne des droits de l'homme, mais peuvent néanmoins faire l'objet de restrictions, si celles-ci sont prévues par la loi, poursuivent un but légitime et sont nécessaires dans une société démocratique, selon le triple contrôle classique prévu par cette convention.

Or, si on peut considérer que cette condamnation pénale est « prévue par la loi » [8] et peut être considérée comme « poursuivant un but légitime » (protection des droits d'autrui et préservation de la sécurité), elle ne saurait passer pour « nécessaire dans une société démocratique » et cela pour plusieurs raisons.

En premier lieu, il faut constater que Monsieur El Haski n'a jamais été accusé d'avoir été impliqué dans un quelconque acte terroriste, ni même dans la préparation voire l'incitation à commettre de tels actes.

Lahoussine El Haski a certes effectué de courts séjours en Afghanistan où il ne nie pas avoir suivi une instruction militaire, mais c'est insuffisant pour l'impliquer dans quelque action terroriste commise.

Les juridictions belges ne sont d'ailleurs pas parvenues à apporter la preuve matérielle de tels agissements et se sont contentées de condamner Monsieur El Haski pour « appartenance à un groupe terroriste ».

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[7] Tribunal correctionnel de Bruxelles, 54e Chambre *bis*, 16 février 2006, inédit ; Cour d'appel de Bruxelles, 12e Chambre, 21 décembre 2006, inédit.

[8] Articles 137 et 139 du Code pénal belge.

En deuxième lieu, et dans le même ordre d'idées, il faut relever la confusion opérée par les juridictions belges entre le délit d'appartenance et les attaques dont on n'a eu aucune preuve mais qui ont été imputées au GICM.

Alors qu'aucune preuve de la participation de Monsieur El Haski, dans un quelconque attentat, n'est apportée, ni n'apparaît des charges retenues par le ministère public, l'arrêt d'appel – confirmé en cassation – s'appuie sur des « meurtres et destructions préparés » – afin de renverser le régime marocain. Cela revient à imputer à un groupe d'opposition des actions matérielles violentes et contraires aux idéaux de l'Union européenne alors qu'elles n'ont jamais fait l'objet de discussion au cours de procédures pénales internes.

Mon opinion est que la création d'une telle qualification, avec une définition aussi vague, revient à tendre vers un pouvoir arbitraire. En effet, la constatation que les personnes condamnées en Belgique n'avaient participé directement ou indirectement à aucune action violente imputée au GICM, mais tout au plus, avaient montré une sympathie avec l'objectif politique de ce groupe (renverser le régime marocain) est interpellante. A partir du moment où ce mouvement d'opposition politique est étiqueté « terroriste », celui-ci ne peut plus légalement exercer son action de réflexion, d'association et d'expression de ses idées politiques – peu importe si on y adhère ou pas. L'existence même d'une opposition politique de tendance islamiste est devenue impossible. La simple sympathie (réelle ou supposée) à l'égard d'un tel groupement politique rend celui qui l'exerce coupable d'être un membre d'un groupe terroriste. Il existe d'autres infractions pénales qui permettent de punir, au moment où des infractions pénales sont réellement mises en œuvre ou projetées, ces actes déviants.

Le brouillard qui entoure la définition du groupe terroriste empêche naturellement une défense adéquate du suspect. Dans le cadre du GICM, « le terrorisme était le grand absent du procès ». Néanmoins, les défendeurs ont été condamnés pour des faits liés au terrorisme et ont reçu un stigmate difficile à surmonter, et ce particulièrement au moment de leur réinsertion après avoir purgé leur peine, tant en ce qui concerne la mise en œuvre de la libération conditionnelle ou la question de leur séjour administratif sur le territoire de la Belgique.

On pourrait conclure rapidement, avec Maria-Luisa Cesoni, que la définition vague « est basée sur l'orientation d'actions illicites à travers des fins décrites d'une telle manière que cela autorise des interprétations nombreuses et extensives et dont la preuve matérielle ne peut pas être donnée, dans la mesure où il s'agit de l'intention à propos d'un projet criminel futur, en d'autres mots à propos d'un élément subjectif, indépendant de son résultat » [9].

Une autre affaire intéressante en Belgique est celle relative au DHKPC, qui a fait l'objet de quatre décisions différentes au fond :

- Tribunal correctionnel de Bruges ;
- Cour d'appel de Gand, dont l'arrêt fut cassé ;
- Cour d'appel d'Anvers, dont l'arrêt fut à nouveau cassé ;

[9] M.-L. Cesoni, texte tiré de la communication « La décision-cadre sur le terrorisme et la loi belge du 19 décembre 2003 » au colloque « législation antiterroriste et droits de l'homme » qui s'est tenu à Bruxelles le 27 février 2004 (texte non publié).

– Cour d'appel de Bruxelles.

La jurisprudence a manifestement connu certains errements quant à divers sujets, et principalement relativement à la question de la participation à un groupe terroriste.

Ainsi, l'arrêt de la Cour d'appel de Bruxelles, du 23 décembre 2009 [10], considère que :

> « Les prévenus Asoglu et Kimyongur ne peuvent pas être reconnus coupables de participation à une activité d'un groupe terroriste au sens de l'article 140, § 1 du Code pénal.
>
> La preuve n'est pas apportée que les actes matériels réalisés par les prévenus Asoglu et Kimyongur pendant la période incriminée, ont contribué à la réalisation du crime ou du délit par le groupe terroriste ni que les prévenus en avaient connaissance.
>
> La diffusion de l'information mentionnée ci-dessus, le 28 juin 2004, ne peut pas avoir contribué à la réalisation d'un attentat qui avait eu lieu quatre jours auparavant. Il n'y a pas non plus d'indication concrète que la diffusion, le 28 juin 2004, de l'information à propos de l'attentat (raté) du 24 juin 2004 a contribué à la réalisation, par la suite, d'un nouvel attentat concret ou d'un autre délit ou crime « éventuellement après la période incriminée ».
>
> Selon le ministère public, la communication réalisée à la suite d'un attentat terroriste à la lumière des buts politiques ou sociaux poursuivis, est au moins aussi importante aux yeux de ceux qui l'ont commis que l'attentat lui-même, de sorte qu'un attentat n'est commis que si les auteurs sont certains que, par la suite, il y aura de la publicité à ce sujet. Dans la mesure où – outre l'information générale à propos

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[10] Traduction libre. Le texte original en néerlandais est le suivant : « *Beklaagden ASOGLU en KIMYONGUR kunnen evenmin schuldig worden bevonden aan de deelname aan enige activiteit van een terroristische groep in de zin van artikel 140, § 1 Sw. Het bewijs wordt niet geleverd dat de handelingen die door beklaagden ASOGLU en KIMYONGUR waren gesteld tijdens de geïncrimineerde periode hebben bijgedragen tot het plegen van een misdaad of wanbedrijf door de terrostische groep en dat beklaagden daarvan kennis hadden. Het verspreiden van hoger vernoemde informatie op 28 juni 2004 kan niet hebben bijgedragen tot het plegen van een bomaanslag die reeds vier dagen eerder had plaatsgevonden. Evenmin zijn er concrete aanwijzingen dat de verspreiding, op 28 juni 2004 van de informatie over de (mislukte) aanslag van 24 juni 2004 ertoe heeft bijgedragen dat achteraf (eventueel na de geïncriminerende periode) een nieuw concrete aanwijsbare aanslag of enig andere misdaad of wanbedrijf werd gepleegd. De stelling van het openbaar ministerie dat de achteraf gevoerde communicatie over een terroristische aanslag in het licht van de beoogde politieke en maatschappelijke doelstellingen in de ogen van de pledgers ervan minstens even belangrijk is dan de aanslag zelf zodat een aanslag slechts wordt gepleegd indien de daders zeker zijn dat er nadien voldoende ruchtbaarheid aan zal worden gegeven, kan te dezen niet worden getoetst nu de tijdens de geïncrimineerde periode verspreide informatie – naast algemene informatie over de (al dan niet vermeende) politieke wantoestanden in Turkije)- enkel betrekking heeft op een mislukte aanslag (waarbij excuses werden aangeboden aan de door de daders niet geviseerde slachtoffers). Het strafdossier bevat geen lijst met aanslagen die zouden gepleegd zijn tijdens de geïncrimineerde periode (of tiidens een relevante periode die eraan voorafgaat of erop volgt) en waarover door beklaagden of minstens door het informatiebureau zou zijn gecommuniceerd* », p. 31 et 32 de l'arrêt rendu le 23 décembre 2009 par la 13e chambre de la Cour d'appel de Bruxelles, inédit.

de la situation politique intolérable (confirmée ou pas) en Turquie – l'information diffusée pour la période incriminée concerne simplement un attentat raté (à l'occasion duquel des excuses ont été présentées aux victimes qui n'avaient pas été visées par les auteurs), la position précitée du ministère public ne peut être vérifiée dans la présente cause. Le dossier pénal ne contient pas de liste des attentats réalisés pendant la période incriminée – ou pendant une période pertinente qui la précède ou la suit – et à propos desquels les prévenus, ou à tout le moins leur bureau d'informations, auraient communiqué ».

Les prévenus ont donc été acquittés de la prévention de membre d'un groupe terroriste.

Ceci signifie que même si les prévenus adhéraient à l'intention terroriste d'un groupe – c'est-à-dire changer la structure politique de l'Etat turc – ils n'ont pas participé à la réalisation d'un acte terroriste précis, même en diffusant des informations à propos de ces actions – (une certaine forme de complicité selon le Parquet fédéral) – et dès lors les prévenus n'ont pas pu être considérés comme membres d'un groupe terroriste.

Cette interprétation est conforme à la convention des Nations unies de 1999 relativement au financement du terrorisme. La notion de participation aux activités d'un groupe terroriste apparaît déjà dans la convention des Nations unies de 1997 pour la répression des attentats terroristes à l'explosif.

En effet, l'article 2.3 de cette convention établit :

« Commet également une infraction quiconque :

a) Se rend complice d'une infraction au sens des paragraphes 1 et 2 du présent article ;
b) Organise la commission d'une infraction au sens des paragraphes 1 et 2 du présent article ou donne l'ordre à d'autres personnes de la commettre ; ou
c) Contribue de toute autre manière à la commission de l'une ou plusieurs des infractions visées aux paragraphes 1 ou 2 du présent article par un groupe de personnes agissant de concert ; sa contribution doit être délibérée et faite soit pour faciliter l'activité criminelle générale du groupe ou en servir les buts, soit en pleine connaissance de l'intention du groupe de commettre l'infraction ou les infractions visées ».

L'article 2.5.c de la convention de 1999 utilise le même langage et commande aux parties signataires de considérer comme pénalement répréhensibles des faits commis par une personne qui d'une quelconque manière « contribue à la commission de l'une ou plusieurs des infractions visées au paragraphe 1 ou 4 du présent article par un groupe de personnes agissant de concert (…) ».

L'article est clair. La personne doit avoir simplement participé à l'activité d'un groupe qui a commis une infraction terroriste. Cette contribution doit être réalisée « dans le but de perpétuer l'activité criminelle générale ou l'intention du groupe » ou « avec la connaissance de l'intention du groupe de commettre une infraction ».

Il faut souligner que cette infraction implique l'intention particulière du criminel de participer délibérément à l'objectif du groupe de commettre les actes terroristes mentionnés ci-dessus, avec une intention terroriste particulière.

Cet arrêt de la Cour d'appel de Bruxelles de 2009 n'a pas été cassé. Ceci entraîne une grande discussion en droit belge, dans la mesure où il y a une différence de

jurisprudence entre les Chambres francophones et néerlandophones de la Cour d'appel de Bruxelles.

D. Que va-t-il se passer prochainement ?

Nous imaginons que cette situation devrait être présentée à la Cour de justice de l'Union européenne afin d'obtenir une interprétation conforme de la décision-cadre au principe de légalité.

Certains dossiers sont actuellement en cours et devraient apporter une réponse à cette question. Peut-être le dossier « Secours rouge », qui concerne des personnes qui auraient adhéré à un groupement terroriste italien, en Belgique… ou éventuellement à l'occasion de la réouverture du procès GICM, en mars 2012 suite à la condamnation, par la Cour européenne des droits de l'homme, dans l'affaire *Hakimi* [11] et la décision de la Cour de cassation belge de rouvrir le cas.

2. L'usage de preuves secrètes

A. Qu'est-ce qu'une preuve secrète ?

Il y a de nombreux exemples de ce qu'est une preuve secrète. Par exemple, un rapport des services secrets qui contiendrait l'information suivante : « Nous savons que Monsieur X est un salafiste et qu'il a des liens avec Ben Laden. Son numéro de téléphone mobile est le 67788 ».

Ce type de preuve secrète peut également émaner des services de police. Ainsi les services de police d'un Etat pourraient faire des rapports sur la base de preuves secrètes recueillies à partir d'écoutes directes par exemple, et en tirer certaines conclusions. Ces conclusions seraient à leur tour envoyées dans d'autres Etats et serviraient de preuves à charge contre des personnes poursuivies.

On peut trouver un exemple de ceci dans l'affaire du 11M, c'est-à-dire les attentats de Madrid.

Ainsi, l'accusé principal, « El Egipcio », était poursuivi en Espagne en étant considéré comme le cerveau des attentats. Cette accusation reposait principalement sur le résultat d'écoutes directes réalisées en Italie. En effet, cette personne faisait également l'objet d'une investigation en Italie, lieu où elle se trouvait avant son extradition vers l'Espagne. A l'occasion de ces écoutes directes, « El Egipcio » s'exprimait en arabe, et ses propos ont été par la suite traduits vers l'italien.

A la demande de la défense, menée par Endika Zulueta, l'Audience nationale a demandé une expertise des bandes enregistrées en Italie et exigé la présence de celles-ci à l'audience. Les experts nommés par l'Audience nationale ont été très critiques à l'égard des traductions et des transcriptions italiennes [12].

En effet, ceux-ci ont considéré que ces transcriptions et traductions italiennes ont créé un contexte et même des affirmations qui n'étaient pas présents dans les

[11] Cour européenne des droits de l'homme, *HAKIMI c. Belgique*, 29 juin 2010.

[12] Rapport à propos des transcriptions et traductions des enregistrements concernant Rabei Osman Al Sayed, affaire : enregistrement 1339-12 – l'ensemble des documents se trouvent sur le site http://www.elmundo.es/documentos/2004/03/espana/atentados11m/ (15 décembre 2011).

enregistrements. Bien sûr, il y a des problèmes techniques auxquels doivent faire face les services de police. Mais plutôt que de considérer qu'il y a un doute à propos de la valeur incriminatoire des mots – ce qui aurait été une bonne réaction – les services de police ont réalisé une traduction « à charge ».

Cette situation des « transcriptions espagnoles-italiennes » représente un double problème méthodologique :

- d'un côté, le travail italien avait été marqué par un manque de rigueur qui avait débouché sur une traduction orientée et incriminatoire, et
- d'autre part, la police espagnole, en utilisant « simplement » la traduction italienne a commis une erreur en présentant le dossier d'une manière partiale.

Ceci a trait à la question de la preuve contextuelle : il fallait absolument démontrer l'implication de l'accusé dans le « djihad international ».

Par exemple, à l'occasion du même rapport, les experts espagnols ont noté :

> « … de la transcription italienne, il ressort qu'une personne déclare que l'on peut faire un djihad n'importe où sur la terre, mais ce qu'on entend réellement sur la cassette est restreint à certains endroits : Irak, Palestine, Afghanistan, etc. ».

De la même manière, la preuve directe et donc pas simplement contextuelle, semble avoir été surestimée. Rabei Osman « El Egipcio » était poursuivi pour avoir pensé les attentats de Madrid. Il était supposé être le cerveau derrière les attaques et avoir tout préparé et ceci sur la base de ces enregistrements.

Les experts espagnols ont évalué cette preuve de la manière suivante :

> « Commentaire : « entendu dans aucune partie de l'enregistrement que l'opération de Madrid était son idée ou était son projet ». Ou encore : « entendu dans aucune partie des enregistrements : l'idée de l'opération était la mienne ».

L'utilisation des techniques particulières de recherches a permis aux équipes d'enquête de reporter, de manière imprécise, des conversations et de créer un accusé en imaginant un contexte factuel et des déclarations qui n'existaient pas : Rabei Osman n'avait jamais dit que les attentats de Madrid étaient son idée ou qu'il les avait préparés.

Rabei Osman a été acquitté des préventions par l'Audience nationale et ceci fut confirmé par le Tribunal suprême. Le procureur public espagnol souhaitait qu'il soit condamné à 38 962 ans de prison pour avoir participé et organisé un groupe terroriste pour conspirer sur la commission de 191 meurtres et la tentative de commette 1 891 meurtres.

Cet exemple illustre le risque qui gît dans l'usage des techniques spéciales d'enquête. Le haut degré de technicité donne l'apparence d'une preuve scientifique. L'affaire du 11M illustre également que le contrôle judiciaire sur les techniques spéciales d'enquête doit être efficace.

Ainsi que la Cour européenne des droits de l'homme l'avait déjà déclaré en 1978 dans l'affaire *Klass* : « alors que la possibilité d'une action inappropriée par un officiel malhonnête, négligeant ou trop zélé, ne peut pas être complètement évitée quel que soit le système, ce qui est de la plus grande importance pour la Cour dans la présente

affaire est la possibilité qu'une telle action se produise, mais également les gardes-fous qui sont prévus afin de pouvoir s'en protéger » [13].

Je ne peux, dans ce cadre, m'empêcher de m'interroger sur ce qui se serait passé si le juge espagnol avait seulement reçu un rapport des autorités italiennes rapportant que Rabei Osman « El Egipcio » avait dit qu'il était le cerveau des attentats de Madrid, sans qu'une expertise ait été réalisée par le tribunal.

Ceci signifie qu'en cas d'usage de techniques particulières d'enquête, il est nécessaire qu'existe une contradiction efficace sur le matériel probatoire lui-même, et pas seulement sur des rapports réalisés à propos de ce matériel probatoire.

C'est la même question en matière de preuve secrète. Un contrôle judiciaire effectif ne peut être réalisé que si la défense peut réellement exercer son rôle. On doit malheureusement constater qu'à l'occasion de l'usage de ces techniques particulières d'enquête ou de la preuve secrète, nous sommes souvent confrontés au résultat de ces enquêtes avec une faible possibilité de contradiction à l'égard du contenu même de l'enquête réalisée.

Pour revenir à l'exemple du 11M à Madrid et à la situation de l'accusé Rabei Osman, les conclusions des experts sont tout à fait édifiantes.

Le premier problème concerne la qualité des enregistrements : les experts considèrent qu'il est très difficile de comprendre ce qu'il y a dans l'enregistrement pour des raisons techniques (localisation des microphones, personnes présentes pendant les conversations ; problème technique pur de la tonalité de la voix).

Plus loin, ils expliquent que la police espagnole avait initialement traduit de l'italien vers la langue espagnole, sans considérer la langue originale des enregistrements.

Les experts espagnols concluent en disant :

> « Dans la transcription sous contrôle, nous avons enregistré, à diverses occasions, les défauts suivants : omissions, additions, contradictions, interprétations et distorsions de ce qui est dit dans l'enregistrement.
>
> L'omission des mots ou de phrases complètes peut être due à un manque de clarté de la voix dû au bruit environnant, etc. Mais d'autres défauts, qui impliquent l'ajout de nuances et même d'informations qui n'étaient pas présentes dans l'enregistrement, peuvent résulter, selon nous, dans un manque de compréhension par le transcripteur, qui manquait d'unité syntaxique et sémantique, qui à son tour a conduit à une mauvaise compréhension ou à une faible compréhension de tout ou partie de conversations.
>
> Globalement, nous considérons qu'il y a eu une reconstruction d'un contexte artificiel qui a donné une certaine cohérence thématique, mais qui ne reflète pas le contexte original que nous trouvons dans l'enregistrement ».

3. Conclusion

Primo, la définition restrictive des infractions, qui devrait prédominer en droit pénal, doit nous conduire, logiquement, à considérer qu'un groupe terroriste est un groupe de personnes qui ont commis ou essayé de commettre des infractions terroristes bien définies.

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[13] Cour européenne des droits de l'homme, *Klass et autres c. Allemagne*, 6 septembre 1978, § 58.

De son côté, le Comité des droits de l'homme des Nations unies a publié des observations pendant sa 81e session concernant le rapport des parties, conformément à l'article 40 du pacte des droits civils et politiques [14] :

> « 24. Le Comité est inquiet que la loi du 19 décembre 2003, sur les infractions terroristes, donne une définition du terrorisme qui, en référence au degré de sévérité des infractions et de l'intention exprimée des criminels, ne satisfait pas entièrement au principe que les infractions et les peines doivent être établies par la loi (article 15). L'Etat partie devrait donner une définition plus précise des infractions terroristes ».

Cette critique du Comité des droits de l'homme des Nations unies devrait être prise en compte afin de revoir ou à tout le moins d'évaluer la définition des infractions terroristes telles que prévues par le droit belge.

Secundo, lorsque la défense est confrontée à des rapports secrets, réalisés par les services secrets, ou par des services de police nationaux ou étrangers, nous ne savons pas si ce qui a été réalisé l'a été de manière légale. Par exemple si des écoutes directes réalisées dans tel pays l'ont été conformément au droit de ce pays, mais également au droit européen des droits de l'homme.

En matière de rapports secrets, cette question est particulièrement importante lorsque l'on en arrive à la question de preuves qui peuvent venir d'un Etat où la torture est pratiquée. Il n'y a pas de contradiction possible par la défense (comment réaliser un contre-interrogatoire d'une personne incarcérée au Maroc ?) et cela signifie habituellement que les tribunaux considèrent que ces preuves doivent être admises comme des preuves circonstancielles, c'est-à-dire simplement confirmatives d'informations qui ont été obtenues d'une autre manière.

On en arrive alors à une situation où nos Etats « blanchissent » des informations obtenues de manière odieuse dans des Etats tiers au système européen de protection des droits de l'homme.

[14] Pacte international relatif aux droits civils et politiques, adopté et ouvert à la signature, à la ratification et à l'adhésion par l'Assemblée générale dans sa résolution 2200 A (XXI) du 16 décembre 1966, entré en vigueur le 23 mars 1976.

Annexe – La définition belge du terrorisme

Art. 137 (inséré par L 2003-12-19/34, art. 3, 046 ; en vigueur : 8 janvier 2004)

§ 1er. Constitue une infraction terroriste, l'infraction prévue aux §§ 2 et 3 qui, de par sa nature ou son contexte, peut porter gravement atteinte à un pays ou à une organisation internationale et est commise intentionnellement dans le but d'intimider gravement une population ou de contraindre indûment des pouvoirs publics ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte, ou de gravement déstabiliser ou détruire les structures fondamentales politiques, constitutionnelles, économiques ou sociales d'un pays ou d'une organisation internationale.

§ 2. Constitue, aux conditions prévues au § 1er, une infraction terroriste :

1° l'homicide volontaire ou les coups et blessures volontaires visés aux articles 393 à 404, 405*bis*, 405*ter* dans la mesure où il renvoie aux articles précités, 409, § 1er, alinéa 1er, et §§ 2 à 5, 410 dans la mesure où il renvoie aux articles précités, 417*ter* et 417*quater* ;

2° la prise d'otage visée à l'article 347*bis* ;

3° l'enlèvement visé aux articles 428 à 430, et 434 à 437 ;

4° la destruction ou la dégradation massives visées aux articles 521, alinéas 1er et 3, 522, 523, 525, 526, 550*bis*, § 3, 3°, à l'article 15 de la loi du 5 juin 1928 portant révision du Code disciplinaire et pénal pour la marine marchande et la pêche maritime, ainsi qu'à l'article 114, § 4, de la loi du 21 mars 1991 portant réforme de certaines entreprises publiques économiques, ayant pour effet de mettre en danger des vies humaines ou de produire des pertes économiques considérables ;

5° la capture d'aéronef visée à l'article 30, § 1er, 2°, de la loi du 27 juin 1937 portant révision de la loi du 16 novembre 1919 relative à la réglementation de la navigation aérienne ;

6° le fait de s'emparer par fraude, violence ou menaces envers le capitaine d'un navire, visé à l'article 33 de la loi du 5 juin 1928 portant révision du Code disciplinaire et pénal pour la marine marchande et la pêche maritime [1 ainsi que les actes de piraterie visés à l'article 3 de la loi du 30 décembre 2009 relative à la lutte contre la piraterie maritime]1 ;

7° les infractions visées par l'arrêté royal du 23 septembre 1958 portant règlement général sur la fabrication, l'emmagasinage, la détention, le débit, le transport et l'emploi des produits explosifs, modifié par l'arrêté royal du 1er février 2000, et punies par les articles 5 à 7 de la loi du 28 mai 1956 relative aux substances et mélanges explosibles ou susceptibles de déflagrer et aux engins qui en sont chargés ;

8° les infractions visées aux articles 510 à 513, 516 à 518, 520, 547 à 549, ainsi qu'à l'article 14 de la loi du 5 juin 1928 portant révision du Code disciplinaire et pénal pour la marine marchande et la pêche maritime, ayant pour effet de mettre en danger des vies humaines ;

9° les infractions visées par la loi du 3 janvier 1933 relative à la fabrication, au commerce et au port des armes et au commerce des munitions ;

10° les infractions visées à l'article 2, alinéa premier, 2°, de la loi du 10 juillet 1978 portant approbation de la convention sur l'interdiction de la mise au point, de la fabrication et du stockage des armes bactériologiques (biologiques) ou à toxines et sur leur destruction, faite à Londres, Moscou et Washington le 10 avril 1972.

§ 3. Constitue également, aux conditions prévues au § 1er, une infraction terroriste :

1° la destruction ou la dégradation massives, ou la provocation d'une inondation d'une infrastructure, d'un système de transport, d'une propriété publique ou privée, ayant pour effet de mettre en danger des vies humaines ou de produire des pertes économiques considérables, autres que celles visées au § 2 ;

2° la capture d'autres moyens de transport que ceux visés aux 5° et 6° du § 2 ;

3° la fabrication, la possession, l'acquisition, le transport ou la fourniture d'armes nucléaires ou chimiques, l'utilisation d'armes nucléaires, biologiques ou chimiques, ainsi que la recherche et le développement d'armes chimiques ;

4° la libération de substances dangereuses ayant pour effet de mettre en danger des vies humaines ;

5° la perturbation ou l'interruption de l'approvisionnement en eau, en électricité ou en toute autre ressource naturelle fondamentale ayant pour effet de mettre en danger des vies humaines ;

6° la menace de réaliser l'une des infractions énumérées au § 2 ou au présent paragraphe.

Inchoate offences
The sanctioning of an act prior to and irrespective of the commission of any harm

Katja Šugman Stubbs and Francesca Galli [1]

1. Introduction

Traditionally, the line of criminal responsibility in the phases of the preparation of a criminal offence was drawn at the stage of an attempt; preparatory acts were rarely incriminated. Even the phase of the attempt was usually only criminalised when it comes to the most serious offences.

The fight against terrorism and organised crime has brought a fundamental policy change in western criminal justice systems such that reactive criminal law has been increasingly used for preventive aims. The emphasis is no longer put on responding to offences that have been committed but on averting their commission. In this respect the line of criminalization is drawn lower down to fully encompass the attempt; the preparatory acts and inchoate offences are being frequently used as a tool to incriminate those earlier stages in the development of the criminal offence.

The purpose of this chapter is to show how the emergence of antiterrorist legislation has dramatically changed the traditional fundamental concepts of criminal law, moved the criminal law interventions from *ex post* to *ex ante* interventions, extended criminal liability further back to preparatory acts and then changed the demarcation between the stage of preparation and attempt. All this also changed the definition of inchoate

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offences and enabled inchoate offences to become one of the major tools in fight against terrorism [2].

2. What are inchoate offences?

It is common for the continental legal criminal law theory to differentiate between few steps in the process of commission of a criminal offence. Those steps are: (1) a mental plan, (2) preparation acts, (3) an attempt, (4) a full completion of an offence [3].

The traditional criminal law doctrine is based on a belief that criminal law should be used as a last resort for most serious violations that cannot be adequately suppressed in any milder way (*ultima ratio*) [4]. This school of thought suggests that, in the name of freedom of expression, the mere intention to commit a crime should not constitute an offence and opinions should remain free [5]. The State should be able to punish only outwardly expressed action or a failure to perform one.

The doctrine regarding preparatory acts (the second phase) is more complex. Academics have traditionally considered it inappropriate to criminalise acts which are merely preparatory to a criminal offence [6]. In defining the scope of criminal law through the harm principle [7], the dominant concern of legal writers has traditionally been to hinder the increasing expansion of criminal liability. In this respect for most

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[2] C.M. Pelser, "Preparations to commit a crime. The Dutch approach to inchoate offences", *Utrecht Law Review*, 4(3), 2004, p. 57-80; L. Picotti, "Expanding forms of preparation and participation", General Report, *Revue Internationale de Droit Pénal*, 78(3), 2007, p. 405-452; F. Galli, *British, French and Italian anti-terrorism legislation: a comparative study*, Doctoral Thesis, University of Cambridge (yet unpublished).

[3] H.H. Jescheck and T. Weigend, *Lehrbuch des Strafrechts*, Berlin, Duncker & Humblot, 1996, p. 509.

[4] N. Jareborg, "Criminalization as Last Resort (Ultima Ratio)", *Ohio State Journal of Criminal Law*, 2, 2004, p. 521-534.

[5] "[P]unishing individuals for their thoughts alone [constitutes] a sensitive taboo in criminal justice. Everyone seems to agree that it would be a perversion of the institution to punish in the absence of action-for thoughts alone" (G. P. Fletcher, *Basic Concepts of Criminal Law*, Oxford, Oxford University Press, 1998, p. 49). "The maxim that civilized societies should not criminally punish individuals for their 'thoughts alone' has existed for three centuries. Generally, the criminal law recognizes that we cannot identify an individual's thoughts or predict whether antisocial behaviour will result from them" (D. W. Denno, "Crime and Consciousness: Science and Involuntary Acts", *Minnesota Law Review*, 87, 2002, p. 282-283).

[6] On the criminalization of remote harms see A. Ashworth, *Principles of Criminal Law*, 5th edn., Oxford, Oxford University Press, 2006, p. 49-50; A. Von Hirsh, "Extending the Harm Principle", in A. Simester and A.T.H. Smith (eds.), *Harm and culpability*, Oxford, Oxford University Press, 1996.

[7] Liberal philosophers have argued that a positive reason in favour of the State's intervention to create a criminal offence is the prevention of a conduct which can cause harm to others. According to Feinberg: "It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values" (J. Feinberg, *The moral limits of the criminal law*, New York Oxford University Press, 1987, p. 26).

legal systems the preparatory acts have not been (or have rarely been) criminalized until they reach the stage of attempt, since it is a generally accepted doctrine that criminal liability arises only after the harm has been caused [8]. Consequently, the line of criminal responsibility is usually drawn at the attempt stage and even that is frequently limited to more serious offences [9]. Hence the demarcation between preparatory acts and an attempt has always been particularly relevant, although complex, since there are numerous theories and doctrines on which the distinction of different phases is based [10]. It is impossible to make a final conclusion regarding the distinction of those two phases because of at least two reasons: the first one being that the definition of a certain criminal offence (especially the complex ones *e.g*. terrorism) differs so much from system to system that this affects the distinction between the different phases of committing a criminal offence, and the second one being the difference among different legal cultures in defining the criteria. Numerous tests and doctrines have developed in order to distinguish between them [11].

Inchoate offences are actions and agreements that are carried out as preparation for a substantive offence. "Inchoate" means "not yet completed or fully developed". Although they do not constitute a complete offence, they are nonetheless criminalised because they are steps towards it being committed [12]. As a result, inchoate offences are also offences in their own right with their own criminal liability attached. They always relate to a substantive offence but are completed and can be prosecuted before the commission of any full offence [13].

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[8] J. Child and A. Hunt, "Risk, Pre-emption, and the Limits of the Criminal Law", in K. Doolin, J. Child, J. Raine, A. Beech (eds.), *Whose Criminal Justice? State of Community*, Sherfield Gales, Waterside Press, 2011, p. 51-68.

[9] "Thus in a current English law on attempts, for instance, criminal liability attaches only to acts which are more than merely preparatory to the commission of the offence. Therefore, although an attempt in English law is clearly a departure from the paradigm since it clearly allows for intervention before any harm has resulted, nonetheless there is some relationship between the conduct and the clear resulting harm in the sense that clearly the risk that the harm may result is greater the further along the path of criminal preparation the offender has progressed" (J. Child and A. Hunt, *op. cit*., p. 53-54).

[10] It is also difficult to establish different kinds of criminal liability which stems from those phases. As Lacey underlines: "... the lines between no liability, inchoate liability and full liability are notoriously hard to draw" (N. Lacey, *Reconstructing Criminal Law: Text and materials*, 3rd ed., Cambridge, Cambridge University Press, 2006, p. 68).

[11] See for example comparison of the distinctions between preparatory acts and an attempt in Croatian, German and French system in P. Novoselec, "Razgraničenje pripremnih radnji i pokušaja", *Zbornik PF Rijeka*, 1991, 29(2), p. 721-759.

[12] They contain a set of different criminal offences which include preparatory acts and also contain the stage of the attempt.

[13] For example, participation in a criminal organisation is an inchoate offence. It is sufficient to be involved in the organisation and an actual contribution to the commission of the offence that the organisation intends to commit is not necessary. It is not even required that the organisation has already committed offences. The commission of offences may not be the only purpose of the organisation.

Legal theory distinguishes between two sorts of inchoate criminal offences: (1) the 'general part' ones that can be superimposed onto other indictable offences and (2) a 'special part ones'. The first category traditionally includes inchoate criminal offences such as: attempt (any act that is more than merely preparatory to the intended commission of an offence), conspiracy (an agreement between two or more people to behave in a manner that will automatically constitute an offence by at least one of them) and incitement (persuading someone else to commit an offence, regardless of whether or not the offence is eventually committed). Within this general categorisation, they are understood and defined differently in different countries depending on their legal traditions. Attempt, conspiracy and incitement are very often only criminalised when it comes to the most serious offences [14]. This means that inchoate offences traditionally constitute an exception.

This is even more true for the special part inchoate criminal offences; traditionally there are only very limited exceptions for the existence of special part preparatory offences (possession offences – *e.g.* possession of means to forge money). We can therefore safely argue that in general, incriminating preparatory acts in a form of inchoate offences used to be an exception.

3. Inchoate offences and anti-terrorist law

However, some strong arguments exist for setting the line lower down on the scale of evolution of a criminal offence. From a government's point of view, the criminalisation of inchoate offences serves two social purposes. Firstly, an individual who commits an inchoate offence is hardly to be considered less dangerous, thus he/she must be put under investigation and prosecuted. Secondly, state authorities must be able to intervene at an earlier stage than the full completion of the offence. The argument is that preventing the completion of the offence is more beneficial to society than merely punishing the offender. There seem to be therefore sound reasons of policy and principle to punish these types of wrongdoing, a key one being that the defendant has demonstrated, by his actions, his willingness for a substantive offence be committed [15].

One of the factors contributing to setting the line to the more preventive criminal law practice in the last decade was definitely the fight against terrorism and organized crime. The specific characteristics of terrorist offences literally allure the thinking that the traditional criminal law concepts have to be changed. Terrorist attacks are not spontaneous, but require long, elaborate preparations, which by themselves do usually not constitute criminal acts (*e.g.* learning to fly planes, donating money to certain

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[14] *E.g.* in the Netherlands an attempt is punishable only if it relates to the criminal offence punishable by a prison sentence of 8 years or more and in Slovenia only up from 3 years (Article 34 CC). Slovenia has generally very lenient crime legislation and the offences punishable by a prison sentence of more than 3 years are already serious criminal offences. See C.M. Pelsner, *op. cit*., p. 63.

[15] See the elaboration of the Law Commission on the rational of the conspiracy offence in *Conspiracy and Attempts: A Consultation Paper*, Law Commission Consultation, no. 183, 2007, Part 2. What is interesting is the effort with which they are arguing for an existence of inchoate offences.

organizations). The transition from an attempt to the full completion of the specific offence is fast – it is an execution of an *iter criminis* which has been planned in detail in the previous stages of preparation. The simple straightforward logic that stems from those facts is that if we want to prevent terrorism, we have to extinguish it 'at the root', meaning at the preparation phase or even earlier. According to this philosophy, the exceptions to the general criminal law principles are acceptable, based on a utilitarian argument – the devastating consequences of the terrorist attacks [16].

The emergence of those two forms of crime has definitely brought fundamental policy changes in Western criminal justice systems, the first one being the extension of criminal liability further back to preparatory acts and the second one being the fact that that reactive criminal law has been increasingly used for preventive aims [17]. Criminal law is moving further and further away from *ex post* reactions to *ex ante* intervention.

As a consequence, the fight against organised crime and terrorism dramatically affects the definition of inchoate offences in modern criminal law, its fundamental principles and concepts [18] and the demarcation of preparation and attempt. For instance, the problem with some offences, such as "association for terrorist purposes" or "participation in a terrorist organisation", is that they encompass all three stages in the commission of an offence: the preparation, the attempt and the completed offence. A clear demarcation between preparatory acts and attempt is thus not always possible. Inchoate offences are thus used as a major instrument of criminal law in the legal fight against terrorism. This cannot but be a source of concern.

Although they definitely existed prior to September 11, the counter-terrorism legislation enacted since then has certainly expanded all previous trends towards anticipating risks. The aim of current counter-terrorism measures is mostly that of a preventive identification, isolation and control of individuals and groups who are regarded as dangerous and allegedly represent a threat to society. The risk in terms of mass casualties resulting from a terrorist attack is thought to be so high that the traditional due process safeguards are deemed unreasonable or unaffordable and prevention becomes a political imperative. In the words of the UK anti-terrorism branch:

> "The threat from international terrorism is so completely different that it has been necessary to adopt new ways of working (...). The advent of terrorist attacks designed

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[16] See *e.g.* Hallevy's concluding remark: "The fight against terrorism effects the definition of inchoate offences, and inchoate offences are used as a major instrument of criminal law in the legal fight against terrorism" (G. Hallevy, "Counter-Terrorism and Inchoate Offences", Paper presented at the 2nd Annual Conference on the Legal Fight Against Terrorism, Columbia University and Ono Academic College, at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406042).

[17] See *e.g.* J.T. Parry, "Terrorism and the new criminal process", *William & Marry Bill of Rights Journal*, 15(3), 2007, p. 765-835.

[18] K. Šugman and M. Jager, "Post 9/11 developments of the EU criminal law-related initiatives and their implications on some basic criminal law principles", in P.C. Duyne (ed.), *Crime business and crime money in Europe : the dirty linen of illicit enterprise*, Nijmegen, Wolf Legal Publishers, 2007, p. 247-267.

> to cause mass casualties, with no warning, sometimes involving the use of suicide, and with the threat of chemical, biological, radiological or nuclear weapons means that we can no longer wait until the point of attack before intervening. The threat to the public is simply too great to run that risk (...) the result of this is that there are occasions when suspected terrorists are arrested at an earlier stage in their planning and preparation than would have been the case in the past" [19].

Most of the preparatory steps which are at the basis of terrorist attacks were allegedly not punishable under the old concept of inchoate offences hence, law enforcement agents could not have intervened at the preparation stage. Intervention at the attempt stage ran the risk of being ineffective as the transition from the attempt to the full completion of an offence is often fast in terrorist cases.

The legislator has thus enacted specific offences to seize preparatory acts of terrorism: terrorism financing; membership in an association for terrorist purposes; glorification of terrorism; production of means, chemical substances, biological substances; training potential perpetrators; and the detailed planning of terror operations, etc. [20].

As has been underlined in the course of this publication, inchoate offences have been expanded in most countries not only because of national developments, but also to comply with international and European requirements. The 2002 EU Framework Decision, for example, requires the punishment of offences such as the "direction of a terrorist group" and "participation in a terrorist group", including "providing information or material means via any kind of financing of these activities with knowledge that this participation will contribute to the criminal activities of the group" [21]. Both the Council of Europe Convention for the Prevention of Terrorism (2005) and the EU Framework Decision 2008/919/JHA require States to criminalise public provocation to commit a terrorist offence and recruitment and training for terrorist purposes when committed intentionally. Such offences must be punishable by effective, proportionate and dissuasive penalties [22].

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[19] London Anti-Terrorism Branch (SO13), "Submission in support of three month pre-charge detention" (2005), appendix of Home Affairs Committee, "Terrorism Detention Powers", HC, 2005-06, no. 910-I, p. 54 as quoted by J. McCulloch and S. Pickering, "Pre-crime and counter-terrorism", *British Journal of Criminology*, 49(5), 2009, p. 628, at p. 632.

[20] With regards to the UK, see for example S. 56 Terrorism Act 2000 (directing a terrorist organisation) and S. 1 Terrorism Act 2006 (encouragement of terrorism). As for France see the "*association de malfaiteurs* for terrorism purposes" (Article 421(2)(1) CP) and its Italian homologue encompassed in Article 270 *bis* CP.

[21] Article 2 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ*, no. L 164, 22 June 2002, p. 3-7.

[22] Article 3, Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ*, no. L 330/51, 9 December 2008, p. 21-23.

4. A concrete example of a terrorist inchoate offence: the "possession of an article for terrorist purposes"

The United Kingdom's anti-terrorist legislation, by contrast, is a particularly controversial example of a current trend in English criminal law, which is to create new offences in inchoate mode over and above the traditional categories of conspiracy, incitement and attempt.

A particularly significant example of a terrorist inchoate offence is the "possession of an article for terrorist purposes" (S. 57, UK Terrorism Act 2000), punishable with a maximum sentence of ten years imprisonment (increased to fifteen years by the Terrorism Act 2006). This offence goes as far as to criminalise suspicious circumstances where an individual becomes liable unless he has a "reasonable excuse" to explain "the circumstances". Section 57 only requires the existence of circumstances creating a suspicion that the possession of the article in question is connected with the commission, preparation or instigation of an act of terrorism [23]. The problem is: when does the possession of an article (possibly harmless as such) become criminally relevant [24]?

As underlined in the contribution on the UK counter-terrorism legislation, a key question in relation to this offence is the reversal of burden of proof and what the defendant has to do, if anything, to avoid conviction where the circumstances mentioned in the section exist.

The offence existed in the earlier Northern Ireland legislation [25]. When reform of anti-terrorism legislation was discussed in the late 1990s, the need for such an offence was questioned. However, retaining this offence in legislation was considered necessary precisely in order to allow police intervention at an early stage against the commission of terrorist acts. This provision is allegedly needed in order to allow action to be taken against a person who is found in possession of an article (*e.g.* during a search of premises) which, although perhaps commonplace in normal circumstances, is well known to be used in the manufacture of bombs. If no other evidence exists, it might be difficult to charge the terrorist suspect with an offence of conspiracy, for instance, to cause explosions [26].

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[23] Controversies have recently arisen as for the interpretation of this section. See C. WALKER, "Case comment. Terrorism: precedent", *Criminal Law Review*, 1, 2008, p. 80; C. WALKER, "Case Comment. Terrorism: possessing an article", *Criminal Law Review*, 1, 2008, p. 71; C. WALKER, "Case Comment. Terrorism: Terrorism Act 2000 s 57", *Criminal Law Review*, 1, 2008, p. 72.

[24] The concept of possession has already given rise to great difficulties in drug cases. However, not even the leading House of Lords decision in *Warner v Metropolitan Police Commissioner* identified a clear set of principles on the matter. [1969] 2 AC 256.

[25] S. 16A Prevention of Terrorism Act 1989, S. 30 Northern Ireland Emergency Provision Act 1991 and S. 32 Northern Ireland Emergency Provision Act 1996. Widely used since its introduction, S. 30 resulted from the recommendations of the Colville Report (1990), though its application was there confined to possession in public places. Then, S. 63 Criminal Justice and Public Order Act 1994 amended the Prevention of Terrorism Act 1989 so as to extend the possession offence to the United Kingdom.

[26] Lord LLOYD OF BERWICK and P. WILKINSON, "Inquiry into legislation against terrorism", Cm 3420, 1996, para 14.5.

France and Italy have been more circumspect in this area. For instance, the two jurisdictions have not criminalised alleged terrorist speeches (or the mere public expression of opinions) to the same extent, nor have they criminalised the possession of articles for terrorist purposes. Their legislation has instead gradually expanded the notion of conspiracy ("association for terrorist purposes") and relevant provisions on aiding and abetting.

5. Critical aspects in the use of inchoate offences

In the last decade, parliaments have been active in enacting new offences in the "inchoate mode" and criminalising preparatory activities even where these stand several steps away from the actual perpetration of the harm. This trend is particularly visible in the legislation related to terrorism, where it is sometimes coupled with an extensive use of administrative measures for preventive purposes.

For instance, the British legislator has gone a long way in designing offences in the inchoate mode and even imposing a shift in the evidential burden of proof on to the defendant [27]. The current tendency to legislate with a view to eliminating risk, though recently accentuated, dates back much earlier [28]. And the shift in criminal liability is also manifest with regard to recent examples, such as the Sexual Offences Act 2003, the Fraud Act 2006 and the Serious Crime Act 2007.

The criminalisation of inchoate offences raises particular difficulties. The tendency to devise offences around a minimal *actus reus* has meant that the boundaries of criminal liability have become vague, elastic and porous, often emphasising the importance of *mens rea* over the *actus reus* [29]. Inchoate and preparatory offences broaden the scope of criminal responsibility not only because their boundaries are vague and uncertain but also because they move criminal liability very far from the actual commission of an act. The *actus reus* of terrorist inchoate offences is often currently extended to embrace a wide range of behaviours, sometimes apparently innocuous. Although they always relate to a substantive offence, these preparatory offences are completed and can be prosecuted before the commission of any full offence.

The reach of these offences is further extended by the fact that they operate with reference to a definition of terrorism that is extremely broad, therefore possibly in breach of the *lex certa* principle. The new offences are, moreover, often superfluous,

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[27] *Inchoate Liability for encouraging and committing crime*, London, 2006, Cm 6878. See for a comment G.R. SULLIVAN, "Inchoate liability for assisting and encouraging crime – the Law Commission Report", *Criminal Law Review*, 12, 2006, p. 1047-1057.

[28] For example, in 1883 the Explosive Substances Act (which is still in force) encompassed in its S. 3(b) an early example of an extremely extensive possession offence with a minimum *actus reus*.

[29] In the words of Justice Jackson: "The modern crime of conspiracy is so vague that it almost defies definition. (...). It is always 'predominantly mental in composition' because it consists primarily of a meeting of minds and an intent". *Krulewitch v. US* (1949), 336 U.S. 440.

the behaviour they proscribe being already sufficiently addressed under existing legislation [30].

Not only do inchoate offences expand criminal liability, but they also regrettably allow the use of enhanced preventive powers and police interventions before the commission of an offence [31]. These unsatisfactory criminal law developments are even more problematic as they trigger the application of special procedural rules for the investigation and trial of terrorist offences to a larger group of individuals, often with reduced judicial oversight. Their introduction and use is dictated by law enforcement arguments – the need to intervene at an early stage and prevent the commission of an offence – rather than reasons of criminal liability. They thus allow an early intervention, but where are its limits? Hence, recent provisions have gone beyond the limits of what criminal law normally penalises [32].

New inchoate offences also include descriptions like: the "encouragement" of, "glorification" of and/or "apology" for terrorism (albeit in an undefined future and at undefined places) as well as the dissemination and the publication of relevant material [33]. The impact of international instruments aimed at terrorism is noticeable in this context.

These offences are likely to affect the right to freedom of expression (Article 10 ECHR). This right may be legitimately restricted under limited conditions identified in Article 10(2), *i.e.* only when interferences: are prescribed by law [34], pursue a legitimate aim [35], and are "necessary in a democratic society" [36]. These three requirements imply that criminal offences in this area should be narrowly defined.

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[30] See for example the conviction of the imams Abu Hamza and El-Faisal for incitement to murder before the introduction of the offence of "encouragement to terrorism" in British legislation in 2006.

[31] The UK Law Commission even encourages this when they compare the two different types of policing: (1) the more traditional (they call it simplistic) 'fire-brigade' one, responding to the report that the crime has been committed and (2) 'intelligence-led' policing or 'problem-oriented' policing, which is reacting to the information that the crime will be committed. They obviously favour and encourage the second approach. *Conspiracy and Attempts: A Consultation Paper*, Law Commission Consultation, no. 183, 2007, p. 26-27.

[32] Child and Hunt concisely point out the lack of justification for the existence of the special part inchoate offences. See J. Child and A. Hunt, *op. cit.*, p. 55-67.

[33] See for example S. 1 ("encouragement of terrorism") and S. 2 ("dissemination of terrorism publications") UK Terrorism Act 2006.

[34] The restriction must be based in law and meet certain standards of clarity and accessibility, enabling citizens to foresee the circumstances which a given conduct might entail. Laws granting public authorities a broad discretion to limit the freedom of expression fail such a requirement. See Eur. Court HR, 25 November 1996, *Wingrove v. United Kingdom*, App. no. 17419/90.

[35] See Article 18 ECHR on permitted restrictions.

[36] The third requirement entails a pressing social need for the limitation, justified by relevant and sufficient reasons, proportionate to the aims pursued and brought about by the least restrictive means available. See *e.g.* Eur. Court HR, 7 December 1976, *Handyside v. United Kingdom*, App. no. 5493/72; Eur. Court HR, 8 July 1986, *Lingens v. Austria*, App. no. 9815/82; Eur. Court HR, 18 July 2000, *Sener v. Turkey*, App. no. 26680/95); Eur. Court HR, 9 June 1998, *Incal v. Turkey*, App. no. 22678/93.

Otherwise, their vagueness and breadth would increase the impact of an already unclear definition of terrorism and their interpretation is likely to be highly subjective. According to the European Court of Human Rights, freedom of expression is meant to protect precisely the most controversial views and dissenting opinions [37]. Thus to avoid the criminalisation of legitimate statements, extreme speech provisions should only prohibit the direct incitement of terrorist acts resulting in imminent violence and a risk of harm to security [38].

Similar concerns arise in relation to the new offences of recruiting or training for terrorist purposes. These offences run the risk of curtailing freedom of association and assembly (Article 11 ECHR), which may only be restrained under the previously mentioned conditions of legality, necessity and proportionality. The increasing impact of anti-terrorism legislation on the legitimate exercise both of freedom of expression and freedom of association cannot but be a source of concern.

The interpretation of inchoate offences may create difficulties both at the investigation and trial stage. As underlined with regards to the "association for terrorist purposes" offence in Italian criminal law, case law may be incoherent and merely require evidence to prove the association of a person with a terrorist group rather than evidence of the commission of terrorist acts. In some cases, ideological adherence to criminal purposes has been considered enough for a charge; in other cases, criminal liability was thought to require concrete steps towards the commission of an offence [39].

6. Shift towards prevention, anticipation of risk and normalization of the exception

There are numerous dangers inherent in an approach which tries to use criminal law as a preventive tool. As Ulrich Beck pointed out, nowadays, risk and damage control are at the centre of the means and legitimisation of State intervention [40]. There is, however, a difficulty in translating the policy concept of "risk" into a criminal law language which is supposed to be based on a principle of legality, especially its *lex certa* aspect.

The development of inchoate offences is one feature of a paradigm shift towards preventive action, which poses critical challenges for the protection of individual rights. First, the boundaries of what is a dangerous type of behaviour are highly contentious and problems arise with the assessment of future harm. Secondly, "suspicion" has replaced an objective "reasonable belief" in most cases in order to justify police intervention at an early stage in terrorism cases without the need to

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[37] See *e.g.* Eur. Court HR, 23 April 1992, *Castells v. Spain*, App. no. 11798/85; Eur. Court HR, 8 July 1999, *Sürek and Özdemir v. Turkey*, App. nos. 23927/94 and 24277/94.

[38] See Eur. Court HR, 8 July 1999, *Karatas v. Turkey*, App. No. 23168/94.

[39] See F. Galli, "Italian counter-terrorism legislation: the development of a parallel track ('doppio binario')" in this same publication.

[40] On the development of a "risk society" and a "culture of control" see U. Beck, *Risk Society: Towards a New Modernity*, London, Sage, 1992, p. 21; M.M. Feeley and J. Simon, "The new penology", *Criminology*, 30(4), 1992, p. 449; D. Garland, *The culture of control*, Oxford, Oxford University Press, 2001.

envisage evidence-gathering with a view to a prosecution. The risk of potential harm is often assessed on the basis of secret evidence and justified by political considerations, possibly prior to the establishment of any trial. Thirdly, there is greater reliance on preventive administrative measures as a means of general use instead of seeing them as exceptional and temporary, and necessarily linked to a genuine emergency. They are created for the purpose of early interventions in order to avoid terrorist acts taking place rather than merely to respond after the event (*e.g.* detention, expulsion and deportation of immigrants, administrative detention, control orders and listing). Governments can thus act on the lower standard of possibility of future harm rather than the higher standard of proof of past criminal activities. This allows a shift towards greater government discretion on national security grounds at the expense of judicial scrutiny.

This drift towards prevention raises the question of whether one should see terrorists as criminals, who are both bound and protected, as all citizens are, by criminal law and rights of due process. And, if not, to what rights should they be entitled? The question has been explored by the German author, Gunther Jakobs, who has developed the notion of "*Feindstrafrecht*" [41]. Since 2000, the author has described the development of an "enemy criminal law" as inevitable and called for exceptional treatment for non law-abiding citizens who have become "enemies". A significant shift in inchoate liability implying that individuals are not always punished after wrongdoing (retrospectively), but before any actual harm occurs, in order to prevent it (prospectively) [42] is one of the three distinctive features of enemy criminal law [43].

The introduction of terrorist inchoate offences and the criminalisation of preparatory acts with a terrorist purpose has been regarded as exceptional and legitimised by the fact that such measures are temporary and target only terrorism-related activities and specific groups of people. The description of anti-terrorism powers as temporary emergency measures facilitates their acceptance. The notion of "normalisation" describes a process through which emergency measures prompted by extraordinary events become institutionalised over time as part of the ordinary criminal justice system, long after the circumstances that initiated them have disappeared [44]. The theory of "normalisation" does not claim that the adoption of extraordinary powers is

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[41] See S. Braum, "Are we heading towards a European form of 'enemy criminal law'? On the compatibility of Jakob's' conception of 'an enemy criminal law' and European criminal law" in this same publication; G. Jakobs, "Terroristen als Personen im Recht?", *Zeitschrift für die gesamte Strafrechtswissenschaft*, 117, 2006, p. 839; A. Gamberini and R. Orlandi, *Delitto Politico e diritto penale del nemico*, Bologna, Monduzzi, 2007; M. Donini and M. Papa, *Diritto Penale del nemico*, Milano, Giuffrè, 2007; C. G. Jara Diez, "Enemy combatants versus enemy criminal law", *New Criminal Law Review*, 11, 2008, p. 529.

[42] This would represent an upheaval of the traditional function of the investigation and the trial meant to ascertain the commission of an offence and not to prevent it.

[43] The other features being the limitation or exclusion of procedural rights and the application of disproportionate sanctions if compared to similar provisions.

[44] See more on a process of normalization in D. Brock, R. Raby, M.P. Thomas, *Power and Everyday Practices*, Toronto, Nelson Education, 2012, p. 2-33.

necessarily inappropriate in response to exceptional events. The problem is that the powers introduced are unlikely to remain limited to the context of the fight against terrorism, or that they have a tendency to be applied beyond their original scope and thus become part of, and impact upon, the ordinary criminal justice system and law enforcement policies at large [45]. The normalisation of extraordinary powers is also perilous because the new provisions become the standard of reference for the design of future policies [46].

7. Conclusion

Governments continue to believe that a broader definition of terrorism and new preparatory and inchoate offences are proportionate responses to the phenomenon of a contemporary terrorism. In addition, the introduction of new offences is often justified by the need to implement international and European instruments.

It must be accepted, of course, that the creation of inchoate offences is not a negative trend as such. As the borders open, technology and social risks evolve the criminal justice system has to follow. It is naive to expect that the traditional understanding by which only completed acts can be penalised would be able to deal with contemporary crime, such as organized crime and terrorist threats, by judicial means. It would have to rely on preventive administrative measures. The problem arises as for the necessity and proportionality of each measure.

However, such offences are, as shown above, problematic from different reasons which must not be disregarded despite the need for change.

Firstly, they are an exception from the generally accepted criminal law standards and are being drafted in special circumstances, without being based on a coherent theoretical justification, but rather on the State of need and emergency. Despite the fact that the newly created anti-terrorist offences substantially digress from the well-established criminal law standards, there is yet no coherent theoretical base on how such offences should be drafted and how they should be interpreted. Criminal law ought normally be restricted to offences which are likely to cause harm. Or it should target intentional acts only, other than an offence of recklessness. The legislator should go beyond the criminalisation of offences which are likely to cause harm only in serious cases within the reasonable limits constrained by requirements of a strict mental element. Attempts should be made in the drafting of new offences to keep the criminalisation of preparatory acts restricted to those which are close to the stage of execution of the intended offence. This would prevent an immoderate extension of criminal liability and be in compliance with the principle of legality.

Secondly, the criminalisation of intentions that have not yet materialised would be against a fundamental criminal law principle that offences must address concrete acts

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[45] O. Gross, "Chaos and rules", *Yale Law Journal*, 112, 2003, p. 1011, at p. 1090; D. Dyzenhaus, "The permanence of the temporary", in R. J. Daniels *et al.* (eds), *The security of freedom*, Toronto, University of Toronto Press, 2001.

[46] See the examples of an use of an anti-terrorist legislation on people/groups who were obviously not terrorist: *e.g.* Maya Evans convicted under anti-terrorist law after refusing a police instruction to stop reading out loud the list of dead soldiers at the Cenotaph in Whitehall. B. Gibson, *The New Home Office*, Winchester, Waterside Press, 2007, p. 75.

or behaviours, and not mere ideas. In order to ensure compliance with the principle of legality (*nulla poena sine lege, nulla poena sine culpa*) and the principle of proportionality, there must be damage to the protected interest or harm for punishment to occur. This does not mean that inchoate offences can be regarded as George Orwell's "thought crime". There remains a requirement that the defendant's blameworthy State of mind manifests itself by some words or conduct. However, since, in the case of terrorism, the *actus reus* is so broad, sometimes seemingly innocuous, it is important that inchoate offences are kept within reasonable limits by requirements of strict *mens rea*. Under new legislation, it is too frequently the case that sanctions are more severe than in ordinary cases [47]. With regard to sentencing practice, offenders must in any case receive a lesser punishment than they would have received in the case of a completed offence.

Thirdly, there is a danger that such measures will be used for circumstances other than the one intended for and that the weak standards on which they are based will be used as a standard for future law drafting. This is a worst-case scenario in which all the above mentioned flaws would actually 'flood' the legal systems and change its nature. Such a State is surely not to be desired.

In the end, it is difficult to object to the new developments, but the new solutions should be carefully considered, well-founded, concise, proportionate and reasonable. Only respecting those standards the new legislation trends will not endanger the democratic foundations of our societies.

[47] Particularly severe is the punishment of inchoate offences no matter what the actual or potential harm caused is. The mere participation in a terrorist organization is liable to a maximum charge of ten years of imprisonment (Article 270 *bis* Italian *Codice Penale*). This is even more significant given the fact that according to a strict interpretation of the general rule *ex* Article 115 *Codice Penale* preparatory acts cannot be punished unless the main offence is actually committed. In the United Kingdom the offences of "directing a terrorist organization" and engaging in "any preparatory act" is liable to imprisonment for life; the possession of an article for terrorist purposes is liable to fifteen years of imprisonment.

Concluding remarks

Pedro Caeiro

> Tzu-lu said, 'If the Lord of Wei left the administration of his State to you, what would you put first?'
> Confucius said, 'If something has to be put first, it is, perhaps, *the correction of naming [zheng ming]*'.
> Tzu-lu said, 'Is that so? What a roundabout way you take! (…)'. Confucius said, '(…) When names are not correct, what is said will not sound reasonable'.
> Confucius, *Analects*, 13.3 (transl. D. C. Lau, with an adaptation by Chong-Ming Lim [*italicised*]).

The texts compiled in this volume provide a thorough analysis of the impact of European counter-terrorism legislation on the penal law systems of the Member States of the European Union (EU). The following considerations are intended as a brief reflection on some of the general trends and problematic issues identified therein.

1. It has been argued that the common definition of terrorism introduced by European law was essential for police, security and judicial cooperation between Member States in that it helped to build a common language and thus ensured mutual trust for cooperation [1]. In fact, the most relevant effect of the Framework Decision 2002 [2] was to impose the duty to incriminate terrorist offences *as such* [3], since some of the Member States (perhaps even the majority) did not provide for any specific punishment for acts of terrorism [4].

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[1] See Roland Genson's and Gilles de Kerchove's contributions within this same publication. This argument was equally supported by Michele Coninsx in her oral contribution at the ECLAN conference.

[2] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ*, no. L 164/3, 22 June 2002 (FD 2002).

[3] But see the contribution of Martin Böse within this same publication, and the reference to the prevailing opinion in German legal literature, according to which the FD does not impose a specific consideration (and labelling) of terrorist offences as a separate set of crimes.

[4] According to Whittaker, only France, Portugal, Spain and the United Kingdom "had a specified legal definition" of terrorism in 2001. See D. J. Whittaker, *The Terrorism Reader*, London and New York, Routledge, 3rd ed., 2007, p. 288. The disparity between the laws of the different Member States reflected the different degree in which terrorism was perceived as an issue in the several cultural and historical contexts: see Gilles de Kerchove's, Robert Kert's,

However, after going through the presentations of the national *rapporteurs*, one might wonder whether the FDs of 2002 and 2008 [5] actually led, or indeed could lead at all, to the implementation of a *true common definition* of terrorist offences:

1.1 In the first place, the Member States did not all fully and accurately transpose the FDs. Belgian and Austrian legislation, for instance, might not punish the crime of provocation to carry out an act of terrorism where it is punishable by other laws. The former has not transposed the FD 2008 into domestic law yet [6] and the latter has not implemented that particular norm [7].

The same conclusion applies to the (non) transposition of the incrimination of 'terrorist groups' into German law, since the *Bundesgerichtshof* [Germany's Supreme Court] refused to widen the scope of the expression 'criminal organisation' through interpretation, so as to encompass plain membership in a terrorist group and thus comply with the definition provided in the FD 2002 [8].

1.2 So far, it might be argued that the problem lies in the lack of full and accurate transposition of the FDs and that straightforward compliance with European legislation would put in place a common definition. However, the law of some Member States entails definitions of terrorism which are *broader* than the European ones, either because they already existed long before 2002 [9] or because national legislators have 'over-implemented' the FDs [10]. Although 'over-implementation' (which is, in itself, a rather intriguing concept) can occur in other contexts [11], 'over-implementation' of European legislation on substantive criminal law is also a direct consequence of the

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Henri Labayle's, John Spencer's, Anne Weyembergh and Laurent Kennes' contributions within this same publication.

[5] Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ*, no. L 330, 9 December 2008, p. 21 (FD 2008).

[6] See Anne Weyembergh and Laurent Kennes' contribution within this same publication.

[7] See Robert Kert's contribution within this same publication. Austrian law has also restricted the scope of some offences (*e.g.*, bodily harm and threats) in relation to the definitions of the FD 2002 (*ibid.*).

[8] *BGH Urteil vom 3. 12. 2009 – 3 StR 277/ 09*, para. 43 and f.: see the contribution of Martin Böse within this same publication.

[9] See Henri Labayle's, Manuel Cancio Meliá's and John Spencer's contributions within this same publication.

[10] See Robert Kert's, Katalin Ligeti's and Jorn Vestergaard's contributions within this same publication.

[11] A good example of 'over-implementation' is the way in which Portuguese law draws the offence of financing of terrorism: where Article 2(1) of the UN International Convention for the Suppression of the Financing of Terrorism (1999) requires intent or actual knowledge that the funds provided *are to be used* to carry out terrorist offences, Article 5º-A of Portuguese *Lei no. 52/2003*, of 22 August (transposing FD 2002), as amended by *Lei no. 25/2008*, of 5 June (implementing the UN Convention), deems it sufficient that one knows that the funds *can be used* for that purpose. Obviously, the norm must be construed restrictively, or it would otherwise lead to obnoxious consequences: since every individual that makes a bank deposit is aware that financial institutions can engage, albeit unknowingly, in murky business with terrorist groups (that is indeed the reason underlying accounts freezing orders), and as it is not

so-called 'minimum rules' scheme that continues to limit the legislative competence of the Union, even under the new Treaties. The EU can set the definition of minimum punishable conduct but cannot prevent Member States from adopting broader incriminations or harsher penalties [12].

Therefore, the 'minimum rules' competence also accounts for the lack of a true common definition of terrorism and, ultimately, makes it virtually impossible.

1.3 Hence, Member States share now, at most, a common *core notion* of terrorist offences and the FDs have significantly contributed to building that up. It is a positive development that cooperation has reportedly improved on the basis of that core notion.

2. Alongside this core notion of terrorist offences, European antiterrorism legislation has had other impacts:

2.1 The FDs have imposed on Member States the duty to expand the *ambit of protection* provided by their penal law systems in order to encompass the Union itself (its institutions, bodies and agencies) as well as the other Member States together with their nationals and residents. Such expansion is a paradigmatic concretisation of the idea of a *common* area of freedom, security and justice.

Indeed, this is a most legitimate claim of the EU and it filled in gaps that were plainly unacceptable. In the past, a terrorist offence committed in the territory of one Member State against the EU or against another Member State might not fall under the former's law because most States traditionally perceive terrorism to be an offence against their own inner security or public peace. Therefore, in the past, those offences would be prosecuted and tried, in the *forum loci delicti* – if at all –, as common murders, taking of hostages, etc., which would probably prevent other Member States from exerting their jurisdiction and applying their antiterrorist laws, given the interpretation of *non bis in idem* by the European Court of Justice in *Van Esbroeck* (same material acts) [13]. Consequently, those terrorist acts, *as such*, might remain unpunished.

2.2 The protection of third States intended by the FDs is quite broad. On the one hand, it is a positive achievement that the FD 2002 took a formal approach and did not require that those States be democratic or abide by the rule of law [14]. The protected

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required that the funds are *actually* used to carry out terrorist offences, virtually everybody would be perpetrating the offence of financing of terrorism by simply owning a bank account.

[12] P. Caeiro, *Fundamento, Conteúdo e Limites da Jurisdição Penal do Estado. O Caso Português*, Coimbra, Coimbra Editora, 2010, p. 438 and f., and p. 566 and f.; see also Emmanuel Barbe's contribution within this same publication. Upholding the opposite opinion, see H. G. Nilsson, "How to combine minimum rules with maximum legal certainty?", *Europarättslig Tidskrift*, 2011, p. 665, especially at p. 673.

[13] ECJ, 9 March 2006, Judgment C-436/04, *Van Esbroeck*, *ECR*, p. I-2333 § 25 f.

[14] See Sabine Gless's contribution within this same publication. But see, in a different direction, Jorn Vestergaard's contribution, and the negative definition of terrorism brought into Austrian law so as to exclude from the ambit of terrorist offences the acts that "aim to establish or re-establish democratic or constitutional order or to exercise or protect human rights", which is intended to refer, in particular, to "acts (*e.g.* by political opposition groups) which

legal interest is not the State as such – which would possibly call for a restriction of the protection to 'worthy' States – but rather, ultimately, the *peace* that the populations should enjoy. On the other hand, if we admit that terrorism is not an international crime under customary law (save for terrorism as a war crime or as a crime against humanity) [15], the extension of Member State jurisdiction to terrorist offences committed by third country nationals against third States outside the European territory is difficult to justify, even if the perpetrators have their residence in Europe. Extending Member State jurisdiction as above might also violate international law (illegitimate intervention) [16] since the *lex loci* might not punish the concrete act at stake, especially when we bear in mind some of the acts that European law criminalises and how close they can be to the exercise of certain rights and freedoms.

3. It is clear that the EU was entitled to approximate Member State laws on the definition and punishment of terrorism and, in doing so, it certainly fulfilled its duties. However, the EU seems to have followed Member States' traditions in this field by legislating immediately after terrorist attacks, as States usually do, and in a hasty manner that raises just criticism. Why does the legislation on terrorism vary so easily in time and space?

The answer is, of course, that terrorism is a dynamic phenomenon that takes on ever-changing and multifarious forms [17]. That is also the reason why, as distinct from international core crimes, no universally agreed definition of terrorism has ever been reached. And yet, in no other field is there such a strong push to label prohibited acts with a precise official name. Is it not interesting that Article 1(1) FD 2002 explicitly imposes on MS the specific duty to deem the designated acts as 'terrorist offences' [18]? What is the reason for this obsession with a name? Obviously, the special moral blame (terrorist offences are graver than the underlying acts of murder, violence, etc.) and the simplification of references in other legislative acts: 'terrorist offences' becomes a single, homogenous category, dealt with through a uniform set of rules [19]. The author of a cartoon that is interpreted as glorifying the attack on the twin towers can be subject to the same investigative techniques [20] and prosecuted, tried and convicted

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are committed in non-democratic societies outside the European Union and which must be adjudicated in Austria", with all the consequences this has on the principle of legality / *lex certa* (Robert Kert's contribution).

[15] See, *e.g.*, G. Werle, *Principles of International Criminal Law*, 2nd ed., The Hague, TMC, 2009, p. 30, marginal number 85; but see, opposing, A. Cassese, *International Criminal Law*, Oxford, OUP, 2nd ed., 2008, p. 162 and f.

[16] See K. Ambos, *Internationales Strafrecht*, Muenchen, Beck, 3rd ed., 2011, p. 23, p. 41, mn. 40.

[17] The new feature introduced by what could be grossly designated as "al-Qaeda linked terrorism" seems to be its "intangibility": "one never knows who one's enemy is" (J. Habermas, in G. Borradori, *Philosophy in a Time of Terror. Dialogues with Jürgen Habermas and Jacques Derrida*, Chicago, University of Chicago Press, 2003, p. 29).

[18] "Each Member State shall take the necessary measures to ensure that the intentional acts referred to below in points (a) to (i), (...) shall be deemed to be terrorist offences".

[19] See Emmanuel Barbe's and Gilles de Kerchove's contributions within this same publication.

[20] See Robert Kert's contribution within this same publication.

under the same procedural rules, restrictions of rights, etc. that would apply to the perpetrators of the attack themselves. This is all by virtue of the magic word that serves as an 'anchorage point' [21]: the label 'terrorist offence'. Given that the degree of harm caused by each of the offences mentioned is not comparable, we cannot avoid asking the question: How did we get here?

The magnitude of recent terrorist offences and the prevailing "culture of fear" are the main reasons. They paved the way for the irrational and otherwise inconceivable legal levelling of the cartoonist and the mastermind of a devastating large-scale bombing. Nevertheless, due to the very different nature of their acts, the legitimacy of such homogenisation requires a stronger basis, which has been found, ultimately, in a sort of new *Tätertyp* [type of perpetrator] doctrine [22]. The legal treatment of terrorists does not relate primarily to the offences committed or the harm caused, but rather to what offenders *are*, or are assumed to be [23], and the threat they pose to society. Let us look with more detail into this combination of perpetrator-centred approach and risk prevention.

3.1 Arguably, laws are no longer meant to work to prevent terrorist acts as criminal offences. Rather, they are intended to control *terrorists*, conceived as an absolute *them*, as opposed to *us*. Indeed, when a given society criminalises any type of conduct, there is always an implicit *them* underlying the circle of addressees of the penal norm since the prohibition relies, precisely, on a general commitment not to engage in illegal behaviour.

However, it is likely that one of us will someday be in breach of a prohibition and will perpetrate an act of fraud, a sex crime, manslaughter or even murder.

In that case, *we* want to be treated decently and therefore our representatives pass laws to make sure that no State intervention occurs before our behaviour jeopardises society's or third party interests. In addition, penal norms must be clear-cut and precise in their meaning; our right to be informed of the charges must be respected and the evidence against us must be examined by an impartial court.

These requirements do not have to apply when we are legislating on terrorists [24]. Whereas a physical barrier between *them* and *us* simply cannot be built in Europe, it seems that a symbolic, spiritual fence, made of legislation, is being erected to target specific groups. That does not necessarily mean that a *Feindstrafrecht* [25] approach to terrorism is being followed. More simply, the aim of legislating on terrorists is not to create mechanisms that enable society to respond to their offences (*e.g.*, by claiming, through punishment, that the violated norm is in force in spite of the offence

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[21] See Jorn Vestergaard's contribution within this same publication.

[22] G. Dahm, *Der Tätertyp im Strafrecht*, Leipzig, 1940.

[23] M. Cancio Meliá, in G. Jakobs and M. Cancio Meliá, *Derecho Penal del Enemigo*, Madrid, Thomson, 2003, p. 94 f.

[24] See Christophe Marchand's contribution on the use of secret evidence within this same publication.

[25] As it is well known, this controversial concept has been developed by Günther Jakobs since 1985: see G. Jakobs, "Kriminalisierung im Vorfeld einer Rechtsgutverletzung", *ZStW*, 97, 1985, p. 753 and f., and the discussion in G. Jakobs and M. Cancio Meliá, *Derecho Penal del Enemigo*. See also Stephan Braum's contribution within this same publication.

committed) but rather to identify them as such *before* they can violate those norms. As distinct from common criminal law, prevention (meaning deterrence) [26] is no longer used to signify the goal of punishment [27]. Instead, prevention describes police activity *stricto sensu*, *i.e.*, the development of strategies to prevent risk from materialising into damage (prevention as in *Präventionsstaat* [28] [Prevention State]).

3.2 Given the magnitude of the threat posed by terrorists as a general category of people (not necessarily by every terrorist offence), it is not surprising that formal agencies of crime control enjoy exceptional powers of surveillance, investigation and use of secret evidence. Such powers are coupled with the exceptional levels of incrimination of preparatory acts, assistance (a form of participation possibly more tenuous than complicity) [29], provocation, training, recruitment, glorification of terrorist acts and their perpetrators and even certain constructions of the crime of terrorist association where simple ideological adherence suffices to materialise the crime [30] so that investigation and surveillance can start as early and extend as far as possible.

Incriminating preparatory and accessory acts [31] is useful because it grants the police the necessary powers to identify and stop terrorists beforehand. It also provides the legal basis for keeping them under control. If police activity is fruitful and terrorists are actually prevented from causing damage and spreading terror, they cannot just be set free. Thus, those incriminations allow for the application of penalties that do not really correspond to the rather modest harm caused by the offence. They are, in substance, *pre-criminal security measures* that serve the purposes of rendering the terrorist innocuous and available for the authorities as a source of information for a period of time [32], circumventing, by the same token, objections that might be raised against administrative preventive detention [33]. Indeed, the purpose of keeping

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[26] See A. Ashworth, *Principles of Criminal Law*, Oxford, Oxford University Press, 5th ed., 2006, p. 16: "(...) one fundamental reason for having a criminal law backed by sanctions is deterrent or preventive: (...)".

[27] As argued by Michele Coninsx during her oral presentation at the ECLAN conference.

[28] See, *e.g.*, S. Huster and K. Rudolph, "Einleitung", in S. Huster and K. Rudolph (eds.), *Vom Rechtsstaat zum Präventionsstaat*, Frankfurt, Suhrkamp, 2008, p. 12 and f.; P.-A. Albrecht, *Die vergessene Freiheit*, 2nd ed., BWV, 2006, p. 45 and f.; and A. Hofmann and B. Zängerling, "Innere Sicherheit und Präventionsstaat. Herausforderungen durch den internationalen Terrorismus", available at <http://fzk.rewi.hu-berlin.de/inneresicherheit.pdf> (last visited 11 March 2012). On the pervasive obsession with risk prevention, see also C. Shearing and P. Stenning, "From the Panopticon to Disney World: the development of discipline", in A. N. Doob and E. L. Greenspan (eds.), *Perspectives in Criminal Law: Essays in Honour of John Ll. J. Edwards*, Aurora, Canadian Law Book Inc., 1985, p. 335 and f.

[29] See Francesca Galli's contribution within this same publication.

[30] See Katalin Ligeti's contribution within this same publication.

[31] See Katja Šugman and Francesca Galli's and Ulrich Sieber's contributions within this same publication.

[32] The different nature of these sanctions was clearly perceived by Michele Coninsx, when she wondered during her oral presentation at the ECLAN conference, albeit in a more general context, what purpose the imprisonment of terrorists should serve.

[33] See John Spencer's contribution within this same publication.

terrorism control within the judicial system (as opposed to the administrative or military system) should be endorsed (both for the sake of fundamental rights and for the confirmation of the State's exclusive authority to define a given act as criminal) [34], but the obvious question is: At what price? How far can the principles and categories of criminal law be stretched to accommodate the so-called "fight against terrorism"?

3.3 In a way, it could be said that some elements of antiterrorism legislation already substantiate a *Feindstrafrecht* approach but it seems that the current general mechanism created for terrorists owes more to the lineaments of the so-called "new penology" paradigm theorised by Malcolm Feeley and Jonathan Simon [35]. In fact, both theories, being quite different in many aspects, share nonetheless a common element – the depersonalisation of the individual. However, as far as terrorists are concerned, the idea is not only to neutralise dangerous 'un-personal' individuals (in the framework of Jakobs's conception, the enemy keeps his individuality, which is indeed the basis that allows for *his* classification as such: de-personalisation is still a consequence of an undesired individual attitude, of his disposition, of his decision of self-exclusion from the legal polity) [36], but rather to assess the *dangerousness of a targeted group* and manage the risk posed by that group regardless of the particular acts or features of each individual [37].

4. The early stage of State intervention leads to an overly broad scope of the relevant norms, which is exacerbated by the vague way in which European and domestic law phrase prohibited conduct. The *rapporteurs* brought some awkward instances of actual prosecution for terrorist offences [38]. Indeed, the concern is even stronger when the extension of criminal liability puts in jeopardy a significant part of a country's population, for particular reasons [39]. Moreover, the dangers of criminalising acts of everyday life as discrete offences are self-evident. Laws that have been made for *them* could actually be applied to *us*. And there lies the ultimate paradox of antiterrorist

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[34] See M. Cancio Meliá, in G. Jakobs and M. Cancio Melià, p. 97 and f., and Gilles de Kerchove's contribution within this same publication.

[35] Compare M. Feeley and J. Simon, "The New Penology: notes on the emerging strategy of corrections and its implications", *Criminology*, 30/4, 1992, p. 449 and f.; see also Gilles de Kerchove's contribution and Katja Šugman and Francesca Galli's contribution on inchoate offences within this same publication.

[36] See G. Jakobs, in G. Jakobs and M. Cancio Meliá, p. 36 and f. But see, proposing a possibly different interpretation, M. Cancio Meliá, *Los Delitos de Terrorismo: Estructura Típica e Injusto*, Madrid, ed. Reus, 2010, p. 36 and f.

[37] See M. Feeley and J. Simon, p. 455. The purposes and methods of the new penology are conceived to deal with (manageable) "common offenders" rather than terrorists, but both the risk-assessment approach and the prevalence of (group) profiles over (individual) faces adapt easily to anti-terrorist policies: see M. Ajzenstadt and B. Ariel, "Terrorism and risk management: The Israeli case", *Punishment & Society*, 10/4, 2008, p. 355 and f. ; and Ulrich Sieber's contribution within this same publication

[38] *E.g.*, the almost picturesque cases of the divorced fathers' association and the flaming of two dustbins reported by Robert Kert in his contribution and the taking of hostages by inmates in a prison, to be traded against a pizza, reported by Katalin Ligeti's in her contribution within this same publication.

[39] See Manuel Cancio Meliá's contribution within this same publication.

legislation: the most worrying of all criminal offences walks hand in hand with some of the most cherished freedoms in western culture (association, expression, etc.), and not even the State can always tell them apart in the face of its own law [40]. It is quite odd that the European legislator, while fighting such a heinous kind of criminality, feels the unusual need to assert that the instruments at stake respect fundamental rights and cannot be interpreted as being intended to restrict them [41].

In a nutshell, it seems clear that the main criticism raised and shared by all national *rapporteurs* relates to the fact that antiterrorist legislation throughout Europe is largely overly broad. Maybe the responsibility for that is to be shared between Member States and the European Union.

It is not likely that the FDs will be reshaped in a way that proves more consistent with general principles of criminal law, especially the principles of harm and proportionality. It is probable that the EU does not even have the competence, under the current version of the Treaty, to reduce the scope of its own provisions on substantive criminal law – and that would be, in any case, most undesired at a political level.

Therefore, in the near future, citizens' rights and freedoms in the realm of antiterrorism can expect little from the European legislator (except, perhaps, as regards procedural rights). The defence against their possible violation seems to lie now with the courts (including the European Court of Justice). Maybe the courts can, in their decisions, hold that Article 1(2) of the FD 2002 and Article 2 of the FD 2008 contain actual, binding norms and not just pious intentions or useless reminders of the States' obligations in this field.

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[40] See Christophe Marchand's and Anne Weyembergh and Laurent Kennes' contributions within this same publication.

[41] "This Framework Decision respects fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they emerge from the constitutional traditions common to the Member States as principles of Community law. The Union observes the principles recognised by Article 6(2) of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, notably Chapter VI thereof. Nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate" (10th recital of the Preamble of FD 2002); "This Framework Decision shall not have the effect of altering the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union" (Article 1(2) of FD 2002); "This Framework Decision shall not have the effect of requiring Member States to take measures in contradiction of fundamental principles relating to freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability" (Article 2 of FD 2008). On the 'unease' caused by the felt need to insert such clauses in the European legislation, see A. Miranda Rodrigues, *O Direito Penal Europeu Emergente*, Coimbra Editora, 2008, p. 219.

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