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EU counter-terrorism offences

What impact on national legislation
and case-law?

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Concluding remarks

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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 cooperation¹. In fact, the most relevant effect of the Framework Decision 2002² 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 terrorism⁴.

¹ See Roland Genson's and Gilles de Kerchove's contributions within this same publication. This argument was equally supported by Michele Coninx 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 2008⁵ 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 yet⁶ and the latter has not implemented that particular norm⁷.

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 2002⁸.

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 2002⁹ or because national legislators have 'over-implemented' the FDs¹⁰. Although 'over-implementation' (which is, in itself, a rather intriguing concept) can occur in other contexts¹¹, 'over-implementation' of European legislation on substantive criminal law is also a direct consequence of the

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 5^o-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 penalties¹².

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 law¹⁴. The protected

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 forms¹⁷. 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 rules¹⁹. The author of a cartoon that is interpreted as glorifying the attack on the twin towers can be subject to the same investigative techniques²⁰ and prosecuted, tried and convicted

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] doctrine²². 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 be²³, 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 terrorists²⁴. 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

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 punishment²⁷. 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 crime³⁰ so that investigation and surveillance can start as early and extend as far as possible.

Incriminating preparatory and accessory acts³¹ 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 time³², circumventing, by the same token, objections that might be raised against administrative preventive detention³³. Indeed, the purpose of keeping

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 Coninx 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 Coninx, 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 Simon³⁵. 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 individual³⁷.

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 offences³⁸. 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 reasons³⁹. 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

³⁴ See M. CANCIO MELIÀ, 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 MELIÀ, p. 36 and f. But see, proposing a possibly different interpretation, M. CANCIO MELIÀ, *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 Melià'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 law⁴⁰. 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 them⁴¹.

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.

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.