

Legal tools for prosecution of threat network agents

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Index

<i>1. Introduction.....</i>	<i>3</i>
<i>2. European counter-terrorism legislation frame.....</i>	<i>4</i>
<i>3. Terrorist offences under the Spanish Criminal Code.....</i>	<i>7</i>
<i>4. Evidence: Technical Exploitation, Chain of Custody and Cross-Border Chain of Possession.....</i>	<i>8</i>
<i>References.....</i>	<i>9</i>

1. Introduction

After September 11, most of the States have adopted exceptional legislation in order to combat terrorism, as, for instance, opening of new possibilities of intervention for the police, increasing punishments and hardening the execution conditions.

Certainly, terrorism is one of the most serious criminal behaviour that produces a sense of terror and instability in the population of targeted States. Prevention and suppression of terrorism must be a priority in any modern society and in order to achieve it successfully States cannot spare any means. However, in the fight against terrorism the proportionate balance among prosecution, penal intervention and individual human rights must be guaranteed. Punctual exceptions from the ordinary system can be justified by the particular characteristics of the terrorism, but they should always be applied under judicial control and with a full respect to the principles of legality and proportionality.

In the other hand, the correct application of these rules requires the utmost care in the development of investigations. There are more punished behaviours now, but this kind of crimes, when the attack has not been committed yet, are very difficult to prove.

Legal tools for prosecution of threat network agents is a seminar which covers a wide range of very interesting items relating to counter terrorism from a Law Enforcement perspective. The aim is to show the main ideas about the European frame of counter terrorism law, how Spain has adapted the Directive 541 to its procedures, the main terrorist crimes and the legal requirements to commit them, and, finally, practices and procedures that underpin the process of making evidence through the prosecution and pinpointed some legal aspects which need to be considered as requirements to be successful in the Court.

With this purpose, three experts in counter terrorism from the National Police of Spain have been received in the CIED-COE. Two legal advisors, experts in terrorist crimes who carry out their duties in the area of the strategic analysis of intelligence and legal advice, and usually take part in national and international meetings, seminars, workshops and forums related to the judicial area, especially in Criminal law and Criminal procedural law matters. And a EOD-CBRN¹ expert, bomb technician and operational chief, who has taken active part on the training programs of regional police agencies, and national and international missions in countering the threat of EOD-CBRN. He gives to this seminar the operational view about collection, exploitation and processing evidence after an Improvised Explosive Device-related event takes place.

Nowadays the focus is in radicalizing and recruiting networks, so diverse programs of collaboration with the civilian scope are being developed for the prevention of the radicalization and the recruitment, jointly with the measures of prosecution of the terrorist crimes².

¹ EOD-CBRN are called TEDAX-NRBQ by National Police.

² Spanish National Strategic Plan against Radicalization.

2. European counter-terrorism legislation frame

The Spanish counter terrorism law is adapted to the Directive 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism³. The long trajectory of fighting against terrorism in Spain has given this country the necessary expertise to face the threat and adapt to it. As an example, the Spanish Law of Victims of Terrorism, created on September 2011, includes most of the measures of the Directive about this subject. In any case, the Directive 541 provides an opportunity to improve.

The new phenomena that the European Union (EU) is facing are related to the ease of travel in modern world. 'Foreign Terrorist Fighters' (FTF), the cross-border nature of terrorism, training for terrorism, travelling for the purpose of terrorism, money laundering or terrorism on the internet, are the new threats which the EU has developed the Directive 541 against.

The terrorist threat has grown and rapidly evolved in recent years. FTF travel abroad for the purpose of terrorism. Returning foreign terrorist fighters pose a heightened security threat to all Member States. FTF have been linked to recent attacks and plots in several Member States. In addition, the Union and its Member States face increased threats from individuals who are inspired or instructed by terrorist groups abroad but who remain within Europe.

Taking account of the evolution of terrorist threats, the definition of terrorist offences, group or activity should be further approximated in all EU States, in order to cover the conduct related, in particular, to foreign terrorists and the financing of terrorism more comprehensively. These forms of conduct should also be punishable if committed through the internet, including social media.

Furthermore, the cross-border nature of terrorism requires a strong coordinated response and cooperation within and between the countries. To that end, efficient use of the available tools and resources for cooperation should be made. The global character of terrorism necessitates an international answer, requiring the EU to strengthen cooperation with relevant third countries. A strong coordinated response and cooperation is also necessary with a view to securing and obtaining electronic evidence.

Criminalisation of receiving training for terrorism complements the existing offence of providing training and specifically addresses the threats resulting from those actively preparing for the commission of terrorist offences, including those ultimately acting alone. Receiving training for terrorism includes obtaining knowledge, documentation or practical skills. Self-study, including through the internet or consulting other teaching material, should also be considered as receiving training for terrorism when resulting from active conduct and done with the intent to commit or contribute to the commission of a terrorist offence. In the context of all of the specific circumstances of the case, this intention can for instance be inferred from the type of materials and the frequency of reference. Thus, downloading a manual to make explosives for the purpose of committing a terrorist offence could be considered to be receiving training for terrorism. On the contrary, merely

³ All the information contained in this heading is included in the aforementioned Directive.

visiting websites or collecting materials for legitimate purposes, such as academic or research purposes, is not considered to be receiving training for terrorism under this Directive.

Considering the seriousness of the threat and the need, in particular, to stem the flow of foreign terrorist fighters, it is necessary to criminalise outbound travelling for the purpose of terrorism, namely not only the commission of terrorist offences and providing or receiving training but also the participation in the activities of a terrorist group. It is not indispensable to criminalise the act of travelling as such. Furthermore, travel to the territory of the Union for the purpose of terrorism presents a growing security threat. EU States may also decide to address terrorist threats arising from travel for the purpose of terrorism to the Member State concerned by criminalising preparatory acts, which may include planning or conspiracy, with a view to committing or contributing to a terrorist offence. Any act of facilitation of such travel should also be criminalised.

The common rules on the prevention of the use of the Union's financial system for the purposes of money laundering or terrorist financing were established by the Directive 2015/849 of the European Parliament and of the Council. In addition to this preventive approach, terrorist financing should be punishable in the Member States. Criminalisation should cover not only the financing of terrorist acts, but also the financing of a terrorist group, as well as other offences related to terrorist activities, such as the recruitment and training, or travel for the purpose of terrorism, with a view to disrupting the support structures facilitating the commission of terrorist offences.

An effective means of combating terrorism on the internet is to remove online content constituting a public provocation to commit a terrorist offence at its source. Member States should use their best endeavours to cooperate with third countries in seeking to secure the removal of online content constituting a public provocation to commit a terrorist offence from servers within their territory. However, when removal of such content at its source is not feasible, mechanisms may also be put in place to block access from EU territory to such content. Any taken measures must take account of the rights of the end users and comply with existing legal and judicial procedures and the Charter of Fundamental Rights of the European Union.

The last remarkable aspect in this Directive is the protection to terrorism victims. A comprehensive response to the specific needs of victims of terrorism immediately after a terrorist attack, and as long as necessary, should be provided within the national emergency response infrastructure. To that end, each EU country may set up a single and updated website with all relevant information and an emergency support centre for victims and their family members providing for psychological first aid and emotional support. Initiatives of Member States in this respect should be supported by making full use of available common assistance mechanisms and resources at Union level. Support services should take into account that specific needs of victims of terrorism may evolve over time. In that regard, the Member States should ensure that support services provided in the first place at least the emotional and psychological needs of the most vulnerable victims of terrorism, and inform all victims of terrorism about the availability of further emotional and psychological support including trauma support and counselling.

The directive ends by appealing to human rights. It respects fundamental rights and freedoms and observes the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union, including the right to liberty and security, freedom of expression and information,

freedom of association and freedom of thought, conscience and religion, the general prohibition of discrimination, in particular on grounds of race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, the right to respect for private and family life and the right to protection of personal data, the principles of legality and proportionality of criminal offences and penalties, covering also the requirement of precision, clarity and foreseeability in criminal law, the presumption of innocence as well as freedom of movement , taking also into account the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, and other human rights obligations under international law.

3. Terrorist offences under the Spanish Criminal Code

Spanish anti-terrorist criminal legislation is a typical example of emergency legislation, establishing several exceptions to the general rules. The legislators have taken advantage of the European Directive to improve some aspects that had not been clear in the previous reforms of the penal code.

In the Criminal Code, anti-terrorist legislation includes a broad range of offences. The wording of the offences is often very complex, in order to embrace all kind of behaviours connected with the terrorism. New forms of independent preparatory acts and participation appear, frequently as autonomous offences, advancing the moment of the penal intervention. At the same time, procedural anti-terrorist legislation provides some exceptions compared to ordinary crimes.

The novelties that have been introduced in the Spanish Criminal Code in the last years are very numerous, and regarding the fight against the new terrorist threats, article 575 is one of the most relevant ones.

Firstly, it punishes the fact of receiving military training or indoctrination, including techniques to develop chemical or biological weapons, or to elaborate or prepare explosive devices. The most important point that investigators must prove is the purpose of becoming skilled in carrying out any of the terrorist offences.

This article focus on the self-indoctrination: whoever, with the same purpose of becoming skilled in carrying out any of the terrorist offences, habitually accedes to contents on the Internet directed at or appropriate for inciting to joining a terrorist group or to collaborate with any of them or to carrying out any of the terrorist offences. Only the access or the possession with terrorist purposes is punished. Freedom of information and ideological and religious freedom should always be respected.

These purposes must be proved with external acts. Criminal Code can't punish thoughts. For instance, publications in social networks providing moral support to terrorist groups or lone actors and showing the purpose of carrying out any of the terrorist offences is a mean to prove that someone is committing this crime, according to the last judicial decisions.

This article also tackles the Foreign Terrorist Fighter's phenomenon. The so called Foreign Terrorist Fighter are individuals who travel to a State other than their States of residence or nationality and controlled by a terrorist group, with the purpose of participate in terrorism acts or providing or receiving training or indoctrination. Nowadays, official reports show that there are two hundred and eight Spanish Foreign Terrorist Fighters who have travelled to Syria and Iraq to join DAESH and other terrorist groups.

As final conclusion, it should be stressed that current Spanish anti-terrorism legislation provides effective tools against the new forms of terrorism, especially through the Internet. However, respect for fundamental rights and procedural guarantees are always present in the law.

4. Evidence: Technical Exploitation, Chain of Custody and Cross-Border Chain of Possession

According to the Security Forces Spanish Law⁴, one of the functions of the Law Enforcement Agencies is to ensure the instruments, effects and evidence of the crime, making them available to the appropriate Judge or Court and to prepare all the technical and expert reports which are applicable (article 11). Also, the Criminal Procedure Law says that Criminal Police must collect the instruments, effects and evidence of the crime which might be in danger to disappear, making them available to the executing judicial authority.

In terrorism events using IED's, EOD Teams are in charge of collecting, examining and elaborating intelligence and technical reports. This responsibility is shared Scientific Police according to their roles and competences:

Scientific Police (Level 1 Exploitation) will focus on evidence and rests, which can determine who the perpetrators are and other substances found, while EOD will focus on the IED components identification, analysis, assessment and reconstruction. This Service will determine the danger, lethality, technical feasibility and those non-proofs through forensic analytics.

They deserve special attention to the adherence to the procedures to be followed avoiding the process to become either polluted or overridden, ruining evidence captured and exploited, and afterwards lack of proofs enough to topple down the main individual's right known as "innocence's presumption", emphasizing the coordination and collaboration of not only national but international police services aimed to find, fix and finish (identify, investigate and apprehend to) the perpetrators of either criminal or terrorist attacks.

As a conclusion, the possibility of conducting technical exploitation out of national's sovereignty and the feasibility of those evidence's taken/exploited to be used in national prosecution process was remarked. The requirement is straight adherence to national and international law and those criminal procedures enacted for such purposes (e.g. chain of custody as a guarantee of having qualifying evidence).

⁴ Organic Law 2/86 about Security Forces and Corps.

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