

Counter-Terrorism, Human Rights and the Rule of Law

Crossing Legal Boundaries in Defence of
the State

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7. Terrorism and crimes against humanity

Interferences and differences at the international level and their projection upon Spanish domestic law

Jon-Mirena Landa Gorostiza*

INTRODUCTION

Many leading scholars describe the counter-terrorism policy in Spain as an instance of the so-called 'criminal law for the enemy'.¹ Such an expression stresses the general tendency in this field to go beyond the limits of the normal pattern of both legislation and law enforcement. The result is a radical withdrawal of guarantees and the suspension of fundamental principles which should be imperative in every democracy. From another point of view we could describe the situation related to counter-terrorism policy as one where the standards of International Human Rights Law or International Humanitarian Law should be without exception taken into account in order to fix the scope of the crimes, the criminal procedure, and the conditions of serving penalties. The response

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¹ See G Jakobs, 'Kriminalisierung im Vorfeld einer Rechtsgutverletzung' (1985) 97 *Zeitschrift für die gesamte Strafrechtswissenschaft* 751. For the Spanish literature see M Cancio, *Los Delitos de Terrorismo: Estructura típica e injusto* (Reus, 2010), 19 ff.

to terrorism should be limited according to these standards, especially human rights standards, if we want to remain under the rule of law recognised by civilised nations.² In short, under the rule of human rights there is not any 'enemy' who deserves exceptional treatment.

Therefore, to label the Spanish counter-terrorism policy as a 'criminal law for the enemy' implies a critical approach that attempts to highlight some excesses and to make proposals in order to compensate the lack of safeguards in the field. In this regard, there is a crucial aspect that deserves closer attention due to its potential for rendering criminal law policy as contrary to human rights standards: that is the interpretative tendency to attribute equivalent seriousness to the crimes of terrorism and grave violations of human rights standards and, particularly, to identify terrorism with a systematic and widespread violation of human rights amounting to crimes against humanity. In other words, if terrorism is as serious as crimes against humanity, the practical consequence is to apply to the former all the exceptional measures available for the latter, paving the way for an even more intense intervention against terrorism. In the view of those who consider that terrorism deserves the same juridical treatment as crimes against humanity, such identification should result in strengthening even more counter-terrorism policies and applying, as a result, the same legal standards for both types of offences. In the case of Spain, the political pressure for acknowledging such identification between terrorism and crimes against humanity seeks to target the domestic terrorism of ETA (the Basque terrorist organisation) with the aim of applying to it the philosophy, the legal discourse and the criminal strategy designed for atrocious crimes such as genocide, crimes against humanity or war crimes.³

Nevertheless, to take that equivalence seriously could generate an illegitimate infiltration of international criminal law and human rights standards, philosophy and model regulations into the field of counter-terrorism policy. In distinction to a classical approach to international criminal law and human rights and instead of using them to control the

² See M Scheinin, A/HRC/10/3/Add.2, 16 December 2008. See also Grupo de Estudios de Política Criminal, *Una alternativa a la actual política criminal sobre terrorismo* (Málaga, 2008).

³ See the Interlocutory Decision of the Special Tribunal for Lebanon SSTL-II-O 1111 AC/R 176bis, FOO I O/Cor/20 II 0223/R000489-R000642/EN/pvk, 16 February 2011, <http://www.stl-tsl.org/en/tag/stl-11-01/i/ac/r176bis-تيضقلا-مقر> (accessed 28 September 2012), where international tribunals are confronted with the issue of terrorism considering this offence, for the first time, as a distinct international crime.

atrocities and excesses of state apparatuses, there would be a radical inversion in terms of those branches of law becoming new tools for the disproportionate persecution of terrorism in so far as this kind of crime is regarded as a serious violation of human rights.⁴ The role of the State thus changes, and it would be placed under less strict scrutiny about the way it combats terrorism, and under greater pressure to be effective in fighting that crime and in giving appropriate reparation to its victims. Human rights would no longer be limits but obstacles or, at most, part of the demands of the victims who ask for the recognition of those human right standards, but only for themselves.

The main goal of this contribution is to open up discussion about the pernicious effects that such a crossing of boundaries and mutual identification between domestic terrorism and crimes against humanity could have upon both Spanish criminal policy and the policy regarding its victims. For that purpose, first of all, the definition and types of terrorism will be analysed. Secondly, we shall draw attention to the differences and interferences between terrorism and crimes against humanity from the perspective of international criminal law. Finally, we shall explore the particularities of Spanish regulations, but mainly focusing on the comparison between terrorism and crimes against humanity.

DEFINITION AND TYPES OF TERRORISM AT THE INTERNATIONAL LEVEL

It is well known that for decades the attempt to reach a common definition of terrorism has failed in the field of international law.⁵ Probably this lack of definition can help to explain why there has not been any possibility of approving a comprehensive international convention on terrorism which would regulate this phenomenon with a general

⁴ See the new Spanish Act of Victims of Terrorism 29/2011 (Ley 29/2011, 22 September, de Reconocimiento y Protección Integral a las Víctimas del Terrorismo). In the preamble of that Act the victims of terrorism are regarded as victims of violations of human rights ('Esta ley asume igualmente una idea relativamente novedosa, que impregna todo su articulado y es que las víctimas del terrorismo son, en efecto, víctimas de violaciones de derechos humanos').

⁵ B Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006), 130 ff.

and thorough approach and not just with a sectoral one.⁶ As Casese states, the discussion about a uniform concept of terrorism began in the 1970s, and the reason for the enduring controversy is at least twofold. On the one hand, it is not clear whether so-called freedom fighters should be considered within the scope of terrorism when they are acting as members of national liberation movements. On the other hand, many problems arise when the phenomenon of terrorism is defined as resulting from profound roots and deep causes.⁷

Given the lack of definition of terrorism at the international level, it is not surprising that there is a trend to promote such a definition for domestic⁸ or regional purposes.⁹ Especially significant is the instrument made by the European Union through the Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) which embodies in its article 1 a compulsory definition to be reflected and actioned in the criminal law of all member states as follows:

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

⁶ M Shaw, *International Law* (6th edn, Cambridge University Press, 2008), 1160. See also M Cancio, *Los Delitos de Terrorismo: Estructura típica e injusto* (Reus, 2010) 143, 144.

⁷ A Cassese, *International Criminal Law* (Oxford University Press, 2008), 162, 163. There are several other causes for the lack of agreement, especially the liabilities of official personnel for alleged state terrorism and whether or not activities of 'dissident forces' (in addition to a State's armed forces) during an armed conflict situation should be excluded from the Convention. See A/57/37, A/59/894, A/C.6/60/L.6, A/61/37, A/C.6/61/SR.21, A/62/37, A/C.6/62/SR.16, A/63/37, A/C.6/63/SR.14, A/64/37, A/C.6/64/SR.14, A/65/37, A/C.6/65/L.10, A/66/37 and A/C.6/66/SR.28, <http://www.un.org/law/terrorism/index.html> (accessed 28 September 2012), for the ongoing debates before the Ad Hoc Committee set up by the General Assembly resolution 51/210 of 17 December 1996. Pursuant to resolution 66/105 of the General Assembly, although the Ad hoc Committee will not be convened in 2012, the Sixth Committee will establish a working group with a view to finalising the draft comprehensive convention on international terrorism.

⁸ For a classification of different models of regulation in Europe, see A Asua, 'Concepto de terrorismo y elementos subjetivos de finalidad. Fines políticos últimos y fines de terror instrumental' in J Echano (coord.) *Estudios Jurídicos en memoria de José María Lidón* (Deustuko Unibertsitatea, 2002) 48 ff, 68 ff.

⁹ M Di Filippo, 'Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes' (2008) 19 *European Journal of International Law* 491, 493.

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 ...¹⁰

This definition was a first attempt to set a general and uniform definition of terrorism at the European level, and it was amended by a further Council Framework Decision (2008/919/JHA) of 28 November 2008. Even though the later Decision endorses and extends the former definition of terrorism to cover 'public provocation to commit a terrorist offence', recruitment for terrorism, and training for terrorism, it did not take the opportunity to insert a more precise definition through taking into account and distinguishing between different types of terrorism, such as international, transnational or domestic varieties.¹¹ In fact, the ultimate aim pursued by that Framework Decision of 2008 was to adjust the

¹⁰ The offences are: (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). For a deep analysis of terrorism as defined in the Council Framework, see A Asua, 'Concepto de terrorismo y elementos subjetivos de finalidad. Fines políticos últimos y fines de terror instrumental' in J Echano (coord.) *Estudios Jurídicos en memoria de José María Lidón* (Deustuko Unibertsitatea, 2002) 61 ff.

¹¹ F Reinales, 'Conceptualizando el terrorismo internacional' (2005) 79 *Real Instituto Elcano* ARI 1.

European counter-terrorism policy to the latest developments in the perpetration of international terrorism.¹²

Similar to what has happened in Europe, the Spanish definition of terrorism does not distinguish between different kinds of that phenomenon. By article 571.3 of the Penal Code,¹³ 'terrorism' is defined according to one main specific feature: the criminal behaviour of promoting, forming, organising, directing, or actively participating in a terrorist organisation or group has to be committed with the aim of subverting constitutional order or seriously disturbing public peace by committing any of the felonies specified in articles 572 to 580 (including homicides and attacks on persons, damage to property, arson, munitions offences, collaboration and concealment, funding, provocation, conspiracy, solicitation, apology or justification). There is no mention within the definition of a distinction between different types of terrorism, whether domestic or international.

The lack of an appropriate juridical definition of terrorism is not the only difficulty. The state of research from the point of view of social sciences adds more obstacles, insofar as it is underdeveloped,¹⁴ especially in the case of sociology. As Turk states, sociology has never shown interest in the study of terrorism until the attack of 11 September in New

¹² The Council Framework Decision states in the Preamble (number 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 semiautonomous 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'. These reasons especially related to British concerns about the indirect incitement of terrorism – also reflected in UNSCR 1624 (2005) which was tabled by the Prime Minister Tony Blair – see C Walker, 'The legal definition of "terrorism" in United Kingdom law and beyond' [2007] *Public Law* 331.

¹³ Ley Orgánica 10/1995, 23 November, del Código Penal, amended by 5/2010 Act (Ley Orgánica 5/2010, 22 June). By art 571.3, 'For the purposes of this Code there shall be considered terrorist organisations or those groups that, gathering the features respectively established in the second paragraph of Article 570 paragraph 1 bis and in the second paragraph of Article 570 paragraph 1 ter, whose purpose or intent is to subvert the constitutional order or seriously disturb public peace by committing any of the offences set forth in the following section'.

¹⁴ See F Reinales, 'Terrorism' in W Heitmeyer and J Hagan (eds), *International Handbook of Violence Research* (Kluwer, 2003) 315; A Silke (ed), *Research on Terrorism: Trends, Achievements and Failures* (Frank Cass, 2004); A Schmid (ed), *The Routledge Handbook of Terrorism Research* (Routledge, 2011).

York.¹⁵ As a result the attempt to reach a definition has become even more illusory in a field fraught with political pressure and manipulation.¹⁶

However, following the proposal made by Reinares, we could try to set a definition of terrorism based on the following fundamental features. A violent act can be considered to be 'terrorism' if its psychological impact on a society or a segment of a society, in terms of anxiety or fear, is far greater than its material consequences, that is, the intentional physical harm to persons and property. Those who instigate or carry out terrorism do so in order to affect the attitudes and behaviour of leaders and citizens in general, and not just of the immediate victims. They generally act systematically and without warning, choosing targets that have some symbolic relevance in their cultural contexts or institutional frameworks – precise targets often selected on the basis of opportunism – and using the consequent harm or destruction to transmit messages and give credibility to their threats. This makes terrorism an extreme form of propaganda¹⁷ and also of social control.¹⁸

Such a definition stresses the communicative and expressive dimension of the phenomenon and goes beyond individual harm to emphasise its collective impact.¹⁹ Accordingly, Reinares paves the way for distinguishing between domestic and international terrorism as follows:

International terrorism is, first of all, practised with the deliberate intention of affecting the structure and distribution of power in entire areas of the world and even at the level of global society itself. Second, the individuals and

¹⁵ AT Turk, 'Sociology of terrorism' (2004) 30 *Annual Review of Sociology* 271.

¹⁶ L Weinberg, A Pedahzur and S Hirsch-Hoefler, 'The challenges of conceptualizing terrorism' (2004) 16 *Terrorism and Political Violence* 777, 778.

¹⁷ As it is stated accordingly in the epigram associated with anarchists such as Kropotkin that '[a] single deed is better propaganda than a thousand pamphlets'. 'Propaganda of the Deed' derives from the doctrine that spectacular action by an individual or an activist group may inspire further action by others. See AH Garrison, 'Defining terrorism: philosophy of the bomb, Propaganda by Deed and change through fear and violence' (2004) 17 *Crim. Just. Stud.: A Critical J. of Crime, L. and Soc.* 259.

¹⁸ F Reinares, 'Terrorism' in W Heitmeyer and J Hagan (eds), *International Handbook of Violence Research* (Kluwer, 2003) 309. See also F Reinares, 'Conceptualizando el terrorismo internacional' (2005) 79 *Real Instituto Elcano ARI* 1, 2.

¹⁹ JM Terradillos, 'El Estado de Derecho y el fenómeno del terrorismo' in JR Serrano-Piedecabras and JR Demetrio (dirs), *Terrorismo y Estado de Derecho* (Iustel, 2010) 274 ff.

groups who carry it out have extended their activities to a significant number of countries and geo-political regions, in accordance with their declared aims.²⁰

In order to label terrorism as 'international', it is not enough just to confirm the fact that its logistical structures are widespread throughout different countries. The component of transnational activities is essential to such a concept, but to qualify as 'international' it will be necessary for there to be something more and different by reference to the aims and intent of the terrorists. In this way, the key point is the intention of affecting the structure and distribution of power, not just in local or domestic spheres, but in entire areas of the world.²¹

Given the lack of juridical definition of terrorism and the absence of an appropriate distinction between different types of that phenomenon, the discussion about differences, similarities and mutual influence or interference between crimes of terrorism and crimes against humanity will reproduce such difficulties.

TERRORISM AND CRIMES AGAINST HUMANITY: INTERFERENCES AND DIFFERENCES

It is not possible to explain the differences and interferences between terrorism and crimes against humanity from the perspective of international criminal law without taking into account the attack against the World Trade Centre in New York on 11 September 2001.²² A sector of juridical literature²³ pleads for considering terrorism as tantamount to a crime against humanity due to its systematic character. Such an attack, resulting in thousands of deaths and casualties, could constitute a widespread or systematic practice carried out against a sector of the

²⁰ F Reinares, 'El terrorismo internacional' in Ministerio de Defensa, *Instituto Español de Estudios Estratégicos y Real Instituto Elcano. Panorama estratégico 2004/2005* (Madrid, 2005) 50, 51.

²¹ *Ibid.* 50.

²² A Masferrer (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Springer, 2012).

²³ JD Fry, 'Terrorism as a crime against humanity and genocide: the backdoor to universal jurisdiction', (2002–2003) 7 *UCLA Journal of International Law and Foreign Affairs* 169; VJ Proulx, 'Rethinking the jurisdiction of the International Criminal Court in the post-September 11th era: should acts of terrorism qualify as crimes against humanity?' (2003–2004) 19 *American University International Law Review* 1009.

civilian population.²⁴ Furthermore, some scholars state that those terrorist acts inherently have all the elements required by the definition of crimes against humanity according to Article 7 of the Statute of Rome. Therefore, in their view, Bin Laden's crimes represent a course of conduct pursuant to, or in furtherance of, a State or organisational policy to commit such an attack.²⁵

Before entering the discussion about whether the 9/11 attacks amount to crimes against humanity, it is necessary to take a broader perspective about how to respond to terrorism in international law. The issue has been a subject of controversy for decades, long before 9/11. Cassese summarises that discussion by making reference to two different approaches: a peaceful method or a coercive approach.²⁶ However, leaving aside the uncertain boundaries of the legitimate use of unilateral force by States, there is no controversy amongst States with respect to the necessity for promoting international legal cooperation in order to combat terrorism and, with that purpose in mind, it is recognised as essential to approve new international counter-terrorism agreements with the widest possible scope.²⁷ The problem, however, arises when it is a matter of deciding whether terrorism *per se* should be regarded as an international crime.

²⁴ A Cassese, 'Terrorism is also disrupting some crucial legal categories of international law' (2001) 12 *European Journal of International Law* 993, 994–5.

²⁵ JD Fry, 'Terrorism as a crime against humanity and genocide: the backdoor to universal jurisdiction', (2002–2003) 7 *UCLA Journal of International Law and Foreign Affairs* 169, 190 asserts that: 'The terrorist attacks of September 11 satisfy all of the elements enumerated above for a crime against humanity. First, the attack was a part of a widespread and systematic war against the United States'. See, also VJ Proulx, 'Rethinking the jurisdiction of the International Criminal Court in the post-September 11th era: should acts of terrorism qualify as crimes against humanity?' (2003–2004) 19 *American University International Law Review* 1009, 1010, 1025 ff, 1030 ff, 1036 ff, 1083 ff.

²⁶ The basis of this distinction is whether or not the response involves a use of force in the territory of another State. In the first group, peaceful responses may be found in the various international treaties that deal with terrorism by, for example, international criminal law. The second group, coercive responses, includes those rather less subtle responses such as destroying terrorist bases and killing terrorists: A Cassese, 'The international community's "legal" response to terrorism' (1986) 64 *Foreign Affairs* 589, 590.

²⁷ M Di Filippo, 'Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes' (2008) 19 *European Journal of International Law* 491.

In tackling that problem, first of all we should distinguish between acts of terrorism committed during times of war or during peace, while bearing in mind that it is very likely that such crimes and war crimes overlap.²⁸ As a result it becomes necessary to decide whether – and how – international criminal law standards or international humanitarian law standards should be applied.²⁹

Leaving aside specific interpretation problems during times of war, there is an emerging, albeit still minority, opinion that considers certain kinds of terrorism during peace as an autonomous new international crime based upon recent developments of customary international law.³⁰ More straightforwardly, the majority opinion points out the desirability of including serious terrorism as a new category of crime against humanity. For that purpose, nevertheless, there are two problems of interpretation that must be solved in international law: first, how should qualifying 'systematic' or 'widespread' attacks be interpreted; and, second, who should be considered perpetrators of such attacks.

These questions are interrelated because both of them deal with the correct interpretation of the intensity and quality of the attack as a constitutive element of crimes against humanity. Only if the attack were

²⁸ See KH Kaikobak, 'Crimes against international peace and security, acts of terrorism and other serious crimes: a theory on distinction and overlap' (2007) 7 *International Criminal Law Review* 187.

²⁹ For the current situation, see A Cassese, *International Criminal Law* (Oxford University Press, 2008) 171 ff; KH Kaikobak, 'Crimes against international peace and security, acts of terrorism and other serious crimes: a theory on distinction and overlap' (2007) 7 *International Criminal Law Review* 187; H Olasolo and A Pérez, *Terrorismo Internacional y Conflicto Armado* (Tirant lo Blanch, 2008). See also, from the perspective of non-state actors, A Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press, 2006), 271 ff.

³⁰ A Cassese, *International Criminal Law* (Oxford University Press, 2008) 166 ff. See also M Di Filippo, 'Terrorist crimes and international co-operation: critical remarks on the definition and inclusion of terrorism in the category of international crimes' (2008) 19 *European Journal of International Law* 491; C Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer, 2008) 370, 371. See also the Decision of the Special Tribunal for Lebanon SSSL-II-O 1111 AC/R 176bis, FOO I O/Cor/20 II 0223/R000489-R000642/EN/pvk, 16 February 2011, <http://www.stl-tsl.org/en/tag/stl-11-01/i/ac/r176bis-مقرر-176bis> (accessed 28 September 2012). Regarding that Tribunal's decision considering terrorism as a new distinct international crime, see B Saul, 'Legislating from a radical Hague: The United Nations Special Tribunal for Lebanon invents an international crime of transnational terrorism' (2011) 24 *Leiden Journal of International Law* 677.

to be extraordinary in nature would it be justified to label it as a sufficiently heinous crime tantamount to a crime against humanity. That is why the controversy about the exact meaning of the 'systematic' or 'widespread' nature of the attack and the discussion about whether non-state perpetrators³¹ can commit such criminal behaviour both remain open. These problems are illustrated by the Decision taken by the Pre-trial Chamber II of the International Criminal Court in the case of Kenya (ICC-01/09 31 March 2010).³²

In that case, the Court was divided precisely on the matter regarding the attributes which the perpetrator should or should not have in order to fall within the scope of such a serious crime. The discussion within the Court led to a Dissenting Opinion by Judge Hans-Peter Kaul, reflecting the tension between a narrow or a broad interpretation of the statement in article 7 of the Statute of Rome that the attack must be interpreted as a 'course of conduct pursuant to or in furtherance of a State or organizational policy'. Crimes against humanity can certainly be committed by a State (as State policy), but the contemplated application of the international crime is focused beyond that kind of state perpetrators inasmuch as article 7 also refers to an 'organizational policy'. The interpretation of this wording is essential to establish either a narrow or a broad understanding of the prohibition. At the same time, such an interpretation would redefine the difference between domestic crimes and crimes which concern the whole international community and which are therefore liable to be taken up before the International Criminal Court.

The case of Kenya goes back to 2007 and 2008, when the post-election violence comprised hundreds of incidents with varying degrees of organisation.³³ According to the Chamber, although such incidents differed from one region to another, depending on the respective ethnical composition and other region-specific dynamics, some of these incidents seem to relate to three general categories of attacks. The first category comprised the attacks initiated by groups associated with the Orange Democratic Movement and were directed against perceived Party of

³¹ See A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 3, 12 ff, 271 ff. See also WA Schabas, 'Punishment of non-state actors in non-international armed conflict' (2002–2003) 26 *Fordham International Law Journal* 907.

³² *Decision pursuant to article 15 of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya Pre-Trial Chamber II*, ICC-01/09 31 March 2010.

³³ For the facts, see also the (Waki) *Report of the Commission of Inquiry into Post Election Violence* (CIPEV) (Govt Printer, 2008).

National Unity supporters. The second category can be understood to involve retaliatory attacks conducted by members of the groups targeted by the initial attacks and directed against members of those groups deemed responsible for the initial violence. Concerning the third category, the supporting material points to a large number of violent acts committed by the police. Overall, the Chamber reported that between 1133 and 1220 people were killed, about 3561 injured and up to approximately 350,000 displaced for the period between 27 December 2007 and 28 February 2008. With regard to the violence emanating from the police, it is reported that in the period from June to October 2007, the police summarily executed at least five hundred people and hundreds more in 2008, with large numbers of cases of sexual violence, torture and so forth.³⁴

Given the scale of this interethnic violence, there have been various relevant 'courses of conduct' carried out both by the State (or state-like) apparatus and by private organised groups at the same time.³⁵ As a result the Court had to decide whether all the facts or only a selection of them should be committed to trial and, therefore, whether crimes against humanity could be committed not only by state actors but also by non-state actors. The decision of the majority was in favour of a broad interpretation of the meaning of 'perpetrator' and consequently of the scope of crimes against humanity. The Chamber's decision was allegedly³⁶ based on the previous case law of the International Criminal Court as well as of other Ad Hoc International Tribunals (Ruanda and Yugoslavia). The majority of the Tribunal also quoted a full range of supportive arguments from juridical literature or other sources such as the interpretation suggested in the Draft Code of Crimes against the Peace and Security of Mankind regarding the interpretation of attacks and perpetrators.³⁷

In this way, the International Criminal Court has moved a step forward in the way of a broad conception of both the perpetrator and the scope of crimes against humanity. However, we do not know yet whether it is going to take a final definitive step. It is to date limited because it is a decision taken by a Pre-trial Chamber and not yet a final decision by the Court. It is also limited because the judges were divided. And it is limited because there remains a full range of different arguments against this new

³⁴ ICC-01/09 31 March 2010, para 101 ff, 131 ff.

³⁵ *Ibid* 117.

³⁶ For a more accurate and informed critical approach against the decision of the majority with solid arguments see *ibid*, Dissenting Opinion.

³⁷ *Ibid* 86 ff, 91.

interpretation, as the dissenting opinion accurately points out.³⁸ A sizeable sector of hostile juridical literature recalls the origin and the background of crimes against humanity as a concept intrinsically linked with the struggle against abuses of state power. Shifting the focus from state to non-state action would be fraught with risks as it would imply dissolving the fine threshold between terrorism or organised crime and crimes against humanity.³⁹

Beyond the details of the discussion,⁴⁰ it is important to reflect upon the relevance of the facts involved in the Court's decision. Hundreds of deaths, thousands of casualties, sexual offences, widespread torture, large numbers of displaced people, and other abuses were inflicted in a very short period of time. Yet, even in this very serious case there remains controversy about whether the acts amounted to crimes against humanity since they were committed pursuant or in furtherance of a non-state organisational policy.

The purpose of the narrative set out above was to explain and analyse the current state of the discussion about the normative limits of crimes against humanity, especially from the point of view of the private nature of potential perpetrators. Crimes against humanity are primarily the deeds of states, and only exceptionally, as a result of very recent developments, can we consider state-like actors or even non-state actors as potential perpetrators. The case of Kenya or the proposals made in favour of considering extraordinarily serious acts of international terrorism (such as 9/11) as qualifying as international crimes, represent the exception both in juridical literature and in case law. However, those cases where terrorism could exceptionally amount to crimes against humanity involve facts that are so heinous that they do not bear any kind of reasonable comparison with domestic terrorism. The activity of non-state actors in extreme cases of gross terrorism should not open the scope of crimes against humanity without limit. Crimes against humanity

³⁸ Ibid, Dissenting Opinion, 45 ff, 50 ff.

³⁹ WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) 149 ff; WA Schabas, 'State policy as an element of international crimes' (2008) 98 *Journal of Criminal Law and Criminology* 953, 974; WA Schabas, 'Is terrorism a crime against humanity?' (2004) 8 *International Peacekeeping* 255, 261. See also MC Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis, and Integrated Text* (Vol 1, Brill, 2005) 151, 152.

⁴⁰ For such information see JM Landa, 'La sombra de los crímenes contra la humanidad en la política antiterrorista española: reflexiones críticas' (2010) 12 (10) *Revista Española de Ciencia Penal y Criminología*, <http://criminet.ugr.es/recpc/12/recpc12.html> (accessed 26 September 2012).

could embrace gross terrorism but certainly not every instance of terrorism. Let us recall that even Cassese, a representative of one of the most expansive interpretation proposals, does not include every kind of terrorism as a crime against humanity but only large-scale international terrorism.⁴¹

In contrast to that interpretation, there is a rising trend in Spain to look at counter-terrorism policies under the light of international criminal law standards and even to identify terrorism at any level with crimes against humanity or at least with serious violations of human rights. Let us now consider this trend and its consequences in the following section.

SPANISH COUNTER-TERRORISM POLICY AND CRIMES AGAINST HUMANITY

Spanish counter-terrorism policy⁴² has experienced a radical change since 2000 when legislation was introduced with the aim of expanding the substantive criminal definition of crimes of terrorism in reference both to adults and minors.⁴³ In the period between 2000 and 2003 more amendments were added affecting not only legal definitions of crimes but also their enforcement, criminal procedure rules, sentencing and penitentiary status.⁴⁴ Therefore, counter-terrorism law experienced a clearly

⁴¹ A Cassese, *International Criminal Law* (Oxford University Press, 2008) 166–177; see also A Cassese, 'Terrorism is also disrupting some crucial legal categories of international law' (2001) 12 *European Journal of International Law* 993, 995.

⁴² See generally A Masferrer (ed), *Estado de Derecho y derechos fundamentales en la lucha contra el terrorismo. Una aproximación multidisciplinar (histórica, jurídico-comparada, filosófica y económica)* (Editorial Aranzadi, 2011).

⁴³ Terrorism Act 7/2000 (of 22 December). Regarding the changes approved for youth offenders, see MC Gomez, 'La nueva responsabilidad penal del menor: las Leyes Orgánicas 5/2000 y 7/2000' (2002) 9 *Revista Penal* 3; see also J Barquin and MA Cano, 'Justicia penal juvenil en España: una legislación a la altura de los tiempos' (2006) 18 *Revista de Derecho Penal y Criminología* 66. For the related treatment of adults, see J Bernal, 'Observaciones en torno a la Ley Orgánica 7/2000, de modificación del Código Penal en materia de terrorismo' (2001) 5 *La Ley* 1627; M Cancio, *Los delitos de terrorismo: estructura típica e injusto* (Reus, 2010) 19 ff.

⁴⁴ Law 5/2003 of 27 May, Judicial Organic Law 6/2003 of June 30, Law 7/2003 of 30 June. See JM Landa, 'Delitos de terrorismo y reformas penitenciarias (1996–2004): un golpe de timón y correcciones de rumbo ¿Hacia dónde?' in M Cancio and C Gomez-Jara (coords), *Derecho penal del enemigo. El*

expansive development based on a new broad conception of criminality and aimed against the Basque terrorist organisation, ETA. To that end, another law passed in 2002, the Law on Political Parties 6/2002,⁴⁵ was of considerable relevance as it led to the banning of the political party Batasuna, considered the political arm of ETA.⁴⁶

As a result of the foregoing legal changes, Spain now has one of the most comprehensive arsenals available for combating terrorism in Europe. Nevertheless, it does not seem to be sufficient according to some of the demands made over the last decade by groups of victims of terrorism. In fact, some of the most representative Spanish groups of such victims are in favour of depicting domestic terrorism as a kind of crime against humanity within Article 7 of the Statute of Rome or even wish to include it as a new autonomous international crime.⁴⁷

The emerging trend of identifying terrorism and international crimes has also reached the legal machinery in Spain. In this regard, the clearest

discurso penal de la exclusión (Vol 2, Edisofer, 2006); A Asua, 'El "cumplimiento integro y efectivo de las penas": un slogan efectista contra el principio constitucional de reinserción social' (2003) 50 *Revista Bake Hitzak* 23.

⁴⁵ 27 June 2002.

⁴⁶ JL De La Cuesta, 'Efforts to put an end to E.T.A.'s terrorism: evolution, present situation and perspective of future' (2009) 47 *Annales Internationales de Criminologie. International Annals of Criminology. Anales Internacionales de Criminología* 23. See also JM Paredes 'Límites sustantivos y procesales en la aplicación de los delitos de integración y de colaboración con banda armada. Comentario a la sentencia de la Audiencia Nacional de 19 de diciembre de 2007 (caso Ekin)' (2008) 6906 *La Ley I*; A Fernández, *Ley de Partidos Políticos y Derecho Penal. Una nueva perspectiva en la lucha contra el terrorismo* (Tirant lo Blanch, 2008), 187 ff; E Virgala, 'El recorrido jurisprudencial de la suspensión y disolución de Batasuna: Agosto de 2002 a Mayo de 2007' (2007) 81 *Revista de Derecho Constitucional* 243. See also the Decisions of the ECtHR which did not find any fundamental breach of the European Convention in the enforcement of the Spanish law on political parties: *Herri Batasuna and Batasuna v Spain*, App nos 25803/04 and 25817/04, 30 June 2009; *Etxeberria and others v Spain*, App nos 35579/03, 35613/03, 35626/03 and 35634/03, 30 June 2009; *Herritarren Zerrenda v Spain*, App no 43518/04, 30 June 2009; *Eusko Abertzale Ekintza-Acción Nacionalista Vasca (EAE-ANV) v Spain*, App nos 51762/07 and 51882/07, 7 December 2010.

⁴⁷ See V Bou and C Fernández de Casadevante, *Inclusión del terrorismo entre los crímenes internacionales previstos en el Estatuto de la Corte penal internacional. (Una propuesta del Colectivo de Víctimas del Terrorismo en el País Vasco, COVITE, para la Conferencia de Revisión del Estatuto de la Corte Penal Internacional)* (Covite-Fundación de Víctimas del Terrorismo, Minimagenencia Editions, 2009) 117 ff (available also at http://www.covite.org/fundacion_victimasdelterrorismo.pdf (accessed 26 September 2012)).

example is the Basque Law on the Recognition and Reparation for Victims of Terrorism 4/2008.⁴⁸ It states in its preamble that Basque terrorism should be regarded as a systematic and serious violation of human rights. Moreover, the Basque Law 4/2008 affirms that the document named Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly of the United Nations (Resolution 60/147 of 16 December 2005), should be applied in the legal treatment of this category of victims. The declaration in the Preamble of the Basque Law 4/2008 has not been followed by substantive content in its normative part. However, it reflects an expansive approach to international human rights standards, which can also be detected in the Spanish Act 29/2011 on the Recognition and Integral Protection of Victims of Terrorism.⁴⁹ In addition, according to a recent amendment of the Criminal Code (Act 5/2010, art 1 paragraph 35)⁵⁰ the statute of limitations for some crimes of terrorism has been changed, and as a result, the possibility of persecution of such crimes now remains open in the future notwithstanding the passage of time. The background of that amendment clearly reflects the intention of making the treatment of terrorism equivalent to that of international crimes.⁵¹ Finally, in some decisions by Spanish tribunals, there is sporadic mention of domestic terrorism as if it were tantamount to crimes against humanity.⁵²

The emerging trend in Spain now described can only be supported with huge difficulties by the general interpretative approach related to crimes against humanity within international criminal law, where such criminality is essentially a matter of a State's transgression and not the affair of

⁴⁸ 19 June 2008.

⁴⁹ 22 September 2011. See fn 4 above. This Act is the new version of the former Act 32/1999 of 8 October on Solidarity with Victims of Terrorism that sets a common framework regulation in the matter for the whole of Spain. The Basque Law 4/2008 fulfils a mere complementary function in relationship with the Spanish Act 29/2011 granting better standards for Basque victims beyond the minimum established by the State.

⁵⁰ 22 June 2010.

⁵¹ Congreso de los Diputados, IX Legislatura, Serie B, 30 mayo 2008, Núm. 109-1 Proposición de Ley de reforma del Código Penal para declarar imprescriptibles los delitos graves del terrorismo (Orgánica).

⁵² A Fernández, *Ley de Partidos Políticos y Derecho Penal. Una nueva perspectiva en la lucha contra el terrorismo* (Tirant lo Blanch, 2008) 231, 233, 234.

private or non-state actors (subject perhaps to wholly exceptional egregious cases). The overlap between terrorism acts and crimes against humanity should take place only in relationship with certain forms of international terrorism and not with its domestic versions. Moreover, only in cases such as the attack against the World Trade Centre in New York⁵³ or the case of Kenya which involved thousands of deaths and casualties that took place almost instantaneously, is there room for discussion about whether terrorism should be considered as an international crime. It is simply inappropriate to try to include the activity of domestic terrorism carried out by ETA or other similar domestic terrorist groups amongst such extreme cases based on the current state of international law.

Perhaps more importantly than this interpretative approach to the overlap between terrorism and international crimes, from a normative or policy perspective it is by no means clear how it could be helpful for an effective domestic prosecution of terrorism to include a crime for which the International Criminal Court has jurisdiction. As Schabas states, international justice deals with state criminality on a large scale. However, in the case of terrorism, states are willing to combat such criminality and the international legal order primarily expects national responses. Therefore, in order to improve efficiency it would be much more effective just to enhance interstate and international cooperation regarding terrorism. The complementary nature of the Statute of Rome (articles 1 and 17) reinforces the point. The International Criminal Court may exercise its jurisdiction only when the State concerned shows unwillingness or inability to prosecute. The Court acts exceptionally to cover blatant impunities as a last resort for the most serious crimes of international concern. Since the International Criminal Court is a very new institution, it lacks financial, material and personal means for a functional and effective administration of justice for any but exceptional cases in comparison with the abilities of domestic jurisdictions.⁵⁴ In summary, according to Schabas, it would be a mistake to insist on

⁵³ As argued by the UN High Commissioner for Rights: M Robertson, *Five Years on from 9/11 – Time to Re-Assert the Rule of Law* (2006) JUSTICE 3, <http://www.justice.org.uk/data/files/resources/196/Time-to-reassert-the-rule-of-law.pdf> (accessed 10 April 2013).

⁵⁴ See RD Sloane, 'The expressive capacity of international punishment: the limits of the national law analogy and the potential of international criminal law' (2007) 43 *Stanford Journal for International Law* 39, 47 ff.

universal jurisdiction or to resort to international tribunals in relationship with this kind of domestic crime.⁵⁵

Sloane equally warns against any kind of analogy between national and international criminal law without taking into account their fundamental differences.⁵⁶ In particular, he insists on the way that differences between jurisdictions would affect the aims that penalties could reasonably attempt to reach. International criminal tribunals are in a worse position than the national jurisdictions to fulfil preventive or retributive functions. However, according to an emerging diagnosis in juridical literature,⁵⁷ the expressive dimension of punishment would best be captured both by the nature of international sentencing and its institutional setting. Symbolic significance becomes then a key factor and should become an even more prominent function in the field of international criminal law than it is at national level.⁵⁸

Sloane's thesis points to an aspect of international criminal jurisdiction which could help us understand the attraction which some groups of victims experience towards international criminal jurisdiction. In fact, the expressive capacity of international criminal law is so evident that victims tend to resort to that kind of universal image of justice. It does not really seem to matter if the dominance of the expressive function is a result of the inability to reach properly retributive or preventive aims. In this way international criminal law offers, following Sloane: '[a] conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those "in whose name" the punishment is inflicted'.⁵⁹

This approach connects the argument back to terrorism as an expressive phenomenon where the collective harm inflicted seems to be even more important than individual harm. Terrorism doubtlessly entails a political communicative dimension, and terrorists aspire to influence the

⁵⁵ WA Schabas, 'State policy as an element of international crimes' (2008) 98 *Journal of Criminal Law and Criminology* 953, 974.

⁵⁶ RD Sloane, fn 54, 40 ff, 56 ff.

⁵⁷ I Tallgren, 'The sensibility and sense of international criminal law' (2002) 13 *European Journal of International Law* 561; M Drumbl, 'Collective violence and individual punishment: the criminality of mass atrocity' (2004–2005) 99 *Northwestern University Law Review* 539, 592 ff; D Luban, 'Fairness to rightness: jurisdiction, legality, and the legitimacy of international criminal law' in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, 2010), 576.

⁵⁸ RD Sloane, fn 54, 42, 70.

⁵⁹ *Ibid.* 42.

political arena and governmental policies. From the perspective of the victims, a resort to international criminal jurisdiction might be an attempt to combat terrorist propaganda. Nevertheless, using international tribunals in that way may be fraught with risks, such as the frustration of victims' expectations,⁶⁰ ineffectiveness and the risk of politicising a new-born International Criminal Court.⁶¹

CONCLUSIONS

A full range of arguments have now been exposed, stressing how distant the Spanish attempt to identify or, at least, compare domestic terrorism and crimes against humanity has grown from the interpretation, discussion, case law and practice of international criminal tribunals and scholars. Yet, its eventual effectiveness is not really evident. At the same time, there is a high risk of destabilising international tribunals through political game-playing. Expressiveness and symbolism as aims of sentencing at the international level could also turn out to be counterproductive. There is a further serious risk of trivialising real and historical crimes against humanity or genocide, such as the holocaust, or atrocities committed in Rwanda, Yugoslavia and Cambodia.

However, one last consideration for the proposed co-identification still remains. Labelling terrorism as a gross or even systematic violation of human rights and identifying it with crimes against humanity also pursues a familiar criminal policy objective: enhancing and strengthening the punitive response. In other words, it is a step further towards a so-called 'criminal law for the enemy', stressing the exceptional nature of counter-terrorism law and broadening its expansive effect. However, from a macro-social point of view, this criminal punitive aspect is not the only facet worth considering. Taking the identification between domestic terrorism in Spain and crimes against humanity in earnest, or simply applying international criminal or human rights law standards in a

⁶⁰ In any case it is worth noting the effort made in favour of the victims at least by the International Criminal Court which fosters their participation within criminal proceedings. See http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx (accessed 15 April 2013).

⁶¹ That risk was present from the beginning in the preparatory works for the establishment of the International Criminal Court. See B Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006) 182. See also WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010) 149 ff.

consistent manner to such phenomena, leads equally to a wrong diagnosis of the troubles as experienced, for example, in the Basque Country.⁶² Taking a distorted understanding of Basque terrorism as a starting point makes it very difficult indeed to reach a reasonable and fair legal design for all policies for victims and reconciliation. In the Basque Country, there is no ongoing genocide and there are no crimes against humanity. There is a brand of terrorism, which is probably reaching its end, but there are also serious and systematic violations of human rights committed by the State apparatus or paramilitary forces both before and after Spanish Constitution was passed.⁶³ These human rights violations have not been properly investigated or prosecuted, and in some cases were directly exonerated by means of an amnesty following a controversial model of transition based on total oblivion.⁶⁴

Distorting what domestic terrorism of ETA really signifies, trying to identify it with crimes against humanity, and then applying this version of the facts in a retroactive way is definitively not the correct starting point. However, when other violations of human rights committed by State agents are not taken into account at the same time, the whole discourse of human rights seems to have become adulterated with the aim of covering up state responsibilities. As Clapham states, one of the major concerns present in the discussion about whether non-state actors should be considered under the scrutiny of international human rights standards is precisely the risk of having that discourse used by States for counter-terrorism purposes.⁶⁵ Likewise, the Spanish state should not manipulate human rights discourse to avoid its responsibilities and international duties in the matter.

⁶² In particular regarding policies of victims see JM Landa, *Victims of Human Rights Violations Derived from Politically Motivated Violence* (Basque Government, 2009).

⁶³ See P Woodworth, *Dirty War, Clean Hands – ETA, the GAL and Spanish Democracy* (Cork University Press, 2001); JM Landa, *Victims of Human Rights Violations Derived from Politically Motivated Violence* (Basque Government, 2009). See also *Vaquero Hernández and others v Spain*, App no S1883/03, 2723/03, 4058/03, 2 November 2010.

⁶⁴ Amnesty Act 46/1977 (15 October). See A Gil, *La Justicia de Transición en España. De la amnistía a la memoria histórica* (Atelier, 2009) 48 ff; see also JL De la Cuesta, 'Spanish legislation on historical memory' in MC Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-conflict Justice* (Intersentia, 2010) 987 ff.

⁶⁵ A Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 2 ff.

We must be aware of how cautiously this boundary issue should be treated and to what extent the consequences of crossing the boundary could become counter-productive in the progression of the social fabric of the Basque society, not to mention the implications in terms of policies of memory. Without doubt, the definition and characterisation of domestic terrorism in the Basque Country affects the reading of the past and influences the way future generations should face peace and reconciliation. The boundary between terrorism and crimes against humanity should almost never be crossed.

8. Safety interviews, adverse inferences and the relationship between terrorism and ordinary criminal law

Shlomit Wallerstein*

INTRODUCTION

A 'safety', or 'urgent', interview is one where the suspect is interviewed for information that might help the police to protect life and prevent serious damage to property. A senior officer can delay a suspect's rights to legal advice and not to be held incommunicado in order to enable a 'safety interview' to take place and thereby secure public safety in situations of immediate urgency.¹ English law permits the conducting of such interviews under strict conditions both in investigations concerned with 'ordinary' criminal offences and those related to terrorism. In practice, however, these interviews are reported as being mainly used in the context of terrorism. The chief difficulty with safety interviews is that when the court wishes to draw inferences, both from silence as well as anything that was said during such interviews, they come up against the defendant's rights to a fair trial, to access legal advice and against self incrimination.

The difficulties arise because safety interviews cross the boundaries from traditional investigative interviewing into arrangements for public safety. It is, therefore, necessary to consider whether these two concepts should always be kept distinct. If, however, the two are not distinct, then the legal system must face up to this transgression and ensure that the law provides a suitable normative framework for those exceptional

* I wish to thank Max Hill, QC for bringing these issues to my attention. Special thanks are due to Nick Barber and to the participants of the workshop on terrorism and the rule of law, which took place at the ILLJS in Oñati in July 2011, for their valuable comments.

¹ Definition taken from *R v Ibrahim* [2008] EWCA Crim 880.

Enforcement of Penalties and Rule of Law: A New Emerging Trend in the Interpretation of Article 7.1 ECHR?

by Jon-M. Landa

The principle of legality, as crystallised in Article 7 of the European Convention of Human Rights (ECHR), occupies a central place in the ECHR because it is one of the few provisions that cannot be derogated even in war times or times of public emergency (Article 15 ECHR). Its prominent place within the ECHR contrasts, however, with the limited use the European Court of Human Rights (ECtHR) has made of it. Some figures could illustrate it at best: since the first time the ECtHR found a violation of Article 7(1) in the case of *Welch v. The United Kingdom* in 1995¹, there has been a record of only 33² violations of the first paragraph of this mentioned provision. Moreover, if we consider the period of time previous to the case of *Kafkaris v. Cyprus* [2008],³ the total number of cases where it had been declared a violation of the principle of legality, descends to eleven.⁴

I will argue that case law interpreting Article 7(1) ECHR has evolved since the landmark decision of *Kafkaris v. Cyprus* [2008] in a way that enables a better control of the enforcement of penalties. In doing so the ECtHR has broadened its interpretation related to the scope of the principle of legality in a way that has been recently confirmed by another important judgment, *Del Rio Prada v. Spain* [2012], currently pending before the Grand Chamber.⁵ Therefore, Article 7(1) ECHR has began to be applied in a growing number of cases and, particularly where the control of the execution of penalties is at the centre of the discussion.

From the very beginning, regardless of its limited invocation, the ECtHR succeeded in establishing a framework of principles for the interpretation of Article 7. Traditionally, there have been two key points for identifying a violation of Article 7 ECHR: first, the concept of penalty; and, second, complementary criteria ascertaining whether the penalty had been accessible and foreseeable. We could consider these two key points as two progressive filters that the ECtHR utilises in order to discern whether safeguards of the rule of law should apply to a particular case.

According to this two-stage analysis, a range of safeguards have been applied by the ECtHR to ensure the rule of law. New definitions of crime and more severe penalties are banned when they are applied retroactively. Moreover, the ECtHR prohibits analogies in *malam partem* (i.e. against the convict) because criminal law must not be extensively construed to an accused's detriment. The Court establishes at the same time a general requirement of precision in defining criminal matters.



These principles, however, are not applied as far as enforcement of penalties is concerned. Since 1986,⁶ the European Commission of Human Rights, followed by the ECtHR,⁷ made a distinction between a penalty as such, likely to be scrutinised in light of Article 7 ECHR, and the manner of its execution. This changed after the judgment in *Kafkaris v. Cyprus* [2008] was handed down.

The *Kafkaris* case dealt with a mandatory life sentence imposed to the applicant on three counts of premeditated murder, where there was an apparent contradiction between its meaning according to the substantive definition of the penalty⁸ and its real meaning in practice, up to a maximum of 20 years, following the interpretation of General Prison Law of Cyprus⁹ in combination with its enforcement and daily application by the prison authorities. *Kafkaris*, the applicant, while in prison, lost his chance for early release, after having served a term of 20 years because the Supreme Court of Cyprus declared unconstitutional the afore-mentioned prison regulations that considered life sentence as tantamount to 20 years imprisonment. The applicant claimed a violation of Article 7 due to a retroactive application of the consequences of that new mentioned ruling of the Supreme Court of Cyprus.

The ECtHR dealt with this matter in a peculiar way. First, it broadened the concept of penalty including the fundamental aspects of enforcement as a matter of scrutiny under Article 7. This teleological approach considers aspects of the execution as part of the concept of penalty. The ECtHR expanded the concept of 'penalty' by incorporating substantive criteria, such as the impact of the measure and its severity. In so doing, it paved the way for applying further criteria (accessibility and foreseeability). In this regard, though, a second major change took place: a new criterion was added, the so-called "quality of law" standard. As a consequence, there is a new perspective stretching the potential of accuracy or precision of the law as the central safeguard inherent to the principle of legality.

The ECtHR could have dealt with this issue in a straightforward way. In light of the fact that the conviction from the domestic criminal authorities stipulated that the penalty of life sentence would entail imprisonment for the entire biological life, the ECtHR could have simply dismissed the case by holding that it was a matter related to the manner of its execution and, therefore, falling out of the scope of Article 7 ECHR.

In the aftermath of *Kafkaris*, the activity of the Court has increased in a remarkable way expanding the scope of Article 7 ECHR to cases dealing with enforcement of penalties. The Court is now more likely to find violations of Article 7. Between the handing down of judgment in *Kafkaris* in 2008 and July 2013, the ECHR has found violations of Article 7(1) in 22 cases: amongst



them at least nine related to core aspects of enforcement and another two more – up to eleven – involving issues subject to protection by the Convention in applying the new criterion of the “quality” of law.¹⁰ The increase of cases, including those that deal with enforcement matters, is remarkable. Paradigmatic examples could be found in two important leading cases: *M v. Germany* [2009] and more recently *Del Rio Prada v. Spain* [2012].¹¹

In the case of *Del Rio Prada*, a convicted terrorist was imprisoned without the opportunity of early release due to a retroactive application of new criteria for accumulating penalties by the sentencing Court (Audiencia Nacional).¹² Spain argued against a conviction of the applicant, Del Rio, based on the fact that criteria for accumulating penalties belong to the manner of execution, not to the substantial definition of the penalty. By contrast, the ECtHR applied the same interpretation adopted in the *Kafkaris* case. Therefore, the Court denied that the new approach of the Supreme Court of Spain putting forward a new interpretation of accumulation criteria would amount to a “mere” operation of enforcement. The ECtHR stressed, first, its substantial nature as far as it affected the severity of the penalty. Enforcement of fundamental aspects of the penalty were subject to Article 7 ECHR scrutiny, as a result of a whole, substantive, consideration of the law. This new broader concept of penalty paves the way for the second, and definitive, line of argument. The ECtHR went beyond appearances and found a substantive violation of Article 7 for retroactive application of a heavier penalty than the one that was applicable at the time the criminal offence was committed. The new interpretation made by the Supreme Court of Spain, as it was applied to the case under scrutiny, was found to be in violation of Article 7 of the Convention.

CONCLUSION

Since the leading *Kafkaris* case there is a new pattern of interpretation, which has led to a remarkable increase in the

number of violations of Article 7(1) ECHR. This evolution in the interpretation of Article 7 ECHR affects fundamental aspects of the execution of penalties.

This new interpretation was reached based on two main lines of argument: *first*, a broader concept of penalty that attracts those aspects considered relevant in terms of impact upon the penalty, although formally they could be placed at the stage of enforcement;

second, a more intensive scrutiny of the foreseeability and accessibility standards: i.e. a higher demand of preciseness for the law. When the “quality” of the law is put at risk (either because from the beginning there is not any clear foreseeable penalty or because it was clear but *ex post facto* there is change for worse) the violation of Article 7 is going to be declared.

According to the new view, Article 7 ECHR could play – is already playing – a very important and complementary role in reassuring that European prison policy sticks to human rights standards. In doing so Article 7 has become an unexpected ally of Article 5 ECHR.

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Postscript

During my visiting fellowship at the Lauterpacht Centre (July-August 2012) I completed an article on this topic, which has been summarised above. A full published version in Spanish may be consulted online at: <http://www.indret.com/pdf/924.pdf>

ENDNOTES

1 *Welch v. The United Kingdom*, Judgment 9.02.1995, Application no. 17440/90.

2 According to the information available through HUDOC database (last access 12 August 2013): *Welch v. The United Kingdom*, Judgment of 9.02.1995, Application no. 17440/90; *Jamil v. France*, Judgment 8.06.1995, Application no. 15917/89; *Baskaya and Okcuogly v. Turkey*, Judgment 8.07.1999, Application no. 23536/94 and 24408/94; *Ecer and Zeyrek v. Turkey*, Judgment 27.02.2001, Application no. 29295/95 and 29363/95; *E.K. v. Turkey*, Judgment 7.02.2002, Application no. 28946/95; *Veeber v. Estonia*, Judgment 21.01.2003, Application no. 45771/99; *Gabbari Moreno v. Spain*, Judgment 22.07.2003, Application no. 68066/01; *Puhk v. Estonia*, Judgment 10.02.2004, Application no. 55103/00; *Unsal Ozturk v. Turkey*, Judgment 4.10.2005, Application no. 29365/95; *Pessino v. France*, Judgment 10.10.2006, Application no. 40403/02; *Dragotoniu and Militaru-Pidhorni v. Romania*, Judgment 24.05.2007, Application no. 77193/01 and 77196/01; *Kafkaris v. Cyprus*, Judgment 12.02.2008, Application no. 21906/04; *Kononov v. Latvia*, Judgment 24.07.2008, Application no. 36376/04; *Korbely v. Hungary*, Judgment 19.09.2008, Application no. 9174/02; *Sud Fondi Srl and others v. Italy*, Judgment 20.01.2009, Application no. 75909/01; *Liivik v. Estonia*, Judgment 25.06.2009, Application no. 12157/05; *Scoppola v. Italy*, Judgment 17.09.2009, Application no. 10249/03; *Gurguchiani v. Spain*, Judgment 15.12.2009, Application no. 16012/06; *M. v. Germany*, Judgment 17.12.2009, Application no. 19359/04; *Kallweit v. Germany*, Judgment 13.01.2011, Application no. 17792/07; *Mautes v. Germany*, Judgment 13.01.2011, Application no. 20008/07; *Schummer v. Germany*, Judgment 13.01.2011, Application no. 27360/04 and 42225/07; *Jendrowiak v. Germany*, Judgment 14.04.2011, Application no. 30060/04; *O.H. v. Germany*, Judgment 24.11.2011, Application no. 4646/08; *Mihai Toma v. Romania*, Judgment 24.01.2012, Application no. 1051/06; *Alimucaj v. Albania*, Judgment 7.02.2012, Application no. 20134/05; *K. c. Germany*, Judgment 7.06.2012, Application no. 61827/09; *G. v. Germany*, Judgment 7.06.2012, Application no. 65210/09; *Del Rio Prada v. Spain*, Judgment 10.07.2012, Application no. 42750/09 (referral to the Grand Chamber 22.10.2012); *Canmilleri v. Malta*, Judgment 22.01.2013, Application no. 42931/10;

Kasymakhunov and Saybatalov v. Russia, Judgment 14.03.2013, Application no. 26261/05 and 26377/06; *Vyerentsov v. Ukraine*, Judgment 11.04.2013, Application no. 20372/11 (not definitive); and *Maktouf and Damjanović v. Bosnia and Herzegovina*, Judgment 18.07.2013, Application no. 2312/08 and 34179/08.

3 *Kafkaris v. Cyprus*, Judgment 12.02.2008, Application no. 21906/04.

4 Amounting so far (July 2013) to 22 the decisions of the Court that had declared the violation of Article 7(1) ECHR.

5 *Del Rio v. Spain*, Judgment 10.07.2012, Application no. 42750/09 (referral to the Grand Chamber 22.10.2012 and hearing held on 20 March 2013).

6 *Hogben v. The United Kingdom*, European Commission of Human Rights Decision 3.03.1986, Application no. 11653/85.

7 See, for all, recently *Del Rio v. Spain*, Judgment 10.07.2012, Application no. 42750/09, & 48.

8 Sections 203 (1) and 203 (2) of the Criminal Code of Cyprus (Cap. 154).

9 Prison (General) Regulations of 1981 and the Prison (General) (Amended) Regulations of 1987, adopted under section 4 of the Prison Discipline Law (Cap 286).

10 See footnote 2 above.

11 *M. v. Germany*, Judgment 17.12.2009, Application no. 19359/04; *Del Rio Prada v. Spain*, Judgment 10.07.2012, Application no. 42750/09 (referral to the Grand Chamber 22.10.2012).

12 Article 70 of the 1973 Spanish Criminal Code stated 30 years term of imprisonment as a maximum for cases of accumulation of penalties. The prison benefits had been systematically applied to that maximum reducing in fact the time to be served in prison. However, the case-law of the Spanish Supreme Court changed suddenly in 2006 (Judgment 197/2006 of 28 February) introducing the so-called ‘Parot doctrine’, under which prison benefits were to be applied to each sentence individually, and not to the maximum. As a result, for the case of the applicant, the maximum imprisonment term to be served was not reduced in any way after the application of the prison benefits.