

JUSTICE Project

Implementing the EU Directive 2017/541 on combating terrorism

Report on the European Transnational Roundtables conducted in 2019

The content of this publication is merely a summary of the roundtables discussions, and opinions expressed by the participants. It does not constitute an official ICJ publication. For ICJ guidance on the implementation of the EU Directive 2017/541 on combating terrorism, please refer to the official ICJ Guidelines available on ICJ website (<https://www.icj.org/>).

April – Pisa
September – The Hague
October – Madrid
November - Brussels

**This project is funded by the
European Union's Justice
Programme (2014-2020).**



<p style="text-align: center;">Pisa Roundtable – April 12th, 2019 The material elements and the <i>mens rea</i> of EU terrorism offences</p>

Through roundtable discussions, participants shared their practices and experiences in the application of the material and mental elements of the criminal offences enshrined in the EU Directive 2017/541 on combating terrorism, within the different legal systems of the European Union (EU). These practices were assessed in light of international human rights law principles in order to select best practices that could be promoted throughout the EU. This document highlights some of the main points of discussion.

1. The EU Directive 2017/541 on combating terrorism

The context in which the Directive was prepared, including the impact of terrorist attacks, and the influence of the UN framework on the Directive 2017/541 was highlighted. Participants welcomed the **criminal law approach** adopted by the Directive and its aim to move beyond “emergency legislation”.

It was noted that the Directive covers a broad list of offences, starting **from the most to the least material offence**, i.e. from terrorist acts to ordinary acts with a terrorist intention. It was argued that the more the material element of the crime is founded on unequivocally terrorist acts, the less important is the weight of the intentional element. On the contrary, the less suggestive it is the more the weight of intention increases.

2. The need to respect for principles of criminal law and human rights

Participants stressed that the fight against terrorism should respect established **criminal law principles and international human rights law and standards**. Antiterrorism legislation retains its authority and legitimacy as an exercise of state power only as long as it is being directed and applied to prevent acts of violence while being governed and constrained by principles of criminal law and human rights.

Some participants noted further that failure to respect rule of law in fighting terrorism only contributes to radicalisation. As summarised by one participant, **the legality and the effectiveness** of the criminal justice system are inevitably linked: rendering justice according to the rules is the best antidote to terrorism and to the radical vision that supports it, even though it is not the only one.

The principles of proportionality, necessity, legality, legal certainty and presumption of innocence were discussed.

3. The preventive application of international criminal law

Participants discussed that, in spite of these principles, there is often **elasticity in the**

criminal law, in the terrorism context amongst others. Concerns were raised about the stretching of criminal law to acts only remotely connected to the terrorist offence: anti-terrorism legislation has been extended to early preparatory stages of an offense and broader forms of “support” to environments perceived to sustain terrorism. Participants noted the implications of labeling a case as “terrorist”, notably in terms of the applied procedures, investigative techniques, penalties and detention regimes.

Participants recognised the challenges posed by offences where the conduct criminalized is significantly broader than the damage it aims to prevent or where the mental elements is delinked from the ultimate act of violence at the heart of terrorism. It was argued that in the name of security, States tend to criminalise actions such as (facilitating) travelling or disseminating materials even in circumstances where there is no **meaningful proximate link** with terrorist acts, i.e. where those actions do not create a real risk of violence. For example, Belgium did criminalise “indirect incitement” to commit a terrorist offence and, in contrast to Italian legislation, Germany does not require incitement to be “public”.

The key role-played by judges, prosecutors and lawyers in avoiding these pitfalls and ensuring respect for international criminal and human rights law was emphasised.

4. The national implementation of EU Directive: ordinary vs specific legislation

It appeared from the discussion that the **national history** and the collective subconscious of each Member States has a great influence on the understanding of the notion of terrorism – and hence the way the Directive has been implemented in each national legislative framework. While Spanish and Italian judiciaries have a strong history of dealing with national terrorism and organised crime, some States have almost exclusively dealt with « modern transnational terrorism ». As an illustration, one participant noted that the crime of “public provocation to commit a terrorist offence” is interpreted more broadly and infringes more on the right to free expression in countries that have suffered terrorism for many years.

The national specificities also lead to different understandings of how to best design terrorism legislation. Some participants argued that there is **no need for specific legislation**: rule of law and fundamental principles of international criminal law are best protected if Member States use ordinary crimes, such as mass murder, organised crimes or, in case of large scale attacks, crimes against humanity. They argued that there is no argument against the application of common criminal law to combat terrorism. On the contrary, common criminal law has stood the test of time. Relying on it would diminish the arbitrariness and legal uncertainty of terrorism offenses and the special aura existing around terrorism. It would also avoid the confusing relationship between anti- terrorism legislation and international humanitarian law (IHL). In this respect, one participant argued that while international counter terrorism instruments– including the Directive itself– include a clause of primacy of IHL, most European countries apply a *de facto* primacy of (substantial and procedural) antiterrorism legislation to the detriment of accountability for international crimes (see *infra*).

Other participants disagreed and felt the need for a legislative criminal framework that takes

into account the **evolving forms of the criminal phenomenon including terrorism** – from the terrorist attacks in the late 20th century, those that followed the 9/11 events and finally those perpetrated by the Islamic State, a terrorist group with a territorial authority. Italy, with its strong tradition in fighting domestic political terrorism and organised mafia crimes, was cited as an example where national legislation has proved its ability to adapt to new challenges. For example, the Italian Criminal Code distinguishes the offence of subversive association (Article 270) from the one of association with the purpose of terrorism (Article 270bis). While both provisions seem similar, they each have their own specific features as they deal with differently structured criminal groups.

5. Vague definitions and wide judicial margin of appreciation

The Directive provides an exhaustive list of serious offences that EU countries must classify as terrorist offences in their national law when they are committed or there is a threat to commit them with a particular terrorist aim. The Directive lists three terrorist aims: (a) seriously intimidating a population; (b) unduly compelling a government or an international organisation to perform or abstain from performing any act; (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

Participants recognized the vague and broad wording of both the Directive and the national legislations that implement it through the (sometimes criticised) technique of the word-for-word transposition. It was argued the wide latitude this leaves to judges was needed given the broad scope of phenomenon they have to deal with.

6. Definition of terrorist group

Some participants shared the view that due to its vagueness, the notion of terrorist group is intrinsically **arbitrary and political**. Participants illustrated this with reference to some acts which committed in certain circumstances are considered legitimate (e.g. members of the resistance during WWII or of the Syrian opposition) while in others they may be deemed to be terrorist.

The possibility to **exclude legitimate activities** was discussed. For example, the Belgian criminal code excludes from the definition of terrorist organisation, organisations whose real purpose is solely of a political, trade union or philanthropic, philosophical or religious nature, or which solely pursue any other legitimate aim (article 139).

It was stressed that the notion of terrorist group covers a **broad scope of associations** from the Islamic State which governs a territory like a State to non-territorial terrorist groups, and differently structured organisations (from the more rudimentary structures with less detailed division of roles among its members to criminal groups structured similarly to a corporation).

7. Participation in a terrorist group

Participants stressed the difficulty of determining participation in a terrorist group – what level of participation is required and how is the membership defined.

Participants stressed the importance of examining the **concrete role played** by the person in the group rather than their mere moral adhesion to the group ideology. In this respect, the Italian case law was highlighted: it requires an “effective integration” of the person in the association, meaning that the person should effectively take part in the activities of the association. Participation cannot be understood as the mere acquisition of a status, nor can it be inferred from the adherence to a criminal program or common aspirations with the associates. This element was recognized as even more relevant when dealing with organisations such as the Islamic State with a high degree of ideological involvement but at the same time internal flexibility and sometime only sporadic and remote contacts between members.

Participants also debated **the tasks** that are deemed to “contribute to the criminal activities of the terrorist group”. The Italian case law for example requires “an efficient causal contribution to the existence, the survival or the operation of the association”. While all participants agreed that participation should not be limited to the execution of a terrorist offence, some disagreements emerged when discussing examples of ancillary tasks and in particular the contribution of women (i.e. in the case study of the crimes related to the organisation of a travel).

Several participants stressed that participation or adhesion to a group **cannot be unilateral**: a person cannot be part of a group if this group is not aware of his/her existence. In other words, the group must have knowledge, even only indirectly, that it can count on the contribution of this person. Focusing on the case of the Islamic State, one participant argued that there is no need for an explicit acceptance of the membership by the core leaders of the network. It is sufficient that the adhesion to the group is known by one of the “peripheral elements” of the network whose activity is essential to the survival of the entire association, stressing also that this knowledge can be indirect or mediated by telecommunications technologies.

Regarding the **intentional element of participation**, the Directive requires that the participant knows that his/her participation will contribute to the criminal activities of the terrorist group (article 4). Participants pointed that some Member States broadened its scope also beyond the “actual knowledge” by adding that the person “should have known” that his/her participation “would or could contribute” to the criminal activities of the terrorist group. It was suggested that radicalisation can contribute to the individual adherence to the criminal purpose of the group and hence to the intentional element required.

8. Terrorist intent

Participants agreed on the difficulty to determine and prove the terrorist intent. One participant raised the issue of interpretation of criminal intent with regard to the element of “recklessness”. He raised the point that the Directive was negotiated in English in which

language “intent” does not include recklessness. However, in several Latin languages, the equivalent translation *dolus* includes elements of recklessness, i.e. *dolus eventualis*. In this case there may be a wider interpretation of the mens rea elements in these countries. For the point of view of the need for a harmonised and restrictive interpretation of criminal law, intent should exclude *dolus eventualis*.

Some participants stressed that their national laws have a broader definition of the terrorist intent than the one provided for in the Directive. France, for example, requires that the act is committed with the intention “to gravely disturb the public order by way of intimidation or terror”. Participants discussed the arbitrary application of such definition and the possibility to **use the Directive to interpret national laws restrictively**. However, it was stressed that the terms of the Directive are also open to interpretation, notably the notion of “intimidation” or “population”.

Some participants noted the tendency to **sanction the intention** regardless of the actual acts committed – a trend which appears also in other areas of criminal law such as organised crime and human trafficking.

9. Evidence challenges

All participants agreed that **the level of evidence** required to prove terrorist offences should be **no different** to the one required for ordinary crimes. Judges need precise elements to establish terrorist offences. They also need to know what kind of elements they need from prosecutors.

Some participants nevertheless stressed the difficulty to prove and collect evidence for core **terrorist acts committed abroad** and argued that this leads States to focus on the prosecution of “peripheral acts” committed at home. One participant denounced the **lack of accountability for war crimes** this creates – counter-terrorism legislation is favoured to international humanitarian law for acts which are definitely taking place as part of an armed conflict abroad but are too difficult to establish by European prosecutors. Another participant noted that the right to truth of the victims is often lost when perpetrators are prosecuted for ancillary terrorism offences instead of the international crimes such as war crimes they are also guilty of. In this respect, one participant responded that anti-terrorism legislation should not in itself be considered as an obstacle: the challenge is rather on the prosecutors who should make it possible to use the evidence collected abroad by military and intelligence officials by strengthening to the maximum the judicial cooperation.

10. Sentencing: the role of judges and the importance of other means to counter terrorism

As recognised by the Directive (recital 31), participants stressed that criminal justice response should not be the only means of countering terrorism. Judicial decisions should take into account **all available resources** (such as de-radicalisation programs). Administrative and preventive measures were also mentioned as important tools for judges.

Participants disagreed on the usefulness of expulsion measures: while some argue it could only lead to further radicalisation, some claim its effectiveness in certain circumstances.

Due to the fear associated with these crimes, it is important that judges explain clearly **the rationale behind the sentence**. Judges must also make clear how their decision complies with international human rights standards from the substantive definition of the crimes to the procedural rules governing investigations, evidence and grounds of the judgment.

<p style="text-align: center;">The Hague Roundtable – September 27th, 2019 Investigative procedures and procedural rights in counter terrorism</p>

Through roundtable discussions, 20 participants - judges, prosecutors and lawyers from 10 EU countries shared their practices and experiences in the application of the investigative procedures and procedural rights related to the prosecution of the criminal offences enshrined in the EU Directive 2017/541 on combating terrorism within the different legal systems of the European Union (EU).

One of the purposes of the roundtable was to share experience of how the Directive operates in practice around the EU, some of which is reflected below. There were differences of views between participants on the compatibility with the human rights framework of some of the practice, and it should not be inferred that all practice referred to is lawful or best practice.

These practices were assessed in light of international human rights law principles in order to select best practices that could be promoted throughout the EU. The event was held under the **Chatham House Rule**.

Among the issues discussed during the event, the main were: Investigative techniques and powers, evidence gathering, the threshold of suspicion to trigger investigation, the definition of offences and the possible sanctions, detention, transfers of suspects to court, political and public pressure on the judges, prosecutors, police and the lawyers, and the overall legitimacy of counter-terrorism legislation.

1. Threshold of suspicion to trigger investigation, Investigative techniques and powers, evidence gathering

Throughout the day it was discussed what kind of evidence is, or should be, enough to start an investigation that may jeopardize human rights, such as the right to freedom of expression, freedom of movement, etc. Which level of suspicion or which indications are enough to trigger investigation of a person, or **restrict someone's rights**, including putting them in pre-trial detention? Under which level of suspicion could a person be monitored, their phone conversations followed, and when could they be arrested, and charged with a specific crime? In each of the different EU Member States represented at the roundtable, different indications and levels of suspicion were needed for various actions that would curtail someone's rights.

Indirect evidence: Participants discussed how much weight was given to “ambiguous” behavior by a suspect as grounds to open an investigation or to take further investigatory steps, and what level of confirmatory evidence was needed of such behavior. The participants agreed that there is always a need to have a number of pieces of evidence – a single piece of indirect evidence cannot lead to any conclusion.

An example was discussed, where a booklet “*Know your chemicals*” was found at the back of someone’s car – was that sufficient to trigger a suspicion and with what effect? There were different points of view by participants, depending on their national legal systems, the actual experience with terrorism in their country and reactions in practice. It was suggested that in countries where more terrorist attacks happened, the judges, prosecutors and lawyers appear to be more inclined to see this as an important indication or suspicion. In some systems this may trigger follow-up surveillance. While some were opposed to seeing a mere booklet as any “evidence” as such, or as sufficient to take investigatory action (GE), underlining the necessity to respect the rule of law by all actors, police, the prosecutor or the judge and that no further follow-up should be taken in such a case.

Examples were given of irrelevant or discriminatory information being taken into account in investigations. “Wearing a beard” was mentioned as an example; it was noted that in practice this may be used as relevant indirect evidence, while some participants highlighted that reliance on such characteristics amounts to **discrimination**.

Following a person as opposed to tapping a person’s phone or searching their home were discussed in terms of interference with the **right to privacy** – participants discussed what actions could be considered proportionate when there was only a low level of suspicion. Practice in this area also varied among different Member states.

In some countries a person suspected based on mere indication or a “rumour” would be **monitored** by the intelligence services without the judiciary being aware. There is also information collected by intelligence services not shared with the judges. So the judicial oversight safeguards required by human rights law for interference with the right to privacy in this case remains very weak.

In one country different levels of suspicion were accepted as justifying different kinds of investigatory methods and an investigation would start by using methods that participants felt did not intrude on privacy rights and not requiring judicial authorisation. Participants from Spain noted that some information, such as “rumours” would not be sufficient to open a judicial case, but could be enough to start a police investigation. Participants also noted that limited resources could play a role in determining which investigatory methods were used.

Participants discussed safeguards applied to protect human rights in the investigatory process, and in particular varying national laws and practices for **judicial authorisation** of investigatory steps, such as surveillance or interception of communications. It was suggested that the level of protection offered by judicial authorisation – what evidence would be required by a judge and what degree of scrutiny was applied – varied in practice depending on the degree to which terrorism cases were perceived as exceptional. There was concern that in some countries, in practice, the stigma of terrorism meant that in practice, even for minor cases being prosecuted as offences ancillary to terrorism, legal safeguards were weakened or suspended.

During the discussion on a case study, **evidence gathering through unauthorized sources**

was discussed. Participants agreed that evidence gathered through unlawful methods, could not be used in court. It was discussed whether checking a “suspect’s” email history should have been authorized – in some countries the threshold is very high and it would have to be a very serious crime to authorize such an invasion of privacy.

The question of **anonymous witnesses** was discussed, as well as the importance that the defense then has the opportunity to challenge the evidence, which is often does not in practice.

The **EU terrorist list**¹ was discussed – in some cases there were mistakes on the list and the participants expressed concern about such listing. For instance it contained the LTTE (Sri Lanka Tamil Tigers) which then had to be removed following a decision of the CJEU.² Many participants agreed that the “EU blacklist” should not be determinative for the purpose of investigations, and the case always needs to be investigated, regardless of the list.

Based on case-law, actions such as Facebook ‘likes’ can be seen to constitute sufficient evidence of being a supporter of terrorism (and sometimes are so in practice), and being an administrator of a facebook group is taken as being member of a terrorist group. It was discussed whether this understanding of **activity on-line** complies with the principles of criminal law and proportionality.

It was agreed that the **test of proportionality** should be applicable at all levels: Police, prosecutor, or judge.

Some participants see terrorist cases as **exactly the same as any other cases and that they should be treated as such**. They considered that there should be no difference in investigatory procedures in such cases. It was agreed that human rights and criminal law standards are the same and apply to all the different crimes. However as noted below striking differences arise in law and practice as between the handling of terrorism related crimes and others. It was shared that when it comes to terrorism there is a tendency in practice to lower the standards of fundamental rights guarantees.

2. Arrest and Pre-trial detention

In most countries a person **can be detained for 24 or 48 hours following arrest on charges relating to terrorism**. Within that time limit the police must find enough evidence to keep the person in detention, otherwise they have to be released.

A striking difference in **powers of the police** was noted by the participants: whereas in some countries the police could decide on police custody based on a small, not necessarily convincing indication (and in 24hrs the judge would have to decide on remaining in the detention (or 48 in other Member States)).

Overuse of detention was raised as a concern. Pre- trial detention became a “habit” in many

¹ <https://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32019D1341&from=en>

² <http://curia.europa.eu/juris/documents.jsf?num=T-208/11>

countries as well – as for terrorism cases it is more frequently used and for a longer time. In other countries, it was noted that rates of pre-trial detention are far higher than average for terrorism cases. In another EU MS, although the principle of exceptionality applied to pre-trial detention, in terrorism cases judges were required by law to detain pre-trial where serious suspicion has been established. In another country, pre-trial detention was also more likely to be applied in terrorism cases, because it was not necessary to show special circumstances such as risk of flight as in other cases.

The **threshold to issue an arrest warrant** is in some countries also much stricter for general crimes than for terrorist offences. Necessity for public security is often the only ground needed to immediately allow for the **issuance of an arrest warrant in terrorism cases. In practice that necessity will be seen to arise from activities deemed to involve participation in activities of terrorist group, including behaviours that are generally legal (such as: browsing the internet, attending public meetings, booking a flight, ...).** Some participants considered this a lowering the standard of human rights guarantees in terrorism related cases.

3. Detention conditions

Detention in **solitary confinement** is the practice in some countries, **although not established in the law.** In others isolation would only be put in place because of a person's behaviour in detention, but not because of the nature of the crimes they are prosecuted for.

Radicalization in prison was discussed. That can be the reason to separate foreign fighters or other terrorism suspect/convicted from other prisoners.

Participants from some countries considered that the rights of people detained for terrorism offences are generally respected – there was access to contact with relatives, lawyers and they were treated exactly as other detainees.

Some countries have the so-called “reading judge”, which means that another judge (not involved in the particular case) is reading all the correspondence of the detained suspect / convicted person – so that the **correspondence is monitored** but in the same time it is not read by the judge in charge of the case.

For instance a practice in one country was shared, where all suspects detained on terrorism charges were automatically placed in one specific detention place for terrorism suspects (**terrorist units**), including minors. It was therefore not a matter for the judge to decide where the person would be placed. Such units were not the best place for a minor to be held, and that consideration influences the choice of charge for the prosecutor (knowing that the minor suspect would immediately be put into such a place of detention definitely not a good place for children, the prosecutor might re-consider charging the minor rather with a general criminal law offence than a terrorist offence in order to ensure they are detained in an ordinary prison).

Good practice. The prosecutor would think twice about the charge when a minor is the

suspect, as it has a major impact also on the place where the child will be detained.

Good practice. To release suspects on conditions. This should in principle be possible in the same way as it is possible for ordinary detainees. It was noted that probation monitoring is cheaper and has better results, but it is not popular with political leaders.

Good practice. Having more possibilities for alternatives to pre-trial detention: as that is something that often remains more limited or in some countries impossible in terrorism cases.

Good practice. In Spain, for instance, procedural rules are the same for terrorist and non-terrorist cases, including for pre-trial detention.

4. Definition of offences

Participants discussed the difficulty in using **broad or vague offences**, such as the *training for terrorism* – which goes beyond the attempt of a terrorist crime, even before a preparation of a crime and is rather complicated to be used by the courts.

The case study presented by one of the prosecutors described one suspect as a sympathizer of a “fanatic anti-government group”. It was discussed what does it really mean? Should this have any impact on the investigation? Participants agreed that the **loose definition of terrorism** is problematic here. Some judges also pointed out that **radicalization is not a crime in itself**.

Some participants noted that the scope of terrorist offences is progressively widening and raised concerns that this was mainly for political reasons. Also administrative law with less guarantees than criminal law is being used more: for example losing citizenship (only possible when there is dual citizenship) or administrative restriction of freedom of movement (the grounds for imposing an administrative measure are considerably lower in comparison with a measure imposed under criminal law). Several participants expressed the view that a fundamental re-consideration of the need for specific offences of terrorism was needed, and that priority should be given to applying the ordinary criminal law, since offences of murder or offences related to organized crime would be sufficient to cover the action that is or should be criminalised by terrorist offences.

5. Disproportionate sanctions (loss of nationality)

In some countries, it is possible to lose citizenship for a relatively minor offence (such as threatening to send a bomb – but never actually initiating anything to that end).

Loosing nationality can be the sanction in all terrorism offences, regardless of the punishment. In some countries this can be part of the sentence – at least the same judge decides about this as about the whole crime. But in other countries this has been separated – **administrative authorities decide** whether to take away the nationality.

Good practice. At an early stage, the prosecutor should **be aware of all these consequences** and take them into account when deciding on how to prosecute the crime. Especially a minor crime, if prosecuted as “terrorist” could have extremely disproportionate consequences, not only in the criminal field.

In Germany there was a recent decision of a court: children of “foreign fighters” should be brought back from abroad. Even in case of dual citizenship there should be **equal treatment and non- discrimination**, for all such children.

6. Political/public pressure

Throughout the day, it was several times discussed that in some countries the pressure on prosecutors, judges or the police can be disproportionately high, so that they start to feel responsible for ensuring safety, and preventing any terrorist attack from happening. That can be the moment when they start to overstep their powers. Some participants mentioned the need for a clear separation between the investigation and public safety.

The participants raised the pressure under which the judges also find themselves, through the society. Often influenced by politics. A lot of the debates around terrorism are very emotional and not rational.

It was raised by some of the participants that the way suspects are treated is in the “us versus them” narrative, which can be very difficult ground for any further re-socialization.

7. Transfer of suspects to court

Another practice, not grounded in law, is the way suspects are transferred to court hearings, with immense security measures created for violent detainees (handcuffs, leader belt, mask on the eyes, soundproof headsets, masked guards staying in the court rooms even if the court room itself is highly secured outside) – this can have an immense influence on the judge and might not in any way be justified. When challenged on individual basis, it is adhered to, but only in the specific case where this is challenged – it would not change the usual practice.

In other countries this is not the case – people suspected of terrorism related offences are brought in front of the judge unrestrained.

Good practice. One judge ordered not to see anyone with handcuffs in their courtroom – for that reason there might be more policemen in the room, but handcuffs were removed. This the judge finds important to ensure in every case. A judge also shared, that they were ensuring the same eye level with the suspects, which allowed them to have empathy and understand the actions of the suspects.

8. Legitimacy of the counter-terrorism legislation

Several participants raised their concerns on how to ensure the compatibility of security measures and a humane approach. For instance on what basis can children in North of Syria are detained on the grounds that their parents were terrorists?

Some participants questioned the democratic deficit of the legislation coming straight from the UN SC resolutions, which then become obligatory for member states to adopt. Although other countries' counter-terrorism preceded the UN SC Resolutions and served rather as their model.

However it was noted that the UN Special Rapporteur for CT and HR highlighted that SC resolutions still say that states must make sure HR are observed. This should be used as a pretext and ensure the strict interpretation of CT legislation, so that it is in line with human rights standards.

9. Cooperation and the European Arrest Warrant³

The participants discussed the main obstacles to cross-border cooperation, including the impact of the double criminality requirement and especially the impact of the risk of human rights violations in some EU member States (in pre-trial detention, unfair trial, use of unlawfully obtained evidence, or targeting of legitimate activity).

It was uncontroversial that cross-border cooperation is an important tool to gather evidence and is needed for effective assistance. On one view, cross-border cooperation must remain a procedural measure that does not overburden the system. At the same time there are important safeguards, such as the double-criminality requirement, *non bis in idem*, or single use protection (where evidence for a purpose can only be used for that specific purpose).

It was discussed that there are problems with the EAW in practice – stemming i.a. from the absence of an internationally accepted definition of terrorism. It was highlighted that the European Commission is currently revising and updating the Handbook on how to issue and execute a European Arrest Warrant.

Most participants agreed that especially the implementation of the EAW as used in practice must be improved. It was discussed that particular problems may arise in terrorism cases where some offences do not exist in some countries, but in others. For instance glorification of terrorism seems to be applied in three member states only. On top of that, because of the often-political nature of these crimes, the offences can be understood differently country to

³ *Within the European Union, the European Arrest Warrant (EAW) establishes a legal framework for extradition between its Member States. Its principal aim is to transfer competences in extradition proceedings to the judiciary. It establishes a system of direct communication between national courts for this purpose. The EAW is a "judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order." The EAW is based on mutual confidence or, as characterized in the Framework Decision, a "high level of confidence" among Member States with regard to their criminal justice systems' compliance—with human rights obligations under national and international law. This has been proven not always fully justified and a lot of problems in the implementation of the EAW have been identified.*

country, creating problems for EAWs.

Madrid Roundtable – October 18th, 2019
The impact of counter-terrorism law on freedom of expression and association

During the roundtable discussion, 28 participants – judges, prosecutors and lawyers - from 10 EU countries shared their experiences in the application of national legislation implementing the EU Directive 2017/541 on combating terrorism, within their particular legal systems, with particular reference to offences of public provocation, incitement, apology, or glorification of terrorism, and other counter-terrorism offences and investigative measures with a particular impact on freedom of expression and association.

At the outset, it was noted that **Article 5** of the Directive sets out the offence of public provocation to commit a terrorist offence, and requires Member States to criminalise direct or indirect incitement to the commission of a terrorist act, including by glorification or advocacy of such acts, thereby causing a danger that a terrorist act *may* be committed. Lack of clarity as to the nature of the intent required, or the degree of proximity to actual violence required for a statement to constitute a criminal offence under this provision, causes difficulties for judges, prosecutors and lawyers in implementing them in practice.

It was noted however that in the 15 years before the Directive, many EU countries had already adopted laws on indirect forms of incitement to terrorism including offences of encouragement of terrorism, glorification of terrorism, apology for terrorism. These often broadly and vaguely defined offences have been widely criticised, not only by human rights NGOs like the ICJ, but also by UN treaty bodies and special rapporteurs, as disproportionately interfering with freedom of expression. They have been applied to prosecute political, artistic and other expression both online and offline in ways that have been criticized as disproportionate or arbitrary.

It was noted that beyond criminal prosecutions, the Directive is also a basis for the removal of online content constituting public provocation (recital 22), which may also be subject to judicial authorisation or review.

Added to this particular issue regarding incitement and provocation is the wider impact of offences under the Directive on freedom of association and the work of civil society, including in conflict areas in the provision of humanitarian assistance, but also in EU MS, where very broadly defined ancillary offences such as participation in a terrorist group and travel for purposes of terrorism can affect freedom of association as well as expression and may narrow the scope for civil society engagement.

It was noted that the Directive was enacted within an international law environment, including i.a. SC resolution 1624 – criminalising incitement of terrorism – while there is no definition in international law generally or in Security Council resolutions of what is the incitement and what is terrorism. The Directive is more specific as to the scope of offences,

but still remains very broad. The problem is therefore how its provisions are to be interpreted and applied in national courts, while respecting human rights, and in particular freedom of expression and association.

1. Freedom of Expression

During the session on freedom of expression, it was discussed, how relevant provisions of the Directive, especially Article 5, can be implemented in compliance with human rights obligations of EU Member States under national, EU and international law.

It was raised that CT legislation is not always in line with the principle of **prescription by law** – law needs to be clear as to its content and foreseeable as to its application– and there is quite a bit of vagueness in the definitions in national and international law. The principle of individual responsibility should always be the basis for the application of offences in the counter-terrorism field, as elsewhere in the criminal law.

The point was raised that the **meaning of intent** and its relation to incitement should be clearly defined in national law and practice. Restrictive interpretation should be put in place as the current practice in some countries raises the question whether the current use of criminal law is justifiable and proportionate.

It was pointed out that **incitement to violence and/or hate speech** is the red line that makes it appropriate the use of the criminal law: the Special Rapporteur on Freedom of Expression mentions that there needs to be a likelihood that a violent act will happen as a result of the speech.

In France there is a long tradition of criminalisation of public speech. In 2016 a new law on glorification of online terrorism was passed, under which even just posting pictures online of acts of terrorism could be seen as incitement. The Constitutional court annulled this legislation, however it passed into law again almost with the same wording.

It was mentioned that reference to the international legal framework could be useful in limiting over broad or arbitrary interpretations.

It was pointed out that in some countries, reference to Article 5 of Directive 541/2017 could also **limit the arbitrariness of the interpretation of national law** both with respect to the definition of the intention and with respect to the need for the speech to be linked to a concrete danger of committing a crime. In this regard it was also very important to always keep in mind the general clause of article 23 of the Directive, regarding protection of fundamental rights.

Examples were given of cases where people had been convicted of incitement offences, for which the penalties were up to 7 years of imprisonment but for which it was not necessary to show any likelihood that the speech would result in an actual terrorist offence. Just speaking positively of an attack can be enough for conviction. An example was cited of cases when people were convicted as a result of things they shouted while drunk in the street.

In the Directive, **provocation of terrorism requires the likelihood of the commission of a terrorist act**, which is more restrictive than some national laws, for example that of France, and therefore imposes an additional safeguard for the protection of freedom of expression.

One participant emphasised that the word provocation is more specific than the word incitement –it means that the words can cause a danger and can be considered as a crime. This has had an impact on the application of the law in Spain for example. In Belgium, incitement is a crime, but glorification is not. In practice, there are no regular prosecutions for incitement to terrorism, but the offence of distribution of propaganda is systematically prosecuted.

In the Netherlands, an offence of incitement exists in law but is not much used in practice. There is a debate on whether it is possible to legislate for an offence of glorification of terrorism but so far there has been no proposal for the introduction of a specific crime able to give a precise definition to such conduct.

In Italy, the issue of glorification has been discussed for years: from 2015 the Italian criminal code introduced the crime of apology of terrorism, which had considerable impact. The criminal law principles applied are that there must be no crime of opinion, and that the criminal law must be applied only as a last resort. Applying these principles in practice in the courts was more difficult than enacting the offence in the criminal code. For apology, it is difficult to justify criminalisation when the speech is disconnected from a specific terrorist offense. Art.5 Dir. 541/2017 tries to eliminate the confusion between instigation and apology, one relevant as a material element and one as an intentional element.

As regards Spain, it was noted that monitoring of the jurisprudence of national courts showed very vague definitions relating to glorification of terrorism. However two elements could be discerned from constitutional jurisprudence: 1) need for objective risk; 2) intention to commit terrorist offenses. The intentional element must be inferred from the objectivity of the act committed or from the content of the message.

As regards Belgium, participants discussed the Valtonyc case – the glorification as it was presented to the Belgian judge concerned attacks by GRAPO, ETA and attacks to overthrow the Franco regime. It was noted that the judgment in this case states that glorification of terrorism must be distinguished from the general acts of terrorism and that **it cannot refer to historical cases of terrorism**.

Issues of **bias and discrimination** in the application of offences of incitement and glorification were raised by one participant, who considered that in some countries there was more readiness to prosecute jihadist speech than speech glorifying “domestic” terrorism. Spain was cited as a possible exception to this, since speech offences in regard to both Islamic or national terrorism were prosecuted. In Spain, the indoctrination of third parties is defined in terms of the spread of the terrorist discourse as apology or hate crime but not as participation in the terrorist group. The existence of a concrete risk is not required to intervene but an abstract risk is enough. It was also pointed out that in Italy incitement to

violence is punished, and racially motivated hate speech repressed regardless of the group the offenders belong to.

Participants discussed how to analyse the level of the risk that speech would lead to a terrorist attack. It was suggested that consideration should be given to the characteristics of the audience; the author of the speech; and the content and context of the message. It was also considered important to consider the audience that is likely to receive the speech. But in assessing this context, judges and prosecutors needed to guard against discriminatory biases – for example a white person might be less likely to be prosecuted for shouting about ISIS in the street, than a black muslim.

It was stressed by one participant that in Spain, there has been an evolution on how the crime of glorification has been interpreted. In particular, greater consideration has been given to assessment of intent, and to the link between the speech and a risk of violence. This change of orientation was motivated by the need to apply Directive No. 541/2017. It was noted that the Spanish National Court distinguishes provocation and glorification but in the Directive the two concepts are conflated and the creation of a danger is specifically required. On this basis, Spanish jurisprudence has been modified to require the creation of a danger for both offences.

Concerns were raised that the use of **message encryption can be considered an automatic indication** of terrorism before some national courts, although not according to UN resolutions. It could be linked to the need to protect privacy (and happens automatically on some apps) and should not be a reason to profile someone or suspect them of terrorist activity. Restrictions on encrypted speech can affect the protection of freedom of expression.

As regards the scope of offences of glorification of terrorism, it was discussed that one problem confronted differently in different EU Member States is how it applies to glorification of past movements that were terrorist or might now be considered terrorist in nature, but that no longer pose any threat. In Belgium, one of the difficult questions raised with proposals to legislate for an offence of glorification of terrorism was to what extent it should apply to such historic speech. In Spain, criminal offences do apply to speech concerning past actions or movements when the injury caused by some past events is still very strong. As with many aspects of debate on glorification of terrorism, it was noted that this question is related to the lack of agreement as to the legal definition of terrorism.

2. Freedom of expression on-line

Participants discussed regulation of freedom of expression online, including interference with freedom of expression through the removal of online content.

It was noted that according to the UN Special Rapporteur, 70% affected by counter-terrorism polices are **human rights defenders**. In the Terrorism Directive, Art. 21: there are problems with the definition of removal of online content constituting a public provocation to commit a terrorist offence. The paragraph 21.3 adds some vague references to "adequate

safeguards", including judicial redress. This seemed probably to be of too many safeguards, so before implementing the Directive last September the Commission, pushed by Member States, published a new text to prevent the dissemination of terrorist content online. The Terrorist Content Regulation⁴ definitions are not in line with Directive and it does not mention the concept of intent.

Also, three specific measures were proposed:

- a. Removal orders
- b. Referral orders
- c. "Pro-active measures": such as upload filters scanning all communications.

An opinion was cited that the proposed Regulation "imposes upon all Member States far-reaching new legal obligations without any effort to define or limit the categories of persons who may be identified as 'terrorists' by an individual state," and that "[t]his approach carries a huge risk of abuse, as various states apply notoriously wide, vague or abusive definitions of terrorism, often with a clear political or oppressive motivation."⁵

Problematic measures include **blocking of content**. Much of this is done by companies and most companies are just blocking all the content without going through a judicial procedure. Companies are in practice acting as police, prosecutor and judge in the process.

It was noted that in addition to issues of blocking of online content, many young people are being criminalised (adults but less than 25) including for example in France. There is a debate on how young people use the internet and how the criminal law applies to this.

Concerns were raised about the **use of administrative measures** that can disproportionately affect freedom of expression – in particular there was a risk of possible expansion of the effects of such measures (e.g. on closing a bank account) on the basis of a mere suspicion of a crime. In the Middle East, these measures could also be used for censorship purposes even if there is only a link to videos or content which could be defined as being of terrorist interest. Once again the problem of defining the terrorist act and participation in the related group returns.

It was noted that in France, administrative police measures must be challenged in front of an administrative judge. However suspected internet content can be removed without any judicial guarantee.

In Italy, monitoring was seen as not the end but the beginning of the investigation. It is not a crime to surf on terrorist websites. The problem is the diffusion of the content to the outside audience. In the case of the click on a web link, the context must be assessed. If it is an anti Isis content, it does is not criminalized. On a substantive level, offences of apology remain the same irrespective of the medium used.

⁴ https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation-640_en.pdf

⁵ M. Scheinin, Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters, Just Security, 23 September 2019

It was noted that the UK passed a law making it an offence watch the same YouTube terrorism content 3 times, and then amended the law again to make a single viewing of such content a criminal offence. There is an exception for academics, research etc, but not mere curiosity. This is particular bad considering that YouTube recommends videos to users automatically. There was a case in Belgium of an election candidate removing video content. The problem is that some companies for economic or other reasons remove uncomfortable content. Hate speech cannot in itself be considered a crime of terrorist interest. There is always a question of balancing fundamental rights and preventing terrorism. The removal of content is however linked not only to the specific content but also to the incapacitation of the subject to continue communicating with the outside world. The removal of contents could also make it more difficult for the collection of evidence.

A participant shared the opinion that the web is the main vehicle of radicalization and self-training. The other channel is prison. The measure of art.21 of the Directive seems to be balanced.

The role of the proactive measures of the providers is important For instance, in cases of scenes of decapitation on-line with enthusiastic comments from clips with scenes of war, Italian Prosecutors do not consider such messaging criminally relevant because it is confined to ideological radicalism. But what should the provider do?

It was noted that if the definition of a terrorist group is unclear, the issue of removing online content also becomes problematic. It would be more efficient if regulation in this field were entrusted to ordinary legislation, rather than anti-terrorism legislation.

It was mentioned that the issue of the use of administrative measures is that of the lack of judicial guarantees ex ante. The ex post guarantee with respect to an already removed content may not be fully in line with article 21. Responsibility for companies could also be very important from the point of view of civil society.

3. Impact of counter-terrorism law on Freedom of Association and on legitimate activities, including humanitarian assistance

Many crimes related to freedom of association are mentioned in the Directive in terms of participation, travel, recruitment, financing. It was noted that the issue of the definition of terrorism and associated crimes raises particular difficulties regarding participation in a terrorist group. The Special Rapporteur on counter-terrorism and human rights has suggested limiting the notion of a “terrorist group”. It is difficult to draft distinctions between armed participation in a conflict and participation in a terrorist group.

There is a significant question of **compliance of counter-terrorism laws with the rules of international humanitarian law**. The decision on the existence of a terrorist group can also be problematic with respect to the use of official lists of terrorist organizations. The issue is, who decides whether or not there is a terrorist organization. Another question is what it means to participate in such an organisation from an objective and subjective point of view (intent to contribute to the realization of the group's criminal program). As for the impact on

the legitimate activities of humanitarian associations, these should normally be exceptions, but it is important to exchange different national experiences.

The European Court of Justice and ECtHR have found problems with **list of terrorist organisations** that sometimes included political organisations.

Some participants considered that the offence of membership in a terrorist organisation is central to anti-terrorism legislation.

For instance, in Italy such offences date from violent Seventies terrorism and organized crime mafia experience but the intervention at the European level was much later. Already in 2002, the notion of terrorist group was extremely important with the relative seriousness of the sanctioning system. Directive 541/2017 had as an historical background those who went to Syria to fight with Islamic State. Today, the context has completely changed. Important issues: 1) The membership cases are absolutely central; 2) use the tools of organized crime; 3) criminal awards and protective measures against those who collaborate. It was noted that crimes of association also exist in Belgian law, but the presence of the association on the list cannot be binding. See e.g. the PKK case.

It was noted by one participant that according to the law, a terrorist group must be a **structured group** with differentiation of roles that has a single terrorist program. It must be more than just ideological. Some individuals have been convicted of belonging to a terrorist organization despite not belonging to a terrorist group.

It was discussed that there is a risk, under current laws, that mere departure to Syria becomes a crime, with potential to disproportionately interfere with freedom of movement and association.

There was a concrete case described of a person who went to fight in an anti-Assad group in the context of civil war. According to subsequent investigations there was also evidence of contextual involvement also in terrorist association. In principle, it should be acknowledged that someone can for example go to fight against ISIS and despite belonging to a non-regular army, not be involved in terrorist crimes.

One participant considered that since a violent terrorist act represents a serious violation of the principles of the rule of law, criminalization of associated behavior could be legitimate even where it limits freedom of expression and association. There is a paradox of tolerance: democracy must be defended with the tools of democracy. It was argued that if an association has an aim (that of attacking a legitimately constituted state) in a violent manner (which the directive specifies) then criminalization of membership is legitimate. But when the state or other bodies attacked are not democratic or there are legitimately constituted governments violating fundamental human rights, is it terrorism? See PKK-terrorist group case according to Turkey. In the Directive, the fundamental principles of democratic bodies are stressed but it is not clear how this applies to the definition of terrorist offences.

The question concerns Syria, Donbass, Lugansk. There is a need for further effort compared to the black lists that are always drawn up by the winners.

In Belgium the definition of participation is copied from the directive. However anti-terrorism rules should not be applicable in the event of armed conflict under international humanitarian law. Counter-terrorism law is heterogeneous and completely different from the area of armed conflict. In 2008 an international trial against PKK started before national courts: the anti-terrorism law was considered inapplicable.

It was mentioned that in a 2003 case regarding Syria, there was a definition of military organizations as terrorist with thousands of arrests. Participation cannot be linked to proof of a formal membership and the role of the judicial component is very important for interpretation. The problem can also arise when the action of ISIS is confused with that of all groups fighting against the regime in Syria.

The example was given of the experience in Egypt, where the Muslim brotherhood, having been in government was then banned and 3,000 people were arrested for participation in or connection to the group. Even lawyers defending people pertaining to the Muslim brotherhood targeted as connected to it. It is therefore very important how the membership of a group is defined.

A further example was cited of cities in Syria under the control of ISIS, where some people are accused of aiding terrorist groups only because they have a restaurant, where members of ISIS would eat. There needs to be a set of further evidence than the mere journey to or residence in a terrorist-controlled area before being able to say that it is a question of **participation** in the terrorist group.

Participants discussed the overlapping application of war crimes, crimes against humanity and terrorist crimes. There is confusion between these different areas, and their application is also often affected by the investigation, or lack of investigation due to practical constraints in battle zones, which means that ancillary offences such as participation in a terrorist group are more likely to be prosecuted. Concretely, when a murder is perpetrated by ISIS in the conflict zone in Syria it is likely to be a war crime, and if it is forms part of an attack on a specific ethnic or religious group there, it may even amount to genocide. If it takes place in Belgium it can be prosecuted under the ordinary criminal law of murder, so the application of counter-terrorism law is unnecessary, but it is also be considered a terrorist offence. It was argued that in a situation where 11 million of people have been killed priority should be given to prosecution of **crimes against humanity**.

Some of the conclusions of the roundtable were mentioned:

- a. There is no contradiction between counter-terrorism systems and respect for fundamental rights;
- b. Need not to punish mere expressions of opinions and necessity of collecting evidence of violent behavior or of the real danger of committing terrorist attacks;
- c. Need to evaluate the context in which the crimes (especially those of opinion) are committed;
- d. Balance between online investigations and data collection and respect for privacy;

- e. Avoid automatism of blacklists in the definition of terrorist groups;
- f. Take into account the history of each country even if respect for fundamental rights must be the common heritage of all States;
- g. Enhance the administrative preventive measures but ensuring compliance with the guarantees of the criminal trial because these measures impact on freedom;
- h. Distinguish between terrorism and fight against non democratic regimes;
- i. Regarding the offence of participation in a terrorist group, draw on the experience gained on organized crime to require effective participation in a terrorist group and not just an ideological adhesion to a general program.
- j. First call the Internet providers to check the published and diffused contents under the control of the set of legal rules.

Brussels Roundtable – November 29th, 2019
**The impact of counter-terrorism law on specific groups,
including children, ethnic and religious groups**

During the roundtable discussion, 26 participants from 7 EU countries have shared their practices and experiences in the application of national legislation implementing the EU Directive 2017/541 on combating terrorism, within the different legal systems of the European Union (EU). Especially the impact on specific groups, including children, victims of trafficking, and ethnic and religious groups were discussed in light of international human rights law principles in order to select best practices that could be promoted throughout the EU. The event was held under the Chatham House Rule.

1. Potential for discrimination in criminal court cases

The prohibition of discrimination is a fundamental principle of international human rights law. And The EU Directive 2017/541 on combating terrorism in its recital 35 specifically states: *“The implementation of criminal law measures adopted under this Directive should be proportional to the nature and circumstances of the offence, with respect to the legitimate aims pursued and to their necessity in a democratic society, and **should exclude any form of arbitrariness, racism or discrimination.**”* However in practice the Counter-terrorism laws application has often had a discriminatory impact and could have far-reaching negative consequences.

Preliminary findings from the research currently undertaken by ENAR with regards to Germany, Poland and Hungary were shared at the beginning of the roundtable. The research was looking at the link between the national counterterrorism legislation and discrimination. It found that there was a **lack of transparency** related to this legislation, especially when it comes to the question of effectiveness thereof.

It was identified that thanks to the broad CT legislation people were **identified as a threat** “pre- crime”. Often the goal of CT legislation is identified as to protect the constitution or identity of a state so the question is who is the threat in such cases? Are the laws made to punish individuals or groups? The groups could be potential radical Islamists, but more broadly who are **targeted are foreigners, migrants, refugees.**

It was further discussed among participants, how **the effectiveness of CT legislation** can be proven it was raised that the state should be able to show that it is necessary to have such measures, in order to justify them.

It was noted by the participants that CT legislation should be there as a way to protect the society and should therefore focus of the aim of **organized crime related to terrorism.** There should not be any discrimination, no link to religion, or any other specific group.

It was noted that the **discriminatory treatment of people with certain religions** for

instance would be contrary to international human rights law, and with the EU Charter: Article 20 “everyone is equal before the law” and the principle of non-discrimination in Article 21. Both direct and indirect discrimination is forbidden; racial profiling is forbidden. The grounds on which discrimination is forbidden include race and ethnicity, religion and belief, immigration status, nationality, age, gender, sexual orientation, disability.

A number of participants raised that CT legislation can be easily used against anyone: be it the opposition or for instance foreigners in a **discriminatory way**.

In the discussions about the discriminatory impact the participants shared a lot of different examples of discriminatory impact of the CT laws on peoples’ lives. A lot of very important concerns were raised with regards to situations where there is no or **very little judicial oversight** – especially with regards to the use of administrative measures, lack of transparency and lack of access to effective remedy.

2. Religion

Muslims or those perceived as Muslims are usually the target of CT legislation. In France, for instance, terrorism is currently associated with the Muslim community. New legislation was enacted after 2015 based on fear of ISIS and the legislator is targeting the Muslim community. Some of the lawyers argued that religion might be one of the reasons why someone is charged with a crime and/or one of the proofs during a prosecution. (FR)

In Belgium, for instance, it was argued that although directly religion is not being expressly taken into consideration in CT cases, **indirectly** it is always the case. Often, **evidence** that is relied upon is related to “practicing radical islam”. So there is a considerable potential for discrimination, which should be acknowledged and addressed. It was also noted that in France, also the way people **practice religion** is being used as evidence of participation in terrorism or other terrorist offences.

Although in the final decision the religion does not play a role – when judges are assessing the case, **certain types of evidence** that have nothing to do with culpability are coming up throughout the procedure while the judge is assessing the case. For instance: the length of the beard can form part of a picture of someone’s criminality, the fact that trousers are shorter can be immediately interpreted as being Salafi. When someone’s daughter is wearing a hijab, this will be immediately seen as radicalization must be taking place in their home. Judges might not even be aware of all such small indications taking place throughout the trial, but these will disproportionately influence the decision in a **discriminatory way**.

Some judges rejected the idea that CT legislation had a discriminatory impact, saying that when people are put on trial it is only because of a rigorous assessment of whether there has been a criminal offence – being planned to be committed or having been committed, but not **religion** or any other aspect. It was noted by judges that religion should not be taken into account as element, but several of those present considered that this was already excluded in their national system.

Others considered that there could be **no discrimination** on the basis of physical appearance or dress – as the “best terrorist would be without a beard and behave as western citizen”. A number of judges were quite sure that discrimination did not exist in their courts. Some judges **express regret to hear that people suffer discrimination in administrative procedures** which judges are not part of and are not aware of. They urged lawyers and NGOs to report that.

It was mentioned by a participant from a counter-terrorism unit that it should currently be taken as a fact that the main terrorist threat is currently coming from “**Islamist radicalization**”. Therefore it is not discrimination when various information is being collected, but such information must always be assessed in a critical way, declassified before passed on to the judiciary and must be based on sound and reasonable information. A judge expressed the need to receive training about Islamist groups that are training young people

It was identified that there is an “**ideology**” component in the definition of terrorism, according to some participants. There is a question of what separates political views, activism and religion – what is normative and what is deviant (such as violent extremism). A participant noted that a defendant’s connection to a religion or being true to values of western democracy becomes a substitute for assessment of the facts. In the end there is no effort made to find out which crimes were committed and which role the defendant played in them. It was argued that CT legislation with broadly defined offences allows for that.

It was mentioned that also **political discourse** was having an impact on people’s lives on a daily basis. It was noted that a lot of people practiced self-censorship by changing clothing for instance. Religion became stigmatized for many.

Trainings on **de-radicalization** can be very dehumanizing and building on stereotypes rather than breaking them. These are for instance such trainings in Spain directed at schools, and they are specifically targeting **Islamic communities**. When terrorism is mentioned, it is always and only djihadi terrorism.

The **impact of CT laws on the community of victims** was mentioned as an important element that needs attention. For instance, it was mentioned by one participant (BE) that CT laws impact disproportionately communities of victims in the Middle East: Shia, Jezidis, etc.

One of the conclusions was that we need to be aware of the **huge potential of discriminatory effect** of the CT legislation and so judges, for instance should make sure they look at the evidence brought in front of them through that lens.

3. Administrative measures

The **state of emergency** in France has made it easier to use the already existing administrative measures. This practice has further been put into law in 2017. It was therefore argued that the state of emergency continues even after it has finished, because of the new laws that implemented in practice the measures that were possible to be taken under the state

of emergency regime.

Experts see the practice in France as quite problematic, as when an administrative measure is **challenged in front of a judge**, it has usually already been implemented. If an administrative measure is in the end cancelled, it can be after having been on-going for about 3 months already.

For example – In the case of a house arrest, a person had to sign in three times each day at the police station (because he was seen taking pictures of a building, after Charlie Hebdo, and was suspected of being a member of a movement and accused of trafficking of vehicles). This measure was reviewed by an administrative judge, who decided based on “white paper” (a document with no signatures, and where it is not possible to obtain information on where the evidence comes from). Finally it came out that he was never taking pictures of the building, just talking to his mother who lived in that house. He was actually a witness in a case and not accused. The administrative measure was lifted 3 months after the house arrest took place.

Administrative measures are especially problematic when it comes to **expulsion/deportation**. Such orders can become very difficult or nearly impossible to challenge. Examples of such measures were mentioned, including at least 10 cases of deportation from Spain were mentioned, mainly of Imams.

Another example from France – A person from Algeria arrived in France at nine years old, now lives with a French wife and two children. As he is not a French citizen, he was deported as an administrative measure and it is nearly impossible to bring him back although the deportation order was not correct, because now this would cost France a lot of money.

It was noted that there is often a wide **scope of discretion** linked in the police forces or CT agencies, so that even with a suspicion of an act of terrorism – specific measures can start to be implemented, such as interception, etc. – sometimes completely **outside of the control of the court**.

It was noted that there is a trend of taking away powers of the judiciary in regard to CT measures and concentrating powers at an administrative level.

Access to a bank (example) – When people finance a project in Palestine, such a project might be somewhere in the world considered terrorist. Thanks to that the person will usually be put on a public list, and consequently the banks freeze their bank accounts, the bank stops all relations with such customers. And then it very often becomes impossible for the person to get any other bank account opened.

There are seven private institutions collecting such information whether a person is commercial “risk” for the bank. This risk can be deduced from a person's work, opinions, even human rights work. And has a lot of potential for discriminatory action. In France, it is possible to close someone's bank account without giving any reasoning.

4. Information/evidence gathered from citizens

It was noted that in some countries, the way people practice religion is routinely being used as evidence of terrorism offences. For instance, participants from France mentioned that teachers in schools receive emails to check radicalisation of their students and report them. There is a phone line “stop dhijadist” for people to be able to **report** anything suspicious.

In such an **information gathering system** by citizens it is very naïve to assume that there will be no bias, as every human has a lens through which they look at the world – how can be the human factor filtered?

The way evidence is collected can be very problematic: Judges who judicially review measures often get a “white paper” with no date nor signature, so it is something difficult for the administrative judge to question.

5. The powers of the police

It was noted that the potential for discriminatory police action in the counter-terrorism field is limited by powers of judicial review – for example in Spain, where the importance of judicial powers was stressed in relation to detention. In Italy, all measures taken by the police have to be validated by a judge in a short time.

6. Prisons

In prisons in France, the **degree of radicalization of an individual is evaluated** over the first four months of imprisonment. After that an analysis is made and based on the results the person is put either in a regular prison, or a specific prison. The “**radicalization level**” in the Netherlands is by contrast is only evaluated after the person has been placed to the terrorist wing in prison. Everyone accused of CT offences is placed there automatically.

7. Broad & vague definitions

Differing national understandings of what behaviour is to be criminalised based on CT legislation were discussed in light of the impact such understandings have on the application of the legislation to particular groups. For instance, fighting in a **civil war** is in some countries (IT) is not seen as terrorism: travelling to fight in Syria in a civil war is not seen as terrorism in Italy. Associations that are deemed terrorist in other countries might not necessarily be recognized as terrorist in Italy: ISIS and Anusa –or Kurds or Hezbollah. It was discussed how these labels of **organisations as “terrorist”** can be very political: for instance, for the US, Hezbollah is considered as dangerous as ISIS.

The fact that **preparation** is in itself punished can create difficulties in evidence gathering for other terrorist offences.

In one of the Member State, there is now new legislation to punish military **training**, making explosives, use of websites with radical content . This was identified as possibly going beyond the Directive.

It was mentioned that an important safeguard against discriminatory application would be **to narrow the definition** of terrorism.

Participation in a terrorist group was discussed as this offence is lacking the individual criminal responsibility aspect. In some countries when people participate directly or indirectly in an armed conflict, they would not be prosecuted as members of the terrorist organisation.

8. Evidence gathering

Anonymous witnesses

In some countries anonymous witnesses would not be allowed in court, all evidence must be heard in court, police would be heard in court to explain any claim they make to court.

One good practice that was shared was that **all evidence has to be always presented in court**, has to be heard, and anonymous evidence would not be accepted.

Accountability / Lack of evidence from abroad

Some participants raised the issue that collecting evidence on the ground in Syria and Iraq should be the priority to ensure **accountability**, in particular for war crimes and crimes against humanity, and argued that this is not happening. There are many witnesses with important stories to tell which European and US investigators should use. Priority should be given to the collection of evidence for crimes including kidnapping, human trafficking, slavery, rape, and murder.

As a result of the lack of evidence from abroad, the real crimes rarely get punished. For instance in Belgium, so far there was one single conviction for murder only. But for being convicted for being a member of a terrorist group, it is enough for 2 people to say that the person was in the group. The threshold is much lower and such evidence is much easier to obtain. Because of the lack of evidence it is actually impossible to give longer sentences. There is a need for battlefield information and also terrorist identification information.

For instance, one participant met a woman in Syria, who was sold 15 times – and is now in a rehabilitation programme. The last person was German and the participant is wondering why is no one collecting the testimonies of victims such as this woman. In order to ensure accountability, this would be crucial.

9. Political pressure and influence

Some participating lawyers mentioned cases where it seemed that judges would be under political pressure to label a group as terrorist. Several indications were leading to that direction and several participants described it as very disturbing, if that was the case. Some participants mentioned that nothing like this could happen in their countries.

In another case there was information that foreign authorities put pressure on an EU member state to bring a prosecution against a group operating in their territory.

10. Children in Syria and Iraq / Foreign fighters

Non-national children in camps in Syria/Iraq are not a homogenous group, labeled as “foreign fighters” / child soldiers, children of “foreign fighters”, trafficking victims, victims of ISIL, etc. Most participants agreed that all these children find themselves in a **vulnerable situation**. Most of the children are younger than 6 and most of them are victims. The conditions of the children held in the camps can be very dire. A lot of children are detained together with adults, although no criminal charges were brought against them. A lot of the children are traumatized. Most of Belgian children, for instance, are 2-4 years old.

The human rights challenges in Iraq and Syria were discussed, children being **deprived from leaving** the countries and from going back to their countries of citizenship. In Iraq there are currently about 700-750 children from EU Member States (FR most of them, 200 NL, 160 BE, GE, SE, etc.).

So far, mainly unaccompanied or orphan children have been **repatriated**. There is less political consensus about repatriating **mothers and fathers** in EU Member States. It was said that some of the mothers that are there have rejected the ideology and wish to return; others remain in the terrorist ideology. Among the challenges discussed was the possible **separation of the children from their mothers** if the mothers are radicalized. What is the best interest of the child in that case? As the question is so delicate for that reason most countries have so far repatriated orphans. Research was quoted showing the importance for the children of being brought back **with their mothers** – as the mother is the only person they trust in that situation.

For the moment, 65 countries have already **repatriated** 650 children. In the EU, only 8-9 countries have repatriated a small number of children. For instance in Belgium so far 30 children were repatriated, last 6 in June 2019.

Some countries are very strict about bringing people back. France for instance only brought 11 children – orphans and children with serious health conditions. They find bringing families back risky in terms of national security. But the participants suggested that not bringing people back might only create more anger and frustration. Some French nationals who are not able to bring their children back become radicalized because of this approach of the French government. In other cases –families are brought back – parents to jail and children to a foster family.

Most participants agreed that the younger children are repatriated the better. It was discussed

that the older they get the more difficult it might be to reintegrate them. Also from the security point of view: returning the children as soon as possible would be the best.

It was mentioned that there is a **EU Handbook** on how to deal with returnees – special section on children. In France and Belgium (at least) there are specialized services to **reintegrate** these children.

Belgium has a good **youth welfare system** able to accompany the children – if needed – through a juvenile justice process. But there is no political consensus on what to do with the mothers and fathers. Sometimes the children have multiple nationalities – various EU nationalities, so a cooperation and coordination at EU level is important.

It was raised that based on the **CRC**: best interest of the child principle must be respected, states must provide consular assistance, and allow for voluntary repatriation to countries of origin/nationality. Family unity must be respected as well as, protection from non-refoulement.

There was a discussion on the treatment of repatriated children as victims, or possible offenders. It was agreed that the main principle is in any case the best interest of the child. From an international legal perspective, it was concluded that there is **a legal obligations by states to bring the children back**: CRC recommendations to Belgium: all children of FF should be repatriated. SC Resolution 24/27 on children recruited in situation of armed conflict: they should be treated primarily as victims. In any case children under the age of criminal responsibility cannot be prosecuted, and should be treated as **victims**.

Some participants shared that as the children are all actually **victims of terrorism**, then a detailed provision of the directive on what to provide the victims of terrorism with (Articles 24-26 CT) can be a useful framework.

It was agreed by most participants that all children have the right to be protected under international law. Not bringing the children back means failing to protect the child and the society as a whole.

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This project is funded by the European Union's Justice Programme (2014-2020).



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