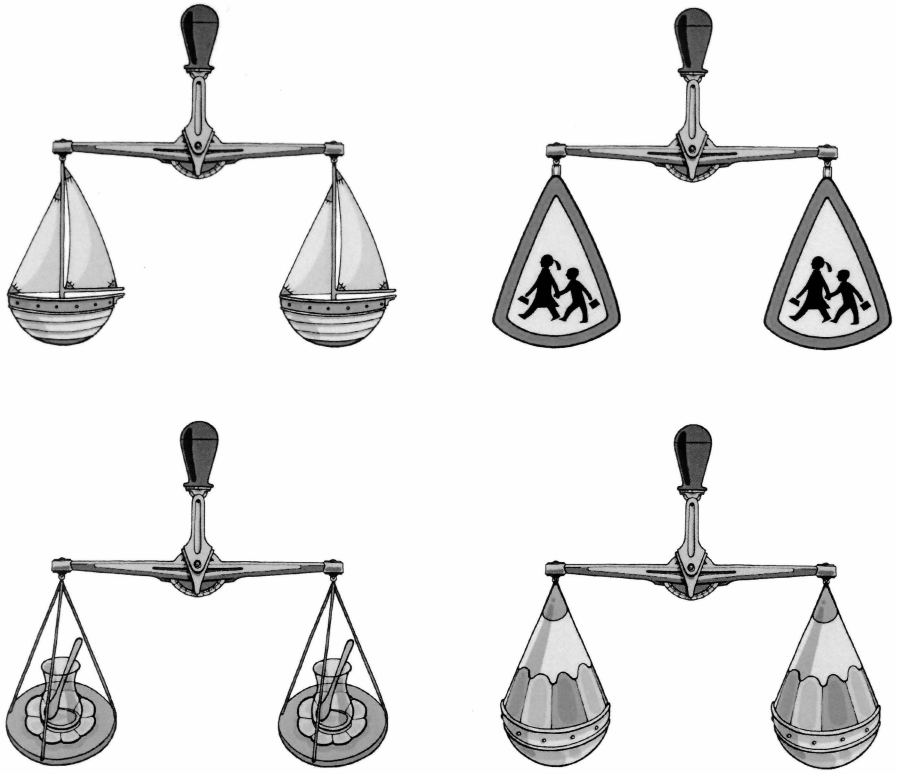
7th INTERNATIONAL CRIME AND PUNISHMENT FILM FESTIVAL
"PROTECTION OF THE RULE OF LAW AGAINST TERRORISM AND THE COUPS"
ACADEMIC PAPERS



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Terrorism and the Rule of Law

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I. Introduction

On 7 April 2015 at 14.22 A was arrested at Zurich Airport at Gate G58 as he was about to board a plane to Istanbul. A was suspected to be on his way to join the Islamic State to make a martyr of himself. He was charged with and convicted for violating the Swiss federal Al-

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Qaida and IS Act. This piece of legislation prohibits any affiliation with the two mentioned groups (prohibited activities include supporting or promoting their activities in any way, including assisting with propaganda or recruitment).

To prepare this presentation, very much like the convicted Jihad traveller, I intensively searched the terms "terrorist attacks", "terrorism", "Al-Qaida" and "Islamic State" on the internet. I also booked the same plane ticket as A did (Zurich-Istanbul) – so I am glad the Swiss Criminal Justice Authorities did not stop me in Zurich and I am very happy to be here. The case of A exemplifies the topic set out in the title of my presentation: on one hand, the threat of terrorism and on the other, the protection of privacy under the rule of law. But let's start from the beginning.

In recent years, Switzerland was untroubled by terrorist attacks. In the late 1960s and in the 1970s, however, Switzerland was the target of a series of grave terrorist attacks: on 21 February 1970 a Swissair Coronado plane on Flight Nr. 330 from Zurich to Tel Aviv crashed shortly after take-off due to an explosion on board. All 39 passengers and nine crew members were killed. The Popular Front for the Liberation of Palestine claimed responsibility. A bomb with an altimeter trigger had been placed in the cargo compartment. Following this and other attacks, several amendments to the Swiss Criminal Code were introduced. As well as changes made to the substantive law, the procedural law was also modified. This step was necessary to ensure the effective application of the substantive offences against terrorism. This will lay the groundwork for me to discuss the role of substantive criminal law in that fight. I will then give you a broad overview of what changes can be expected in the near future. Finally, I would like to elaborate on how the pursuit of collective safety affects individual freedom and the Rule of Law.

In my presentation I use the term the Rule of Law to mean not only every state's duty to adhere to the principle of legality, but in the broader sense of the German "Rechtsstaatlichkeitsprinzip": every state act not only must rely on a legal basis but must also comply with constitutional constraints imposed by fundamental rights and freedoms.

II. Fighting Terrorism de lege lata

In Swiss law, the legal standards concerning fighting terrorism can be found in the Criminal Code, the Criminal Procedure Code and the Intelligence Service Act. There are additional rules, for example, in the Anti Money Laundering Act or the Federal Act on International Mutual Assistance in Criminal Matters, but I will focus solely on measures against terrorism

services (c).

a) Substantive Criminal Law

I will discuss six substantive criminal law measures relevant to terrorism.

The offence of preparatory acts, regulated in art. 260bis of the Swiss Criminal Code, was introduced as a reaction to the terrorist attacks of the 1970s. This was the first offence to be used to target terrorism under Swiss law, although in practice it has been applied very broadly and often out-with the context of terrorism. According to this offence, any person is punishable who, in accordance with a plan, carries out specific technical or organisational measures and thereby indicates that he intends to commit any of the listed offences (homicide, robbery, serious assault, hostage taking, arson etc.). This can reach from spotting possible targets to buying cars, weapons et cetera. Thus, the offence of preparatory acts applies long before the occurrence of the actual attack. Committing preparatory acts carries a sentence of up to five years' imprisonment. Convictions under this article in terrorist cases are problematic when considering the Rule of Law. This is because the law enforcement investigation will most likely be prompted by information received by the intelligence service (often in the form of a tip-off), and as the intelligence services never reveal their sources, this initial information can never be fully challenged in court. This situation can present a conflict with ECHR 6 III d. Moreover, considering the fact that the conviction is often based on circumstantial evidence, courts are working at the very edge of what can still be considered to comply with the "beyond reasonable doubt" requirement (or are potentially not complying with in dubio pro reo).

Another offence that was introduced is participating in or supporting a criminal organisation (260ter of the Swiss Criminal Code). Originally meant to target classical criminal organisations such as the Italian mafia, nowadays the offence is also a valuable tool in fighting terrorist groups. According to art. 260ter of the Swiss Criminal Code, any person will be punished who participates in or supports a group intending on committing financial or violent felonies or crimes. The organisation must be dangerous. This danger is judged inter alia by the number of members and the organisation's purpose. The organisation must strive to commit violent acts such as murder, assault, bombings et cetera. Obviously, terrorist groups regularly fall under this definition of a criminal organisation. Any person who is a member of a terrorist group and acts on behalf of this group is punishable. Supporters who, for example,

offer accommodation to the group, manage funds or organise weapons, will be punished in the same way: regardless of whether a person participated in or just supported a terrorist group, the sentence is up to five years' imprisonment. This sentence only applies, of course, if no specific and more severe crime can be proven. According to the Supreme Court's Jurisdiction, Art. 260ter CC only applies to Mafia-like organisations with a clear hierarchical structure. Thus, "modern" terrorist groups that are organised in loose networks and terrorists acting alone do not fall under this definition.

Due to international treaties and as a reaction to the attacks of 9/11, the Swiss Parliament introduced Article 260^{quinquies} CC on the financing of terrorist activities. It is not clear whether this offence is of any significance in itself, since the financial support of terrorist groups is already punishable under art. 260ter (criminal organisation) of the Swiss Criminal Code. However, under the offence of financing terrorism any person who provides any finances to a single terrorist is punishable. The assets don't necessarily need to directly support an attack. Even financing flights or the rent for a car is considered as financing terrorism. The sentence for financing terrorism is up to five years' imprisonment. This wide scope leads to legal uncertainty over which behaviours may be classified as criminal, especially for companies conducting business in countries where terrorist groups are active, since it might be hard to foresee whether financial assets may end up in the hands of these groups at some point.

A rather old provision in the fights against terror groups is Art. 275ter of the Swiss Criminal Code, which punishes the endangering of the constitutional order by unlawful associations. This article might, however, become more relevant in the future, when terrorist attacks are directed against the state in particular.

A central strategy for fighting organised crime in general and terrorism in particular are asset forfeiture and confiscation. Forfeiture is seen to be an effective instrument to deprive the organisation of its assets. Assets that have been or will be used for criminal purposes in the future can be seized and confiscated. Switzerland has a distinct article for the **forfeiture of assets** belonging to terrorist organisations: based on art. 72 of the Swiss Criminal Code, the court can seize not only just those assets designated for use in an attack, but also all the assets the organisation has control over. The assets might belong to individual members of the organisation or to their families. Art. 72 CC assumes that the organisation has control over these assets. Therefore, the assets can be seized and it is up to the individual member to prove that the seized assets are exclusively his and not serving criminal purposes. This shift in the

burden of proof is, however, highly problematic from a rule of law point of view, as it is a clear violation of the presumption of innocence (Art. 6 II ECHR).

In addition to the offences in the criminal code, the aforementioned Al-Qaida and IS Act has been passed. In principle, both groups also fulfil the criteria of a criminal organisation in the sense of art. 260ter of the Swiss criminal code, but the act applies as lex specialis when either Al-Qaida or IS are involved. What is problematic here is not so much the article itself but the very broad application of it by the courts. As mentioned in the example of the "jihad traveller", flying to Istanbul with the alleged purpose of joining the IS was already interpreted as supporting a terrorist organisation, which – without any concrete evidence – seems a bit far-fetched.

All the measures I have just mentioned have one thing in common: they are not penalising the terrorist attack itself. Individuals who commit such an attack can of course be charged for murder, assault, et cetera. So instead of penalising the act itself under the title of terrorism, the legislator decided to extend the scope of criminal law in order to be able to intervene *before* an attack occurs. This also means that the substantive criminal law does not necessarily just aim at terrorists themselves, but also at any person who is supporting them in any way.

Criminal liability keeps shifting away from inflicted harm towards mere attempts and preparatory acts. Such "early intervention" substantive criminal law serves as a stepping stone for imposing coercive and preventive procedural law measures in the supposed context of fighting terrorism. The substantive criminal law is also used as anchor point for gaining international mutual assistance: for example, making a request to a neighbouring country to impose surveillance measures on a suspect. Consequently, the number of yearly convictions is relatively low (for 2016: 260bis, 14; 260ter, 13; 260^{quin}, 0) and, due to the broad range of behaviours encompassed by the "early intervention" substantive criminal law, the vast majority are unrelated to terrorism,

But let's take a look at these procedural measures now.

b) Procedural Measures

The Swiss Criminal Procedural Code provides law enforcement authorities with numerous options for conducting their investigations. On one hand, there are the ordinary measures like remand, the searching of premises, seizure of assets and many others. On the other hand, law enforcement authorities can also conduct surveillance measures, like for example the

observation of public spaces, the surveillance of bank accounts or telephones, the use of undercover investigators or the use of governmental malware.

To make use of these measures, the law enforcement authorities first have to assess that there is reasonable suspicion that an offence has been committed. In the aftermath of an attack, these measures can be used to track down suspects. However, to use procedural measures *after* an attack cannot be the only approach. The goal must be to prevent attacks. This is where the inchoate offences discussed before come into play. If there is merely suspicion that someone is preparing a terrorist attack, these persons are already suspected to have committed a preparatory offence and can therefore be secretly monitored, searched and arrested.

In other words, if a person is suspected to be engaged in terrorist activities, law enforcement authorities have widespread possibilities to conduct an effective and discreet investigation long before any attack happens, because the scope of substantive criminal law has been extended. However, one key price is a loss of hard evidence. Early intervention usually means that mens-rea-requirements become increasingly hard to prove. Secondly, there is a wide-spread infringement of privacy: the procedural measures apply far beyond the fight against terrorism, meaning that even potential burglars can be systematically subjected to surveillance. Further, the substantive criminal law has been stretched to prohibit much everyday behaviour, which allows privacy-infringing procedural measures to be applied in an over-broad number of situations.

But how is it that law authorities become aware of a possible terrorist attack in the first place?

c) Intelligence Services

Of course, it is not only the law enforcement authorities who are keeping an eye on suspicious individuals. It is the responsibility of the Federal Intelligence Service to gather information about possible terrorist attacks and to monitor potential threats. The intelligence service is acting independently from any suspicion that a crime has been committed. They simply focus on potential threats, based on information they receive from foreign intelligence services or from other Swiss authorities and informants.

I cannot go deeper into the measures the Intelligence Service has at its disposal at this point but let me say this: the competences of the Federal Intelligence Service have recently

been extended. Based on the Intelligence Service Act that came into force on 1st September 2017, the intelligence service can monitor telephone lines and mail accounts, use systems for tracking people, wiretap private rooms or use governmental malware. If the Federal Intelligence Service discovers any relevant information, it will inform the law enforcement authorities. This information provides the basis to open a formal investigation and, for example, take the suspect into custody.

The Intelligence Service does not give away its sources. Therefore, this procedure conflicts with the principles of a fair trial, since the suspect has no chance to challenge the initial evidence that lead to the investigation.

In addition to the *federal* intelligence agency, the federal states (cantons) have their own authorities dealing with potential terrorist threats: in the fight against terrorism several cantons have introduced their own legislation which allows their police forces to conduct secret pre-investigations. In Zurich, for example, the police authorities have the same options for using preventive measures as the law enforcement authorities would have. These measures extend the scope of the federal criminal law into even earlier phases of the commission of terrorist crimes. From a rule of law perspective, there is hardly any protection for the individuals concerned.

III. Fighting Terrorism de lege ferenda

The Swiss Legislator has passed several offences designed to fight terrorism, as we have examined. Considering the fact that some of these offences are merely of a preparatory and auxiliary nature, the sentences are relatively high. A person who organises accommodation for a criminal organisation faces up to five years' imprisonment, even if this person does not contribute any further to the organisation's cause. Combined with the far-reaching procedural and preventive measures, the instruments to prevent terrorist attacks can be considered both effective and tough.

Yet apparently, the numerous existing offences and measures are not enough; just recently, the government proposed additional offences to fight terrorism. The current legislative proposal seeks to double the maximum sentence for participating in or supporting a terrorist organisation. The proposed sentence of up to ten years' imprisonment is high, considering the fact that supporting a terrorist organisation doesn't necessarily entail any other criminal conduct. So in principle even everyday activities – such as letting an apartment

or serving food to a person suspected to be affiliated with a terrorist organisation – can be sentenced heavily.

Furthermore, the government wants to introduce a new offence dealing with so-called "jihad travellers": people who travel to the Middle East with the alleged purpose of fighting for terrorist organisations. The person who travels abroad and engages in terrorist actions can be sentenced to up to five years' imprisonment. The same is the case for people who recruit or train these "jihad travellers". This new offence is proposed despite the fact that such people are already sentenced today, under existing offences. Furthermore, in general, it is highly questionable whether deterring people from returning to their "normal" life by threatening to imprison them when they attempt to return home is the right approach in such a situation.

The most promising proposal seems to be an extension of police competencies to take action against potential terrorists. These measures are totally independent of any criminal investigation. In my opinion, this is a better approach than extending the substantive criminal law for the wrong reasons – namely, to allow the imposition of coercive and preventive measures long before a crime has been committed. In addition to extending police competencies in this area, a campaign to better prevent radicalisation in general is to be drafted.

These government proposals are currently under review and it is not yet clear which changes will make it into law. However, this much is clear: the government wants to provide law enforcement authorities with even more powers to fight terrorism.

IV. Conclusion: Safety in exchange for freedom

With the recently introduced Intelligence Service Act, the Swiss people have more or less given up their privacy rights. The question will remain the same: will it be worth it? Will it be of any use? While it seems that most states have limited their citizens' privacy rights in exchange for increased surveillance, not much safety has been achieved in general. Is it possible to achieve safety while still upholding individual freedom? The answer is: probably not. The best people can hope for in return for sacrificing their rights to freedom is a vague hope for increased safety, but there is no guarantee that this will be the case.

In Switzerland, the public seems to agree with the general saying: if you have nothing to hide, you have nothing to fear. However, this logic falls short for one key reason. The public has no insight into what information the Intelligence Services are looking for, and there is no control

whether they have something to fear.

It is questionable whether it is legitimate to punish everyday behaviour constituting only the very early stages of a crime with severe prison sentences. It becomes even more questionable when the only purpose of this criminalisation is to produce the necessary suspicion to allow the imposition of coercive and covert measures. The standard approach of criminal law is a retrospective one. The anchor for punishment is an act committed in the past. The whole doctrine of criminal law evolves around this core idea. The current approach of attempting to use the substantive criminal law to prevent the main offence from occurring cannot work. I hope to have shown in my presentation that enforcing preventive criminal justice whilst still protecting the rule of law is an increasingly hard task to achieve.

Örgüt Faaliyetlerinin Engellenmesi Çerçevesinde Önleme Amaçlı İletişimin Denetlenmesi

Yrd. Doç. Dr. Mehmet Emin ALŞAHİN*

1. Genel Açıklamalar

Özel hayatın dokunulmazlığının bir türü olan haberleşme hürriyeti, 1982 Anayasası'nın 22 nci maddesinde; *"Herkes, haberleşme hürriyetine sahiptir. Haberleşmenin gizliliği esastır"* denilmek suretiyle anayasal güvence altına alınmıştır.

Aynı şekilde Avrupa İnsan Hakları Sözleşmesi'nin 8 inci maddesinde, herkesin haberleşmesine saygı gösterilmesi hakkı olduğu belirtilmiştir.

Haberleşme hürriyeti ile hem haberleşme hakkı, hem de haberleşmenin gizliliğinin korunması amaçlanmaktadır. Haberleşme hürriyeti *a*ncak millî güvenlik, kamu düzeni, suç işlenmesinin önlenmesi, genel sağlık ve genel ahlâkın korunması veya başkalarının hak ve özgürlüklerinin korunması sebeplerinden biri veya birkaçına bağlı olarak usulüne göre verilmiş hâkim kararı ile ya da gecikmesinde sakınca bulunan hallerde kanunla yetkili kılınmış merciin yazılı emri ile engellenebilir ve gizliliğine dokunulabilir (AY. m.22/2).

Buna göre, kişilerin haberleşme özgürlüğü ve gizliliğinin sınırlandırılması ancak kanunda öngörülen hallerde ve yetkili mercilerin vereceği izin doğrultusunda söz konusu

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