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Criminal law 28.04.2020 Göran Sluiter & Sjors Polm

Secondary Liability and Terrorism – Spill-over to other international crimes?

Terrorism is a grave threat to society that the criminal justice system is meant to address. It therefore seems unsurprising that new offences and rules of procedure have been, and continue to be, introduced in many domestic criminal systems as part of the effort to combat terrorism. Among these is the proposed [article 134b](#) of the Dutch Criminal Code (DCC), which the Lower House of Dutch parliament approved by a [large majority](#) and currently awaits final confirmation by the Senate. This provision would criminalize intentionally being physically present in a designated terrorist-controlled area without prior permission from the Minister of Justice and Security.

The proposed law has been the subject of criticism from both [scholars](#) and the [Council of State](#). The most fundamental objection is that persons to whom the provision would apply would often not be criminally blameworthy since they need not have contributed in any way to terrorist acts, nor have had the intention to do so.

This expansion of criminal liability for terrorism in the Netherlands follows a trend set out in case-law. Earlier this year, [a man was convicted for financing terrorism](#), which is criminalized by article 421 of the DCC, because he transferred 200 euros to his brother who had left for Syria to become a member of Islamic State (IS). The suspect was found guilty even though the court believed that he transferred the money only to support his brother in his subsistence. [In another recent case](#), a woman was convicted for accompanying her husband to Syria, as she thereby facilitated the crimes he committed there. In the first case, a minor material contribution in the form of a transfer of money combined with the court's finding that the suspect should have known that the money he transferred could end up benefiting IS were sufficient for a conviction. In the other case, the woman who intentionally accompanied her husband thereby apparently contributed enough to her husband's crimes to warrant a conviction to two years imprisonment for co-perpetration of the husband's crimes.

Art. 134b appears to go a step further. After the adoption of art. 134b, virtually all Dutch citizens and permanent residents who travel to terrorist-controlled areas for reasons that are not humanitarian or journalistic, can be criminally convicted. Such a conviction would not require a specific link, in the form of facilitation, to any other crime or any acts of terrorism. It is the loosest form of facilitating, or supporting, terrorism one could possibly imagine. It raises the question of where this will end, or what eventually the limits will be for -secondary- criminal liability in relation to terrorism.

Expanding secondary liability for terrorism

The Dutch legislative initiative, its other forms of penalizing terrorism, and its recent case law on terrorism are not unique. Throughout the world there has been a wave of penalizing terrorism in a great variety of forms. Notably, Denmark, Australia, and the United Kingdom already have offences similar to the proposed Dutch offence of intentionally being in a terrorist-controlled area. Another contested expansion in penalisation of terrorism is the offence of 'apologie du terrorisme', the praising or encouraging of terrorism, which has been penalized in France and the United Kingdom. The Dutch legislature voted against introducing such an offence in 2005, but in 2016 a new proposal was introduced which is currently still under consideration.

The central line in all these developments is the increasing criminalization of various forms of assisting -in a broad sense - terrorism, such as financing terrorism, apologie du terrorisme, presence in terrorist areas, cooking for IS fighters, etc. Apparently, many states, including the Netherlands, consider existing crimes prohibiting forms of terrorism and available modes of liability, such as aiding and abetting, largely inadequate to effectively combat terrorism, and that therefore new forms of penalisation are justified. This could arguably be defended on the basis of the seriousness of terrorism and terrorist threats. But this explanation is not really satisfactory. We offer a few critical reflections.

Secondary liability for other serious crimes

Taking a step back and looking holistically at the wave of expanding (secondary) liability for terrorism, one will notice an ever-greater discrepancy with other very serious crimes. Confining ourselves to the sphere of *international* crimes, one can point to a number of crimes which are on account of their impact, gravity, and scale as serious, if not more serious, than terrorism. We are especially referring to genocide and crimes against humanity. Genocide ranks as the most serious and heinous crime, on account of the special intent to destroy in whole or in part a group on discriminatory grounds, is generally acknowledged. Genocide is the only crime under international law for which the modes of liability are specifically set out in the relevant source of international law (the Genocide Convention) and which include a mode of liability -incitement- that is dissociated from genocide actually occurring (also referred to as an inchoate crime). Crimes against humanity embody, like genocide in practice, a high threshold for criminal liability, because of their preliminary condition of a widespread and systematic attack on a civilian population before anyone can be held liable for any of the punishable acts.

Although a certain act of terrorism can be more serious, in the sense of having more fatalities, than a certain act of genocide or a certain act punishable as a crime against humanity, the opposite is also possible and probably more likely. In other words, there are good arguments to consider genocide and crimes against humanity as actually more serious than terrorism.

In that light it seems puzzling that none of the recent legislative expansions of criminal liability for terrorism appear to exist in the same way for crimes against humanity or genocide. For example, in the Netherlands there is no special, or separate, criminalization of being a member of a criminal organization with genocidal or crime against humanity-objective, or of financing genocide or crimes against humanity, or of being present in an area where genocide or crimes against humanity are being committed. Also, when we look at the law and practice of international criminal tribunals, we hardly see such criminalization-expansion for crimes against humanity and genocide. Rather, it seems that after a period of developing ICL with the creation of the ICTY and ICTR and the use of modes of liability such as Joint Criminal Enterprise, the ICL practice is more and more strictly observing the principle of legality and legal certainty, as provided for in, for example, article 22 of the ICC Statute and as evidenced by a very high number of acquittals. Interestingly, the high number of acquittals at the ICC has, contrary to the wave of penalising terrorism at the national level, not yet resulted in a call for new and expanded forms of criminalization of the crimes set out in the ICC Statute.

Bridging the gap?

This discrepancy between penalisation of terrorism and other equally or even more serious international crimes appears more and more problematic. There are in our view hardly convincing reasons as to why we witness unparalleled expansion of criminal liability in case of terrorism, whereas this is fully absent for equally, or even more, serious criminal conduct. The reason as to why we see this dichotomy growing is that Western states, where most of these legislative expansive efforts regarding terrorism occur, face at present more risks at home from terrorism than genocide or crimes against humanity; victims of genocide and crimes against humanity elsewhere do not interest these States so much, at least not enough to thoroughly address the question whether expansion of criminal liability for these crimes should not be somewhat in sync with what we witness regarding terrorism. One could argue that the importance of preventing terrorism may justify the expansion of its penalization. However, this is not very persuasive as prevention of crimes against humanity and genocide are just as, if not more, important.

The effects of the growing discrepancy between the scope of liability for terrorism and crimes against humanity/genocide in practice can be demonstrated by pointing out some of the aspects of the Dutch case law which were briefly described above and comparing it to what is available - or rather unavailable- in relation to the opposing party to IS in the Syrian conflict, i.e. the Syrian government and its regime.

We can safely say that Syria has a regime that is largely implicated in the commission of crimes against humanity. This large-scale commission of crimes by the Syrian regime could trigger scenarios of liability similar to those supporting IS, as mentioned above, but they do not exist. Simply: it is not a crime to support, by cooking or performing household tasks, any soldier fighting or torturing for or on behalf of the Syrian regime. Likewise, there is no criminal liability for

individuals travelling to or being present in Syria (or North-Korea or Eritrea, to name a few other examples of regimes known for crimes against humanity). Yet, the suffering of victims of the Syrian regime is not any less than those suffering at the hands of IS.

If, on the basis of the above, we would agree that the gap between the scope of liability for terrorism, on the one hand, and liability for crimes against humanity and genocide, on the other hand needs to be bridged, the question is how to do this. There are two possible views on this. The first is that expansion of liability for terrorism has gone too far and needs to be reduced to what is traditionally available for every serious crime (i.e. aiding and abetting, membership of criminal organization). The second view is that liability for genocide and crimes against humanity should match -or follow- the expansion of liability for terrorism. This should then result in new crimes -or new modes of liability- such as financing genocide or crimes against humanity and membership of a criminal organisation with a genocidal objective.

Human rights law can give some initial guidance as to how this gap should be bridged. Both the criminalization of being present in a terrorist area as well as the praising of terrorism infringe upon human rights: the freedom of movement and the freedom of expression, respectively. The freedom of movement, as protected in article 2 to the fourth protocol of the European Convention on Human Rights (ECHR), includes the right to leave one's country. As set out in [jurisprudence](#) (par. 56), this entails the right to leave to any country a person may want to go to, although that country may of course often not agree to let the person in. Although a terrorist-controlled area is not a country, one may gather that the idea behind this elaboration of the freedom of movement is that a state needs to justify any limitations it imposes upon where persons can go freely outside of it. Similarly, the right to freedom of expression as enshrined in article 10 ECHR is limited when a state criminalizes 'apologie du terrorisme'.

Whether these limitations can be justified turns crucially on whether they are necessary in the pursuit of a legitimate aim. The fight against terrorism is without doubt an important aim, sometimes capable of warranting serious interferences with individual rights. Yet, the necessity of further penalization of terrorism is questionable. Experience from the UK and France indicates that relatively few convictions have followed from their introducing 'apologie du terrorisme' and being in a terrorist-controlled area as offences. Most of the times when these offences could be applied, traditional rules of secondary liability such as criminal liability for aiding and abetting would also be available. As we discussed above, these traditional rules have already been used extensively in case law. In the few cases in which general rules of secondary liability would not enable successful prosecutions, it is questionable whether it is desirable to criminalize such distant contributions. This all indicates that human rights concerns to expansive secondary liability for terrorism are not without ground. And even if they would not prohibit certain expansion of criminal liability for terrorism, it at least seems prudent to steer clear from this side of the gap and have rules of secondary liability for terrorism more resemble those for international crimes than the other way around.

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