# Strafrechtelijke antiterrorismemaatregelen
## in Nederland, het Verenigd Koninkrijk, Spanje, Duitsland, Frankrijk en Italië

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**Inhoudsopgave**

# 1 Inleiding

Op verzoek van de Nationaal Coördinator Terrorismebestrijding (NCTb) is een samenwerking opgezet tussen het wetenschappelijk onderzoeks- en documentatiecentrum (WODC) en de sectie straf- en strafprocesrecht van de Radboud Universiteit Nijmegen teneinde een rapport op te stellen waarin overzichten worden geboden van antiterreurmaatregelen in een aantal Europese landen. De Radboud Universiteit Nijmegen heeft in dit verband de taak toebedeeld gekregen uiteen te zetten welke strafrechtelijke antiterreurmaatregelen zijn getroffen of voorgenomen in het Verenigd Koninkrijk, Spanje, Duitsland, Frankrijk en Italië, om vervolgens te bezien welke van de gevonden maatregelen wellicht ook in Nederland zouden kunnen worden ingezet in de strijd tegen terrorisme.

## 1.1 Project

Naar aanleiding van de op 15 augustus 2005 vastgestelde startnotitie 'Stand van Zaken en Effecten Contraterrorismebeleid' van het WODC is door prof. mr. Ybo Buruma op 1 november 2005 een onderzoeksplan ingediend waarin uiteen is gezet dat een serieuze scan van antiterrorismemaatregelen van strafrechtelijke aard zal worden uitgevoerd, met enige uitlopers naar het vreemdelingenrecht. Later is overeengekomen eveneens maatregelen van andere aard op te nemen indien daarop gedurende het onderzoek wordt gestuit. De conclusie van dit rapport is echter beperkt tot strafrechtelijke maatregelen.
In het onderzoeksplan is tevens gerefereerd aan een eventueel vervolg op de genoemde serieuze scan, in die zin dat na afloop van dit project op 1 februari 2006 de kamerstukken en de rechtspraak in het bijzonder op de nieuw gevonden artikelen zouden kunnen worden bestudeerd om te proberen een idee van juridische effecten van die voorstellen helder te maken.
Het onderzoek is verricht door mr. M. Aksu onder leiding van prof. mr. Y. Buruma en mr. dr. P.H.P.H.M.C. van Kempen, en afgesloten op 30 januari 2006.

## 1.2 Werkwijze

In het onderzoeksplan is reeds aangegeven dat de serieuze scan (in meer of mindere mate) steunt op materiaal dat is aangeleverd door buitenlandse collega-onderzoekers. Wat betreft Spanje en vooral Duitsland en Italië geldt dit zo goed als volledig. Voor Frankrijk echter slechts ten dele en voor het Verenigd Koninkrijk in het geheel niet. Een groot deel van het overzicht voor Frankrijk is namelijk opgesteld door middel van onderzoek in Franse juridische databanken. Hetzelfde geldt voor het Verenigd Koninkrijk, zij het dat voor de omschrijving van de gevonden artikelen om praktische redenen gebruik is gemaakt van reeds bestaande overzichten.[1] In mindere mate geldt dat voor alle genoemde landen behalve Duitsland gebruik is gemaakt van dergelijke overzichten van (non-gouvernementele) organisaties. Met Spaanse en Italiaanse collega-onderzoekers is bovendien overleg gepleegd ter aanvulling van het door hen aangeleverde materiaal.
Het verdient aantekening dat een (serieuze) scan per definitie te beperkt is om als basis te kunnen dienen voor beleid of wetgeving. De bevindingen in dit rapport zouden nader bestudeerd moeten worden alvorens ze eventueel navolging verdienen in Nederland. Het rapport is dan ook bedoeld als niet meer dan een aanzet voor nader onderzoek.

[1] In het overzicht voor het Verenigd Koninkrijk wordt deze werkwijze nader verantwoord.

## 1.3 Afbakening, opzet en doel

Hieronder volgen aldus overzichten van substantiële, voornamelijk strafrechtelijke, (voorgenomen) wetswijzigingen ter bestrijding van terrorisme in Nederland, het Verenigd Koninkrijk, Spanje, Duitsland, Frankrijk en Italië. De overzichten richten zich op het recente verleden, met name de periode sinds de aanslagen van 11 september 2001.[2] Indien echter is gestuit op oudere relevante wetsartikelen, zijn deze eveneens opgenomen in de overzichten.
Zoals gezegd is dit onderzoek in beginsel beperkt tot strafrechtelijke maatregelen. Deze afbakening is enigszins rekbaar in die zin dat wetswijzigingen op andere rechtsterreinen welke in samenhang moeten worden bezien met strafrechtelijke wijzigingen, dan wel materieel gezien moeilijk zijn te onderscheiden van maatregelen van strafrechtelijke aard wél zijn opgenomen in de overzichten en worden besproken in de conclusie.[3]
De beperking tot substantiële wijzigingen – welke met name geldt voor de conclusie in hoofdstuk 8 – is opgenomen om binnen het korte tijdsbestek dat voor dit onderzoek beschikbaar is de aandacht te kunnen richten op opmerkelijke maatregelen die interessant zouden kunnen zijn voor de Nederlandse strafrechtelijke terreurbestrijding.[4] Het is niet gemakkelijk exact aan te geven welke wijzigingen als substantieel gelden en welke niet. Zeker is dat wijzigingen die de kern van het strafrecht raken in de zin dat ze de grenzen van het strafrecht doen opschuiven – denk wat Nederland betreft aan de strafbaarstelling van samenspanning en het vervallen van het vereiste dat strafbare voorbereiding in vereniging moet zijn gepleegd – als substantieel gelden. Ook zijn substantieel die wijzigingen die een beperking van mensenrechten inhouden. Denk hierbij met name aan de uitbreiding van (bijzondere) opsporingsbevoegdheden ter bestrijding van terrorisme, beperkingen van de vrijheid van meningsuiting in die zin dat het verheerlijken van terroristische misdrijven strafbaar wordt gesteld of bijvoorbeeld wijzigingen van het straf(proces)recht waardoor mensen in hun (keuzemogelijkheden voor) beroepsuitoefening worden beperkt.
Ten slotte is besloten tot uitzondering van wetswijzigingen op het gebied van het internationale strafrecht. Dit is vanwege de geuite wens van opdrachtgevers om uiteindelijk tot een overzicht van vernieuwende maatregelen te komen aan de hand van hetgeen in een aantal Europese landen op specifiek nationaal(straf)rechtelijk gebied is ontworpen ter bestrijding van terrorisme.

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[2]Voor het overzicht van Nederlandse wetgeving betekent deze concentratie op recente maatregelen dat een aantal oude wetten tot uitvoering van (VN-) verdragen niet aan de orde komt. Het betreft bijvoorbeeld de volgende wetten: Wet van 19 mei 1988, houdende uitvoering van het op 14 december 1973 te New York tot stand gekomen Verdrag inzake de voorkoming en bestraffing van misdrijven tegen internationaal beschermde personen met inbegrip van diplomaten en van het op 17 december 1979 te New York tot stand gekomen Internationaal Verdrag tegen het nemen van gijzelaars;
Wet van 19 mei 1988, houdende wijziging van de wet tot uitvoering van het op 14 december 1973 te New York tot stand gekomen Verdrag inzake de voorkoming en bestraffing van misdrijven tegen internationaal beschermde personen met inbegrip van diplomaten en van het op 17 december 1979 te New York tot stand gekomen Internationaal Verdrag tegen het nemen van gijzelaars;
Wet van 10 mei 1973, houdende uitvoering van het op 16 december 1970 te 's-Gravenhage tot stand gekomen Verdrag tot bestrijding van het wederrechtelijk in zijn macht brengen van luchtvaartuigen en van het op 23 september 1971 te Montreal tot stand gekomen Verdrag tot bestrijding van wederrechtelijke gedragingen gericht tegen de veiligheid van de burgerluchtvaart.

[3] Denk bijvoorbeeld aan de Britse ´control orders´ die burgers aanzienlijk in hun bewegingsvrijheid kunnen beperken. De strengheid van de beperking tot het strafrecht komt echter wel tot uitdrukking door het feit dat bijvoorbeeld de Nederlandse Wet melding ongebruikelijke transacties en de Wet op de uitgebreide identificatieplicht niet aan de orde komen. Dergelijke maatregelen zullen zoals gezegd wel worden opgenomen in de buitenlandse overzichten, echter slechts indien er gedurende het onderzoek toevalligerwijs op is gestuit.

[4] De wet tot uitvoering van het op 15 december 1997 te New York totstandgekomen Verdrag inzake de bestrijding van terroristische bomaanslagen (Trb 1998, 64) en het op 9 december 1994 te New York totstandgekomen Verdrag inzake de veiligheid van VN-personeel en geassocieerd personeel (Trb 1996, 62) (28029), had bijvoorbeeld geen opmerkelijke wetswijzigingen tot gevolg en is daarom niet opgenomen in het overzicht van Nederlandse maatregelen.

Hieronder volgt aldus een (chronologisch) overzicht per land van activiteiten op het gebied van voornamelijk strafrechtelijk antiterreurbeleid. In de conclusie in hoofdstuk 8 zijn de resultaten ondergebracht in paragrafen die elk een strafrechtelijk contraterrorismethema vertegenwoordigen. Het gaat om de volgende thema's: (I) nieuwe strafbaarstellingen en uitbreiding van reeds bestaande strafbaarstellingen, (II) uitbreiding van (bijzondere) opsporingsbevoegdheden, (III) uitbreiding van de mogelijkheden rondom preventieve hechtenis, (IV) beperking van personen in hun bewegingsvrijheid en keuzemogelijkheden wat betreft beroepsuitoefening, (V) veranderingen in de verdeling van bewijslast, (VI) kroongetuigeregelingen, (VII) verbodenverklaring en ontbinding van terroristische organisaties en politieke partijen, (VIII) overige zaken.
Op deze manier wordt overzichtelijk uiteengezet of, en zo ja welke maatregelen in de 6 landen per strafrechtelijk contraterrorismethema zijn getroffen of voorgenomen en kunnen – ter vervulling van het doel van dit onderzoek – de *eventuele* mogelijkheden voor toepassing in Nederland duidelijker in kaart worden gebracht.
Om praktische redenen zijn de overzichten van maatregelen in het buitenland opgesteld in het Engels. De conclusie in hoofdstuk 8 is geschreven in het Nederlands.

## 2. Antiterrorismemaatregelen in Nederland

Hieronder volgt een overzicht van de belangrijkste – voornamelijk – strafrechtelijke antiterrorismemaatregelen in Nederland. Dit nationale overzicht is minder gedetailleerd dan de overige overzichten om de voor de hand liggende reden dat de nationale wetgeving wordt verondersteld bekend te zijn bij de lezers van dit rapport. Het dient slechts ter facilitering van de vergelijking met buitenlandse maatregelen.

**De Wet tot wijziging en aanvulling van het Wetboek van Strafrecht en enige andere wetten in verband met terroristische misdrijven (Wet terroristische misdrijven). Kamerstuknummer 28 463.**

De Wet terroristische misdrijven geeft uitvoering aan het EU-kaderbesluit terrorismebestrijding van 13 juni 2002. Het beoogt het materiële strafrecht aan te scherpen, opdat het beter tot uitdrukking brengt dat terroristische misdrijven tot de ernstigste misdrijven behoren. Bij aanwezigheid van een **terroristisch oogmerk** zijn enkele reeds strafbare gedragingen als terroristisch misdrijf strafbaar gesteld en – waar mogelijk – met een **hogere straf** bedreigd. Dit laatste geldt ook voor enkele misdrijven die worden gepleegd met het oog op een voorgenomen terroristisch misdrijf. Verder is de **rechtsmacht** ter zake van terroristische misdrijven uitgebreid. Ten slotte is ook de **samenspanning** tot een aantal ernstige terroristische misdrijven afzonderlijk strafbaar gesteld en de **rekrutering ten behoeve van de Jihad** onder het bereik van de strafwet gebracht.

*Status: deze wet is opgenomen in Staatsblad 2004, 290 en in werking getreden op 10 augustus 2004 (Staatsblad 2004, 373).*

**Het wetsvoorstel tot wijziging van het Wetboek van Strafvordering in verband met het treffen van een regeling inzake het verhoor van afgeschermde getuigen en enkele andere onderwerpen (afgeschermde getuigen). Kamerstuknummer 29 743.**

Dit wetsvoorstel strekt ertoe de bruikbaarheid van ambtsberichten van de Algemene Inlichtingen en Veiligheidsdienst (AIVD) te verruimen door de in het ambtsbericht van de AIVD opgenomen informatie onderwerp te laten zijn van nader onderzoek door middel van het verhoren van getuigen. Het wetsvoorstel houdt een verruiming in van de mogelijkheden om bij het verhoor van getuigen rekening te houden met het belang van de staatsveiligheid. Voorgesteld wordt de modaliteit voor een afgeschermd getuigenverhoor door de rechter-commissaris. De verdediging in strafzaken behoudt daarbij het recht op ondervraging van getuigen. Teneinde daarin te voorzien heeft de verdediging de gelegenheid om op een op de omstandigheden van het verhoor afgestemde wijze, nu het bijwonen van het getuigenverhoor door de verdediging vanwege het belang van de staatsveiligheid niet dan bij hoge uitzondering toelaatbaar zal zijn, vragen in te dienen die door tussenkomst van de rechter-commissaris gesteld kunnen worden. De verklaring van een op deze wijze gehoorde afgeschermde getuige wordt opgenomen in een proces-verbaal dat door de rechter-commissaris wordt vastgesteld, nadat hij zich ervan heeft vergewist dat de in het proces-verbaal neergelegde tekst het belang van de staatsveiligheid niet schaadt. Omdat uiteindelijk alleen de AIVD volledig kan beoordelen of openbaarmaking van bepaalde informatie, neergelegd in het proces-verbaal van verhoor, schadelijk is voor de staatsveiligheid, vindt voeging van het door de rechter-commissaris opgemaakte procesverbaal vervolgens slechts plaats onder de voorwaarde van toestemming van de getuige. Het gaat hier derhalve om een

uitzonderlijke afwijking van het uitgangspunt dat het de rechter-commissaris is die bepaalt welke gegevens tot de processtukken gaan behoren.

*Status: de Minister van Justitie heeft op 27 december 2005 de memorie van antwoord toegezonden aan de Kamer.*

**Het wetsvoorstel tot wijziging van het Wetboek van Strafvordering, het Wetboek van Strafrecht en enige andere wetten ter verruiming van de mogelijkheden tot opsporing en vervolging van terroristische misdrijven. Kamerstuknummer 30 164**

In dit wetsvoorstel zijn kort gezegd de volgende voorstellen uitgewerkt:
– een verruiming van de mogelijkheden om in een verkennend onderzoek informatie te verzamelen;
– een verruiming van de mogelijkheden om personen te fouilleren buiten een concrete verdenking van een strafbaar feit;
– een verruiming van de toepassingsmogelijkheden van bijzondere opsporingsbevoegdheden, zoals stelselmatige observatie en de telefoontap. Voorgesteld wordt de inzet van deze opsporingsbevoegdheden reeds mogelijk te maken bij aanwijzingen in plaats van een redelijke verdenking;
– het mogelijk maken van bewaring bij verdenking van een terroristisch misdrijf. Bewaring is de eerste fase van de voorlopige hechtenis welke veertien dagen duurt. Momenteel zijn voor de bewaring ernstige bezwaren vereist tegen de verdachte. Voorgesteld wordt de mogelijkheid ook bij een gewone verdenking de verdachte in bewaring te kunnen stellen.
– een mogelijkheid tot uitstel van volledige inzage van processtukken gedurende nog ten hoogste twee jaren ten opzichte van de huidige verplichting de zaak op de terechtzitting aanhangig – en dus de stukken openbaar – te maken na ten hoogste negentig dagen gevangenhouding overeenkomstig art. 66 lid 3 Sv.

*Status: de Minister van Justitie heeft op 21 november 2005 de nota naar aanleiding van het verslag van de vaste commissie voor Justitie (Tweede Kamer) toegezonden aan de Kamer.*

**Wet tot wijziging van het Wetboek van Strafvordering en enkele andere wetten in verband met de regeling van bevoegdheden tot het vorderen van gegevens (Wet bevoegdheden vorderen gegevens). Kamerstuknummer 29441.**

Dit wetsvoorstel strekt ertoe dat in het Wetboek van Strafvordering algemene bevoegdheden tot het vorderen van gegevens worden opgenomen. Indien derden – personen, instanties en bedrijven – beschikken over gegevens die van betekenis kunnen zijn voor de opsporing van strafbare feiten kan het nodig zijn deze ten behoeve van de opsporing van strafbare feiten te vergaren. De voorgestelde bevoegdheden sluiten aan bij reeds bestaande dwangmiddelen in het Wetboek van Strafvordering, in het bijzonder bij de bevoegdheden tot inbeslagneming van voorwerpen.
Het betreft bevoegdheden tot het vorderen van zogenaamde identificerende gegevens, het vorderen van andere dan identificerende gegevens, het vorderen van gevoelige gegevens en het vorderen van medewerking aan het ontsleutelen van versleutelde gegevens. Deze bevoegdheden omvatten mede de thans in artikel 125i neergelegde bevoegdheid van de rechter-commissaris te bevelen dat gegevens uit een geautomatiseerd werk worden verstrekt.

*Status: deze wet is opgenomen in Staatsblad 2005, 390 en in werking getreden op 1 januari 2006 (Staatsblad 2005, 609).*

**Wet tot uitvoering van het op 9 december 1999 te New York totstandgekomen Internationaal Verdrag ter bestrijding van de financiering van terrorisme. Kamerstuknummer 28031.**

Met deze wet is onder meer de strafbaarstelling van voorbereidingshandelingen uitgebreid in die zin dat het vereiste dat de **voorbereiding** in vereniging moet zijn gepleegd, is vervallen.

*Status: deze wet is opgenomen in Staatsblad 2001, 675 en in werking getreden op 1 januari 2002 (Staatsblad 2001, 703).*

**Het wetsvoorstel tot goedkeuring van het op 24 april 1986 te Straatsburg totstandgekomen Europees Verdrag inzake de erkenning van de rechtspersoonlijkheid van internationale niet-gouvernementele organisaties, alsmede invoering van enige regels met betrekking tot in een terrorismelijst vermelde organisaties en andere organisaties waarvan het doel of de werkzaamheid in strijd is met de openbare orde. Kamerstuknummer 28764.**

Het wetsvoorstel beoogt de civielrechtelijke mogelijkheden tot het verbieden van terroristische organisaties te verruimen. Het houdt onder meer in dat artikel 2:20 van het Burgerlijk Wetboek en artikel 140 van het Wetboek van Strafrecht worden gewijzigd teneinde onder meer de deelneming aan de voortzetting van een verboden (terroristische) organisatie onder het bereik van de strafwet te brengen.

*Status: op 13 januari 2006 is vastgesteld het verslag van het schriftelijk overleg tussen de vaste commissie voor Justitie (Tweede Kamer) en de regering naar aanleiding van de nota naar aanleiding van het verslag en de bijgevoegde nota van wijziging.*

**Het wetsvoorstel houdende regels inzake het opleggen van beperkende maatregelen aan personen in het belang van de nationale veiligheid en inzake het weigeren of intrekken van beschikkingen in het belang van de nationale veiligheid (wetsvoorstel Bestuurlijke maatregelen nationale veiligheid).**

Dit wetsvoorstel voorziet in het invoeren van een periodieke meldplicht, gebieds- of persoonsverbod voor personen die in verband worden gebracht met terroristische activiteiten of ondersteuning daarvan. De maatregelen kunnen worden opgelegd op grond van feiten en omstandigheden die op zichzelf onvoldoende zijn of blijken voor strafrechtelijk optreden, maar die wel van dusdanige aard zijn dat maatregelen gerechtvaardigd zijn. Voorts wordt in dit wetsvoorstel de mogelijkheid voor gemeenten en bestuursorganen vastgesteld om subsidies of vergunningen in te trekken van personen en organisaties die in verband worden gebracht met terroristische activiteiten of ondersteuning daarvan. Deze maatregel kan tot maximaal 2 jaar worden verlengd. De bestuurlijke maatregel wordt opgelegd door de minister van Binnenlandse Zaken en Koninkrijksrelaties in overeenstemming met de minister van Justitie. Betrokkene kan schriftelijk bezwaar aantekenen bij de minister van BZK. Vervolgens is beroep mogelijk bij de rechtbank en eventueel hoger beroep bij de afdeling bestuursrechtspraak van de Raad van State. Als de betrokkene de maatregel negeert, dan kan een vrijheidsbenemende straf volgen.

*Status: dit wetsvoorstel is 24 juni 2005 ingediend bij de Raad van State. De tekst van het wetsvoorstel wordt pas openbaar bij indiening bij de Tweede Kamer.*

**Ontwerpwetsvoorstel tot wijziging van het Wetboek van Strafrecht in verband met de strafbaarstelling van de verheerlijking, vergoelijking, bagatellisering en ontkenning van zeer ernstige misdrijven en ontzetting van de uitoefening van bepaalde beroepen.**

*Status: nog niet ingediend bij de Tweede Kamer. Er is echter wel reeds een advies uitgebracht door de Raad voor de Rechtspraak.*

# 3 Anti-terrorism laws in the United Kingdom

This chapter entails an overview of the key provisions of antiterrorism laws that have been adopted in the United Kingdom. Necessarily, the overview is a strongly compressed summary of the (key provisions of the) relevant Acts and the Terrorism Bill 2005, which combined include a total of 314 provisions and 461 pages (including schedules). Although the overview is strongly compressed, it contains descriptions of all key provisions including provisions that are not part of criminal law but rather of administrative nature, the most important being the so-called control orders.

For practical reasons, the descriptions of the selected provisions are derived from other documents, mostly by simply 'cutting and pasting'. The part of this overview relating tot the Terrorism Act 2000 and the Antiterrorism, Crime and Security Act 2001 is derived from the research that Irene Biglino conducted for Liberty, one of the most prominent human rights organisations in the UK.[5] The part of the overview relating to the Prevention of Terrorism Act 2005 is derived from publications of Human Rights Watch.[6] The same applies to the part of the overview relating to the Terrorism Bill 2005, although its greater part is derived from a document published by Liberty.[7]

We would like to emphasize that *only the descriptions* of the key provisions have been derived, as opposed to value-judgements by the aforementioned organisations in relation to human rights. Notwithstanding the reputation of both organisations, the authors of this document would also like to stress that verification of all derived descriptions of key provisions in the abovementioned sources is performed through consultation of the original Acts and bills.[8] Furthermore, one might suggest that reliance on human rights organisations may entail the risk of unintentionally leaving out key provisions that do not touch upon human rights. The authors have not disregarded this possible objection and are of the opinion that no key provision has been left out.

## The Terrorism Act 2000

### Proscription of terrorist organisations

Part II of the Terrorism Act 2000 is concerned with proscribed, or "banned" organisations. Under Section 3 the Secretary of State is granted the discretion to proscribe an organisation if he believes it engages in acts of terrorism, though it is enough for a group to promote and encourage terrorism to fall within the section. Organisations which fall foul of such requirements can still be proscribed under subsection (d), which covers groups "otherwise concerned in terrorism". Schedule 2 provides a list of organisations which include the IRA, the INLA, the Ulster Freedom Fighters, the Ulster Volunteer Force and ten other organisations related to Northern Ireland. A number of international organisations were added to this list by the Home Secretary; among the twenty-one organisations now listed are Hamas, Al-Qa'ida, the PKK, the ETA, and the Tamil Tigers (LTTE).

Being a member of or belonging to a proscribed organisation is a recognised offence under section 11(1), and carries a maximum penalty of ten years imprisonment. A person may also

[5] The results of her research are laid down in a pamphlet which can be consulted on http://www.liberty-human-rights.org.uk/resources/publications/pdf-documents/anti-terrornew.pdf.

[6] See for example the *Commentary on Prevention of Terrorism Bill 2005, Human Rights Watch Briefing Paper*, March 1, 2005 on www.hrw.org.

[7] The document can be found on http://www.liberty-human-rights.org.uk/resources/policy-papers/2005/terrorism-bill-2nd-reading-lords.PDF.

[8] To be found on www.homeoffices.gov.uk and the UK parliament site.

be guilty in relation to proscription without being an actual member of a banned group. It is enough to **support or further the activities of an organisation by literally any method**. The Act stresses the fact that support is not restricted to money or property terms. Furthermore, **organising or addressing a meeting** with full knowledge of its aims to support or further the activities of a proscribed organisation is an offence under section 12. It is also within the ambit of the section if the meeting merely has a speaker who is a member of an organisation. A meeting can be public or private, and the individuals involved can be three or more.
The final offence elaborated in connection with proscription is **wearing an item of clothing, or wearing/displaying any article** which can give rise to reasonable suspicion indicating membership or support of a proscribed group. It is already a criminal offence to aid and abet another criminal offence so supporting or raising money to assist others to commit offences is an offence in itself.

**Terrorist offences**
Part VI relates to a special category of offences. When the option of proscribing an organisation cannot be exercised, an individual can still be caught within the terrorism legislation through a number of terrorist offences. These offences are not new to the Terrorism Act 2000 with the exception of the additional offence of 'inciting terrorism overseas'. The first three offences are 'directing a terrorist organisation', 'possession for terrorist purposes', and 'collecting information for terrorist purposes':

**-Directing a terrorist organisation**
Section 56 makes it an offence to direct the activities of a terrorist organisation "at any level". The maximum penalty on conviction is life imprisonment. Unlike the other offences under Part VI, there is no defence available by proving non-involvement, lack of knowledge, or other reasonable excuses.
**-Possession for terrorist purposes**
Under section 57 it is an offence to possess something "in circumstances which give rise to reasonable suspicion that [the] possession is for a purpose connected with terrorism". The item taken could be quite harmless; what attributes significance to it is the constable's suspicion about what purposes the object can be used for. It need not be proven that the ones suspected were in fact the accused's actual intentions, but that there was simply a presumption that these were the purposes. The maximum penalty for this offence is ten years imprisonment.
**-Collecting information**
The third offence envisaged by the Act is that of collecting information of a kind likely to be useful to a person committing or preparing an act of terrorism. It is also an offence to keep any form of documentation or record (including photographic or electronic) which contains such information. The maximum penalty for a conviction under this heading is 10 years imprisonment.
**-Inciting terrorism overseas**
This provision is entirely new and not part of the legacy of previous statutes. The inclusion under section 59 of inciting terrorist activity overseas serves to reinforce the increasingly international dimension of the legislation. The structure of the offence is as follows: the act of inciting must be committed within the United Kingdom, but those incited must be based outside the UK, even though at the time of the inciting it is immaterial whether they are inside or outside the UK. A further qualification is that the crime incited must be a recognised crime in the United Kingdom as listed in subsection 222 in order to be captured by the section. These crimes include murder, offences under the Offences Against the Person Act 1861,

endangering life by damaging property as included in the Criminal damage 1971. The penalty attached to this offence is that which would have applied had the "inciter" been convicted of the offence corresponding to the act which he incites.

**Disclosure of information**

Section 19 establishes a duty to disclose to a constable any information where he or she suspects that another person has committed a terrorist offence outlined in sections 15 to 18 (involving funding terrorist purposes and money laundering). This section applies where the belief or suspicion is based on information gathered in the course of a trade, profession, business or employment. While, information gathered in one's private life (i.e. family relationship) is not covered under the section, it is not limited to businesses directly related to financial transactions (i.e. banks). It applies to all businesses, employers and employees. More specifically, the duty consists of disclosing to a constable (a) the belief or suspicion in question and (b) the information on which it is based. The maximum penalty for the failure to disclose such information is five years imprisonment.

**Counter-terrorist powers**

The Act creates a framework for arrest, detention, and prosecution which contains a set of special powers designed exclusively for the fight against terrorism. They differ from normal procedures outlined in the Police and Criminal Evidence Act 1984 (PACE) particularly as that they allow for extended periods of detention:

**-Arrest and detention**

Section 41 of the Act contains powers of arrest. A constable may arrest without a warrant if they reasonably suspect an individual to be a terrorist. Therefore, the police officer is not required to suspect a specific crime, and does not have to arrest with a view to that crime.

Under this section, the maximum **detention period** is 48 hours, (the maximum time limit for serious arrestable offences under the Police and Criminal Evidence Act 1984 is 36 hours) but it can be extended in accordance with a special procedure contained in Schedule 8, which deals with all aspects of detention, including treatment of detainees, review of detention, and extension of detention.

A person arrested under Section 41 has **the right to inform a named person** (a friend, relative or a person likely to take an interest in his welfare) of their detention, and to consult a solicitor as soon as is reasonably practicable. Both the informing of an outsider and a consultation with a solicitor can be delayed for a maximum period of 48 hours by an officer of at least the rank of superintendent.

A person can be **detained incommunicado** for a period of 48 hours if the officer reasonably believes one or more of the following consequences may occur: the contact may cause interference or harm evidence or to any person, alert other people who have not yet been arrested for a serious offence, hinder the recovery of property, make it more difficult to prevent an act of terrorism, or interfere with the gathering of information regarding acts of terrorism. The same criteria apply if a constable reasonably believes consultation with a lawyer should be delayed. The list of consequences is also used to determine whether an officer of at least the rank of superintendent can provide a direction by which the consultation with the solicitor must be carried out in the sight and hearing of a qualified officer. The detainee has the right to be told the reasons for the delay as soon as reasonably practicable.

Continued detention must be reviewed as soon as reasonably practicable, and then at 12 hour intervals unless a warrant for extended detention is issued. The review officer must be of at least the rank of inspector, and to ensure a minimum degree of independence, must not have been involved in the investigation. Furthermore, it is possible for the detainee or his lawyer to

make representations ('protests') before deciding to continue the detention. However, the access to a lawyer can be denied, and a police officer can decide to discard any representation if he believes the detainee to be unfit to make such representations.
Schedule 8 also provides precise guidelines governing the treatment of detainees under section 41. It establishes the Home Secretary's role to designate specific places where people may be detained. Interviews conducted at these centres must be audio recorded in accordance with a Code of Practice elaborated by the Secretary of State by means of a statutory instrument.
Next, the schedule sets out the steps authorised that can be taken to identify a detainee. **Fingerprints and non-intimate samples** can be taken from a detainee without his or her consent if authorised by a constable of at least the rank of superintendent (though only if they are at a police station). The taking of **intimate samples** (for example dental impressions or DNA samples) is restricted to cases where the officer reasonably suspects the samples will help confirm or disprove the detainee's involvement in the commission of certain specified offences under the Act (membership, support, property-related offences under sections 15 to 18, weapons training, the 'terrorist offences' in sections 55 to 58, and terrorist finance) or the general instigation, commission or preparation of acts of terrorism. The safeguard which restricted the use of such samples only for the purpose of terrorist investigations (rather than for generic criminal ones), has been overruled by the A-TCSA 2001.
Part III of the Schedule covers the **extension of detention** under Section 41, which can be obtained if a police officer applies for a warrant during the first 48 hours. The warrant must be granted by a judicial authority (namely a District Judge appointed by the Lord Chancellor) for this purpose. The total maximum detention period cannot exceed 7 days, starting at the time of arrest or the commencement of an examination (the equivalent time limit under PACE is 4 days). In order to grant the warrant the judicial authority must ensure that the following two requirements are complied with. First, that the extension is necessary in order to gather new evidence on the offence, or to preserve existing evidence. Second, the authority must be satisfied that the investigation is being conducted "diligently and expeditiously".
Paragraph 33 states that the relevant individual is entitled to be **legally represented at the hearing** for the extension of detention. However, the judicial authority has the discretion to carry out the hearing in the absence of either the person to whom the application relates, their legal representative, or both. Furthermore, the officer who initiated the application can also apply to have **information** on which he sought to rely, **to be withheld** from the subject and his lawyer. The granting of such an order must be based on reasonable grounds which replicate the ones for arrest in the first 48 hours. (i.e. interference with evidence etc.)

**-Stop and Search**

A police constable can stop and search any individual or vehicle when acting in accordance with an authorisation under Section 44(4). The latter authorisation may be granted by police officers who are of the rank of assistant chief constable (the equivalent ranks are commander of the City of London Police Force in London, commander of the metropolitan police in metropolitan police districts, or Royal Ulster Constabulary in Northern Ireland) if they consider it expedient for the prevention of acts of terrorism, and must specify an area where the stop and search may be carried out. The power to search can last for a maximum of 28 days, after which it can be renewed. Authorisations must be confirmed by the Home Secretary within the first 48 hours of granting the application in order to be effective past the initial period. Once the authorisation is given, the constable's power to stop and search is limited to searching for articles of a kind which could be used in connection with terrorism. The constable does not have to demonstrate they had any grounds or reasonable suspicion for suspecting the presence of such items. If the constable does find the items in question, and if there is reasonable suspicion that they will be used for terrorist purposes, they may be seized

and retained. A provision prohibiting constables from removing a person's clothing in public has been inserted, though headgear, gloves, jackets and footwear can be removed.

**Terrorist property**

Part III of the Act describes the powers exercisable in respect to terrorist property. It is no longer limited to terrorist finance, but incorporates **all terrorist property** and applies to all forms of terrorism. The latter term includes both property used for terrorist purposes, direct proceeds of acts of terrorism, and proceeds of acts carried out in connection with terrorism (section 14(1)). Section 14(2)(b) specifies what amounts to terrorist property in greater detail. The proceeds of an act are defined to include any property which directly or indirectly represents the proceeds of the act and any money or other property available to the organisation. Thus, it is clear that all resources of a proscribed organisation are caught within the term, and any cash accumulated by a terrorist organisation, regardless of its use, are covered in the section.

The Act also designs a list of **specific offences** that can be committed in connection with terrorist property. The first relates to **fund-raising**. Under section 15, it is an offence for a person to provide money or property which s/he knows or has reasonable cause to know will or may be used for terrorist purposes (Section 15(3)). Equally, it is an offence to invite another person to provide money or property for terrorist purposes as described above.

It is also an offence **to receive, possess, and use money or property for the terrorist purposes**. Furthermore, it is an offence **to be engaged in funding arrangements** with people who will or may use the property for terrorist purposes.

Finally, **money laundering** in any form, including concealment, removal from jurisdiction, and transfer to nominees, is an offence under section 18. A defence is available to persons charged under this heading, and takes the shape of reverse onus clauses. It is a defence for the accused to prove that he or she did not know and had no reasonable cause to suspect that the arrangement related to terrorist property (section 18(2)). The maximum penalty on conviction is 14 years imprisonment. Sections 24 to 31, which concerned detention and forfeiture of terrorist cash have now been replaced by the A-TCSA 2001 and, therefore, have ceased to have effect.

**Reverse onus clauses**

Several sections of the Terrorism Act 2001 contain reverse onus clauses meaning that the burden of proof is reversed of substantially enlarged. Particularly interesting in this respect are section 57: possession of goods for terrorist purposes, and section 19: the duty to disclose information on terrorist offences.

Section 56 (directing a terrorist organisation) is particularly remarkable because it does not allow for a defence by proving non-involvement, lack of knowledge, or other reasonable excuses.

**Emergency powers**

A second note relates to the (of course temporary) additional emergency powers applicable exclusively in Northern Ireland that are laid down in part VII of the Act. Although this part of the Act is extremely long and detailed and therefore will not be reviewed in the same manner as the above described powers and offences, a few particular sections deserve mentioning. Namely the provision which entails that the mere statement of a police officer (oral evidence) claiming that the accused is a member of a proscribed organisation will be admitted as evidence of membership.

Another example of a remarkable shifting in rules of evidence can be found in the provision which allows for the drawing of adverse inferences from the accused's silence during police

interrogations. If the accused fails to mention a fact that is material to the offence which he should have reasonably been expected to mention when questioned, the court can draw adverse inferences from the silence. However, the court can only do this if the accused had been able to consult his lawyer before the questioning, and a conviction cannot be based solely on the court's inference.

## Anti-Terrorism, Crime and Security Act 2001 (A-TCSA)

### Immigration and asylum

Part 4 of the Act under which heading non-nationals could be detained indefinitely on the Home Secretary's reasonable belief and suspicion that the individual is a suspected international terrorist or a threat to national security, was repealed by the Government and replaced with a system of control orders under the Prevention of Terrorism Act 2005 which will be discussed elsewhere in this overview. [9]

### Disclosure of information

The A-TCSA contains significant disclosure powers. The police and Security services are authorised to go through personal information held by public authorities (such as medical records, bank statements, school records, tax returns or inland revenue; public authority can be anyone from courts or the police to any person certain of whose functions are functions of a public nature), even though no crime has been committed or suspected. Disclosure is allowed for the purposes of any criminal investigation whatever (section 17(2)(a)) which is either being carried out or anticipated, and criminal proceedings which are in progress or may be initiated in the future.

Subsection (d) adds that disclosure can be requested in order to decide whether or not investigations or proceedings should be initiated or brought to an end. However, the list is not exhaustive; it can be extended to include "any provision contained in any subordinate legislation" via a statutory instrument simply by an order of the Treasury. The provision is not limited to investigations on acts of terrorism, but applies to any criminal investigation or proceeding. Subsections (a) and (b) make it clear that this power is not confined to the United Kingdom, the information can be given "elsewhere", which most likely refers to foreign agencies anywhere in the world.

Section 19 is designed to deal specifically with information held by revenue departments, which are technically bound by an obligation of secrecy. Under the new provisions this obligation can no longer prevent the disclosure of information when the disclosure is requested under the circumstances outlined above. A new circumstance is added in this section, a direction can be made in order to facilitate the carrying out by any of the intelligence services of any of that service's functions (section 19(1)(a)). It is also interesting to note that the provision is retrospective; that is, it applies to information obtained before the Act came into force. When dealing with disclosure by revenue departments, the power extends to all intelligence services' functions - meaning all the services' operations, no matter what kind, can demand disclosure of information under Section 19, without the normal safeguards.

### Police powers

There are police powers which complement the powers envisaged by Section 41 of the Terrorism Act 2000.

[9] In December 2004, the Law Lords ruled that the part 4 powers – which required the U.K. to suspend ("derogate" from) part of the European Convention on Human Rights – were in breach of the Human Rights Act, which incorporates the convention into British law.

The first addition relates to **fingerprinting**. Police officers can now require fingerprinting without consent if he or she is satisfied that it will help ascertain the individual's identity, if the person has not disclosed his identity or there are reasonable grounds to believe he is not who he says he is. Under the TA 2000 these powers could be used only in connection with terrorist investigations. Under this Act physical data obtained under these sections can be used for purposes connected to the prevention or detection of crime, the investigation of an offence, or the conduct of a prosecution (section 89(4)). This provision applies to investigations both inside and outside the UK.
The Act also amends PACE provisions relating to **searches and examinations to ascertain identity**. Officers can now examine a person to see whether he or she has any 'mark' (this refers to any feature or injury which could facilitate the ascertainment of identity) which could help identify them. Permission can be given by a police officer as long as he or she is of at least the rank of inspector, or if there are reasonable grounds for suspecting that the person is not saying the truth about his identity.
Searches cannot be conducted by officers of the opposite sex, nor can intimate searches be carried out by virtue of this section. However, photographs can be taken without consent by any rank of police officer without the need for special authorisation, and can be disclosed to any party for any purpose related to the prevention or detection of crime (section 90(1)). The photographs can then be filed and kept as a record whether or not a conviction has ensued, and may be retained indefinitely. Attached to this provision is **the power to require removal of disguises**. This comes in the form of an amendment to section 60 of the Public Order Act 1994. Any constable in uniform can now demand the removal of any item which he reasonably believes to be worn to conceal his identity, and can subsequently seize the item in question.
Extended powers can be invoked in prevention of crime as well. If a police officer of at least the rank of superintendent reasonably believes that there is a risk of activities (…) likely (…) to involve the commission of offences (section94(1)) being carried out in their area, s/he may **authorise the powers in the entire location** for a maximum period of 24 hours. This can be extended for a further 24 hours by an officer of the rank of superintendent or above if s/he thinks it is expedient to do so. Once again this is not limited to the prevention or investigation of terrorist offences but applies to all offences.

**Retention of communications data**
Part 11 of the Act concerns retention of communications data, by which communications providers such as Internet providers and telephone companies are asked to keep customer records. This would give the police and services access to emails, websites consulted, phone bills, information such as the duration of phone calls, and so on. Technically, it operates on the basis of a voluntary code of practice elaborated by the Home Secretary, by which the providers have to enter into agreements to determine the manner in which the retention must be carried out. It can be described as voluntary in the sense that a failure to abide by the code of practice will not give rise to liability in civil or criminal proceedings.

**Terrorist property**
The provisions relating to terrorist property under Part 1 of the Act complement the existing powers contained in the TA 2000, and completely replace sections 24 to 31 of the latter Act. Forfeiture of terrorist property is now covered by Schedule 1 of the Act, while the other amendments to the TA 2000 are incorporated in Schedule 2. An "authorised officer"(a constable, a customs officer or an immigration officer) can seize any cash on reasonable suspicion that it is terrorist cash (namely cash which is intended to be used for terrorist purposes, or which is part of the resources of a proscribed organization). Once the cash has

been seized it can be detained for 48 hours, though the detention can be extended. Continued detention can be authorized by an order of a magistrates' court, and the authorization is valid for three months.
Further extensions can be granted every three months, though the total maximum detention period cannot exceed two years. However, before extended detention is granted under paragraph 3, at least one of three conditions must be complied with. First, there must be a reasonable suspicion that the cash will be used for terrorist purposes, and the aim of the continued detention must be further investigation or a view to bringing proceedings. If proceedings have already been initiated, it can serve as a justification (schedule 1, part 2, para 3). Alternatively, there must be reasonable grounds to believe the cash in question is part of the resources of a proscribed organization, and as above, further detention is justified by needs to investigate further or to bring about proceedings. Finally, further detention can be sought if there is a reasonable suspicion that the cash is property earmarked as terrorist property. The latter term refers to property by or in return for acts of terrorism, or acts carried out for the purposes of terrorism.
All cash that is detained for more than 48 hours will be paid into an interest-bearing account, unless it is needed as evidence in proceedings. Anyone who claims ownership of the cash may apply to a magistrate's court to have the cash released (paragraph 9). Furthermore, if no further orders (forfeiture) are made with respect to the cash, the owner (or the person from whom it was seized) can apply to a magistrate's court for compensation. Once an officer has seized the cash, he or she can apply to a magistrates' court for the cash to be forfeited. The court may decide to allow the forfeiture if it is satisfied that the cash (or any part of it) is terrorist cash. There is a right to appeal a forfeiture decision at the Crown Court, and the appeal must be initiated within 30 days from the granting of the forfeiture order. If an appeal is successful the cash, and any interest which has accrued, will be returned to its owner.

**Brief notice of other provisions of the Anti-Terrorism, Crime and Security Act 2001**
The Act also contains measures designed to
-ensure the security of the nuclear and aviation industries
-improve security of dangerous substances that may be targeted/used by terrorists (for example particularly in section 64 which holds refusal of access to premises and buildings where dangerous substances are being stored).

## The Prevention of Terrorism Act 2005

The Prevention of Terrorism Act 2005 allows for control orders which restrict the freedom of terrorism suspects.[10] Control orders replace the powers under part 4 of the Anti-Terrorism Crime and Security Act (ATCSA) allowing the indefinite detention of foreign nationals certified as terrorism suspects.

[10] Notably absent from the new Act are any measures to facilitate the prosecution of terrorism suspects, say in the form of relaxing the ban on intercept evidence. The United Kingdom and Ireland are the only two western countries with total bans evidence based on intercepted communications. While the Regulation of Investigatory Powers Act 2000 prohibits using domestic intercepts, foreign intercepts may be used as evidence if obtained legally, and bugged communications and the results of surveillance or eavesdropping are also admissible, even if not authorised. There is a broad consensus that the ban is a disproportionate response to a genuine concern over disclosure of intelligence sources or methods, and that removal of the ban would facilitate prosecution of terrorism suspects. Safeguards to protect against undue disclosure of sources and methods already exist, such as the judicial discretion to exclude under section 28 of the Police and Criminal Evidence Act of 1984. This safeguard seems to be comparable with the Dutch Bill on 'screened witnesses' (wetsvoorstel afgeschermde getuigen). The comparison however shows that The Netherlands are somewhat 'ahead' in relation to the issue of protection of intelligence sources.

The orders include a curfew, electronic tagging, restrictions on the use of certain items such as a computer), restrictions on the use of certain communications (such as internet and phone), restrictions on visitors and meeting others, and travel bans.
The Home Secretary can apply control orders short of house arrest to persons whom he suspects of involvement in terrorism for seven days.[11] Within seven days, the High Court must determine whether there is sufficient evidence that if true would justify the imposition of the control order. The individual need not be present or legally represented at this preliminary hearing. Confirmation of the order triggers a full hearing, a procedure that could include the consideration of secret evidence at closed hearings from which the controlled person and his or lawyer are excluded and the application of a standard of proof well below that required for a criminal conviction.
The U.K. government asserted the right to rely on evidence obtained under torture from third countries in SIAC proceedings provided the U.K. was not involved in the torture, a position affirmed by a two-to-one majority in the Court of Appeal in August 2004.[12] However, on the 8th of December 2005, the English House of Lords delivered judgment[13] in the case of A and others v. the Secretary of State for the Home Department, unanimously holding that information obtained by torture could not be used in English Courts including where British officials had no prior involvement in the torture and where the torture was perpetrated outside of the territory or control of the United Kingdom.[14]

The Act also gives the government the power to impose control orders amounting to house arrest, provided that it first "derogates" from article 5 of European Convention on Human Rights. So-called "derogating" control orders can only be made by the High Court, upon application by the government. The evidence presented by the government must establish "reasonable grounds" for suspecting involvement in terrorism-related activities, in a preliminary hearing from which the individual and his or her lawyer can be excluded. The court must then conduct a narrow judicial review of the order in a subsequent full hearing, with all parties present, applying the civil standard of proof ("balance of probabilities"). The court would be entitled to consider secret evidence in closed sessions from which the controlled person and his or her lawyer would be excluded.
While house arrest can be ordered for an absolute maximum of twelve months, there is no limit on the number of times that other control orders may be renewed. The Act will remain in force for one year, but may be renewed for another year.

Breach of a control order is a criminal offence punishable upon conviction by up to five years imprisonment and/or an unlimited fine (section 9)

[11] Strictly speaking this power is reserved for emergency cases in which de Secretary of State makes a non-derogating control order without the permission of the court. In the absence of an emergency situation the court reviews an application for permission to make a non-derogating control order merely marginally; it may give permission unless the decision or the grounds to make the order are obviously flawed (section 3 clause 2, 3 and 4).
[12] Court of Appeal, A, B, C, D, E, F,G, H, Mahmoud Abu Rideh, Jamal Ajouaou v. Secretary Of State for the Home Department, August 2004, [2004] EWCA 1123.
[13] House of Lords, A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent) (2004) A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) (Conjoined Appeals), December 2005, [2005] UKHL 71 on appeal from: [2004] EWCA Civ 1123.
[14] While the Lords were unanimous in rejecting the use of torture evidence in English courts and other judicial proceedings, they were divided on some of the other related questions of detail in the case. Source: http://www.apt.ch/un/lords_08.12.05.shtml (association for the prevention of torture).

## The Terrorism Bill 2005

The Terrorism Bill 2005 is currently being debated in the British parliament. It concentrates on two key matters: a new offence of encouragement of terrorism (clause 1) and an increased detention period to twenty-eight days in terrorism cases for those who have yet to be charged with a crime (clauses 23 and 24). But there are a few more clauses worth mentioning.

**Part 1**

**Encouragement of terrorism (clause 1)**

Under the clause, it becomes a criminal offence for a person to intentionally or recklessly publish a statement which is likely to be understood as a direct or indirect encouragement or other inducement to commit a terrorist act. The offence carries a sentence of imprisonment of up to seven years on conviction. The bill makes it clear that statements likely to be understood as encouraging terrorism include those that glorify terrorist acts, when members of the public (meaning anyone in the world) hearing the statement would understand what is being glorified as conduct that should be emulated by them.

The amended bill defines “recklessness” in clause 1(3) as follows: For the purposes of this section the cases in which a person is to be taken as reckless as to whether a statement is likely to be understood as mentioned in subsection (1) include any case in which he could not reasonably have failed to be aware of that likelihood.

As presently drafted in the Terrorism Bill, the required causal link is that members of the public to whom a statement is made are likely to understand it as an encouragement to a terrorist act. There is no need to show that any person is in fact so encouraged by the statement.

**Dissemination of terrorist publications (clause 2)**

It is an offence to distribute, circulate, sell, lend, electronically communicate, etc any terrorist publication. It is similarly an offence to possess such material with a view to distribute etc. A terrorist publication is one that is a direct or indirect encouragement to commission acts of terrorism or which gives information that will be of assistance in the commission of a terrorist act. What constitutes 'direct or indirect encouragement' is defined by being understood as such by some or all of the persons to whom it is available. What constitutes 'assistance' is something that would be useful in the commission of terrorism and would be understood as such by some or all of those it is available to.

The offence carries the penalty of up to seven years imprisonment.

**Preparation of terrorist acts (clause 5)**

This is a new offence. It may be easier for the prosecuting authorities to charge suspects with acts preparatory rather than with conspiracy. This means that it would not be necessary to prove agreement between the co-defendants, as it would be in a successful conspiracy prosecution.

**Training for terrorism (clause 6)**

This is also a new offence. It is an offence to offer training to people who commit terrorist attacks. The offence largely mirrors Section 54 of the TA (weapons training) although it does go further in specifying 'noxious substances'. The new offence also goes further in criminalising the person who gives the training who knows or suspects that the training will be used for terrorist purposes.

**Attendance at a place used for terrorist training (clause 8)**

This offence is committed by attending the place where the training takes place. There is a need for the person to be aware that the place is used for training, but they do not need to have been involved in any training themselves.

**Various clauses**
Clauses 9 to 12 introduce a range of offences involving radioactive devices, materials and facilities. The offences in Clause 9 (making and possession of devices or materials) and Clause 10 (misuse of devices and material and damage of facilities) require intent for conviction.
Clause 17 creates provision for a range of specified offences committed abroad to be treated as having being committed in the UK. The specified offences contained in Clause 17 (2) include encouragement of terrorism.

**Corporate liability (clause 18)**
Clause 18 extends liability for any offence listed in the first part of the Bill to cover company directors or other officers if the offence is committed by a corporate body.

**Part 2**
**Extension of grounds for proscription (clause 21)**
Clause 21 allows or the extension of the grounds for proscription under the TA. This will now cover non-violent organisations who 'glorify' terrorism.

**Increased pre-charge detention period (clauses 23 and 24)**
The bill as amended by the House of Commons also proposes that the current maximum period that a person suspected of involvement in terrorism may be held before being charged be doubled to twenty-eight days. The present maximum – which is the longest period of such detention in Europe – is fourteen days.

# 4 Anti-terrorism laws in Spain

In the fight against terrorism, both the general provisions of the Spanish juridical regulations established to prevent all kinds of crime, including terrorism, and the specific provisions drawn up to fight the terrorist phenomenon can be applied. This chapter entails an overview of the key provisions of anti-terrorism laws that have been adopted in Spain. The overview is largely derived – mostly by simply 'cutting and pasting' – firstly from the report 'Counterterrorism strategies in Spain'[15] of November 2005 by dr. Alejandra Gómez-Céspedes and dr. Ana Isabel Cerezo Domínguez[16] from the Instituto andaluz interuniversitario de Criminología of the Universidad de Málaga and secondly (complementary) from the report 'Counter-Terrorism Legislation and Practice: A Survey of Selected Countries'[17] (hereafter: the FCA-report) of the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom. Finally, a Spanish legal database was consulted to verify the substance of this overview.[18]

## Overview

### Suspension of individual human rights

According to article 55.2 of the Spanish Constitution, fundamental human rights recognised in various articles of the Spanish Constitution can be suspended in case a "State of Exception" or a "State of Siege" are declared. An Organic Law[19] can determine the cases in which, on an individual basis and taking into account the right judicial intervention and parliamentary control, the fundamental human rights recognised in Articles 17 & 18 of the Spanish Constitution[20] can be suspended to specific persons in connection with investigations regarding the actions of armed groups or terrorist elements.

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[15] The report was intended for informational purposes only and does not constitute legal advice. The information provided by or cited to third parties does not necessarily reflect the opinions of the Andalusian Institute of Criminology, Section of Malaga.

[16] Dr. Alejandra Gómez-Céspedes (Ph.D., MSc. (Econ.)) and dr. Ana Isabel Cerezo Domínguez (J.D.).

[17] See http://www.fco.gov.uk/Files/kfile/QS%20Draft%2010%20FINAL1.pdf

[18] Verification took place only in as far as possible in view of the language barrier. The legal database can be found on http://noticias.juridicas.com/base_datos/Penal/

[19] Organic Laws are a specific type of statute. They are different from ordinary legislation in two ways: (a) They regulate specific Articles of the Constitution, such as, the exercise of fundamental rights and public liberties; Statutes of Autonomy; and, the general electoral system amongst others. (b) They require an absolute majority of the Congress in a final vote of the entire bill in terms of the requirements for their approval, modification or repeal.

[20] **Article 17**

1. Every person has a right to freedom and security. Nobody may be deprived of his freedom except in accordance with the provisions of this article and in the cases and in the manner provided by the law.
2. Preventive detention may last no longer than the time strictly required in order to carry out the necessary investigations aimed at establishing the facts; in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours.
3. Any person arrested must be informed immediately, and in a manner understandable to him, of his rights and of the grounds for his arrest, and may not be compelled to make a statement. The arrested person shall be guaranteed the assistance of a lawyer during the police inquiries or judicial investigation, under the terms to be laid down by the law.
4. A habeas corpus procedure shall be regulated by law in order to ensure the immediate handing over to the judicial authorities of any person arrested illegally. Likewise, the maximum period of provisional imprisonment shall be stipulated by law.

**Article 18**

1. The right to honour, to personal and family Privacy and to personal reputation is guaranteed.
2. The home is inviolable. No entry or search may be made without the consent of the occupant or under a legal warrant, except in cases of flagrante delicto.
3. Secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary.

The unjustified or abusive use on the enforcement of the above mentioned Organic Law may carry criminal prosecution as a result of the violation of fundamental rights and liberties.

**The Spanish Code of Criminal Procedure** contains a number of provisions according to which the suspension of fundamental human rights is allowed under certain circumstances**:**

**Preventive detention**[21]
In the case of persons detained as assumed parties to offences perpetrated by persons integrated within or involved with armed bands or terrorist organisations (including organized crime offenders) the normal deadline for detention (72 hours) can be extended by an expressly motivated court ruling for an additional 48 hours, so that preventive detention may last for a total of 5 days. Furthermore, the possibility has been foreseen for a judge to order the detainee to be held 'incommunicado', for a period that could only be extended for the period which is strictly necessary to carry out the investigations aimed at establishing the actual facts, within the aforesaid deadline of 5 days.[22]

Incommunicado detention is an infringement of ordinary rights, and consists of the following:
- The detainee has the right to be assisted by an assigned counsel, instead of a freely appointed one;
- The interview with the counsellor is terminated after the statement has been recorded, or after identity has been acknowledged;
- The detainee has the right to be examined by a legal doctor in medicine appointed by the court;
- Communication of the detention to any next of kin or to persons of equal status is delayed;
- Oral communication is not allowed; and,
- All communications in writing are intercepted by a magistrate.

According to the FCA-report, in terrorist cases the judge may order that suspects be held incommunicado if they have grounds to believe that knowledge of the suspect's detention would prejudice the investigation. The initial incommunicado order is valid for 72 hours following arrest. It can be prolonged for a further two days upon the authority of the investigating magistrate. After this period the investigating magistrate must decide whether to commence criminal proceedings. If so, the investigative magistrate may order preventive detention, at which point the suspect is transferred from police custody to judicial custody (prison). At this point, he may extend the incommunicado period by five days, exceptionally followed by a final period of three days. Thus, it is possible for a person against whom criminal proceedings have begun to be held incommunicado for up to 13 days.
While the detainee is held incommunicado in police custody, he may be questioned in the presence of the duty solicitor (not a lawyer of his own choosing), who is called in immediately on arrest. The lawyer may advise the client on procedural matters, but may not consult privately with the suspect. Within the incommunicado period of detention, the suspect is transferred to the judge at the National High Court who has three days in which to hold a

4. The law shall limit the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights.

[21] It can be deducted from Art. 17 par. 2 of the Spanish Constitution that preventive detention relates to detention prior to review by judicial authorities, thus meaning policy custody (conclusion by Meryem Aksu).

[22] This last remark seems contradictory to the conclusions in the FCA-report as discussed on the next page of this overview. This is not the case however. Dr. Ana Isabel Cerezo Domínguez has been contacted to clarify this matter. She explained that the possible confusion is due to the fact the distinction between police custody (the first five days) and pre-trial detention ordered by a investigative magistrate (the following maximum of eight days) is not explicitly made in the English report.

judicial interrogation. If the judge thinks there is a case for prosecution, criminal proceedings begin and the suspect is transferred to judicial custody; if not, the detainee is released. The judge must issue a reasoned judgement justifying his decision to begin criminal proceedings and any extension of the incommunicado period. Once in judicial custody, the detainee has the right to be seen by a second court-appointed forensic doctor and continued legal assistance. He may only have access to a lawyer of his own choosing once the incommunicado period has ended.
When a person has been charged and held in judicial custody, the period of preventative detention may last two years if the penalty for the offence is imprisonment of three years or more. Where circumstances exist that mean that the matter may not be tried within two years, the court may order one extension of up to a further two years. If the defendant is convicted and the sentence is under appeal, the period of custody may be extended for up to half of the sentence imposed. In practice, therefore, investigating magistrates have up to four years during which they can keep a terrorist suspect in detention and prepare the case for trial, although the defendant must be tried within the four year period.

**Entry and search into private dwellings**
Article 533 of the Law of Criminal Procedure foresees that a private dwelling may be entered if any of the following conditions is fulfilled: (1) an arrest warrant has been issued against the owner; (2) a wrongdoer who is closely pursued by law enforcement officers is hiding or seeking cover in the house; or, (3) in case of exceptional or urgent need, when the individuals concerned are suspected of being the perpetrators of terrorist offences or related to armed bands or terrorist organisations. In such cases, the competent magistrate shall be immediately informed, with an indication of the motives for the search, and the results obtained.

**Interception of communications**
In general, the right to privacy of communications can only be restricted by a judicial ruling, and the magistrate leading the proceedings is competent to agree to the measures needed for the interception of communications. Nevertheless, Article 579.4 of the Law of Criminal Procedure states that, exceptionally and in the case of emergency, the Minister of the Interior or, should he or she not be available, the Secretary of State for Security, may order the interception of communications, in the course of a police investigation procedure, whenever the said procedure is aimed at finding out offences related to the activities of armed bands or terrorist organisations. In this case, the competent magistrate overlooking the case should immediately be notified in writing, in an expressly stated form; the magistrate will then, also in an expressly stated form, either overturn or confirm such an order, within a maximum deadline of 72 hours.

**Cautionary suspension of the exercise of public office**
In accordance with Article 384bis of the Law of Criminal Procedure, the moment an indictment becomes executable and preventive detention is decreed for any individual charged with an offence committed by a person integrated within or related to armed bands or terrorist organisations, cautionary suspension of the exercising of any public office or the acquiring of any rights from public elections is in order. The said suspension shall be kept in force while the detention lasts.

**The Spanish Criminal Code contains various provisions related tot terrorism:**

Under Organic Law 10/1995, of 23 November the following alterations of the Spanish Criminal Code, 1995 have been made:

Article 571 of the Criminal Code defines the objective elements of the **crimes of terrorism**, including arson [Art. 351] and destruction [Art. 346]. They are considered as crimes of terrorism only when other elements are present. Those additional elements are that **the author of the crime must belong to, act in the name of, or collaborate with armed bands, organisations or groups whose goal is to disturb the constitutional order or the public peace**.

Article 572 of the Spanish Criminal Code criminalises any individual who **acts against the life, health or freedom of any person particularly when the offender is linked in any way with an armed group or terrorist organisation**.
When the criminal act causes the death of a person, the sanctions outlined in the Criminal Code for crimes of terrorism can reach a maximum of 30 years imprisonment. For terrorist acts consisting of arson and destruction, the sanctions range from 15 to 20 years. When an injury is minor, or the offender who belongs to the armed group threatens, coerces, or illegally detains another person, the sanction ranges from 10 to 15 years of prison. These **prison terms can be expanded if the terrorist actions are directed against government officials**, including the following: government officials at the local, regional or national levels; members of regional or national Parliaments; members of the Council General of the Judicial Power; members of the Supreme Court; officials from the Army, law enforcement forces and, regional and local police corps.

According to article 573 **a terrorist group or anybody collaborating with an armed or terrorist organisation may be prosecuted if they keep an arsenal of weapons, ammunition and substances or devices which are explosive, flammable, incendiary or asphyxiating (including the components of any of these weapons)**. Along with using or placing these elements, actors are also criminalised for manufacturing, dealing, transporting, or providing any of these substances, instruments or devices. The sanction for any of these actions is a prison term ranging from 6 to 10 years. Article 573 also provides that the actors must belong to an armed group or terrorist organisation.

The FCA-report complements this part of the overview with the following conclusions on prison terms:
• promoting or directing armed gangs or terrorist organisations: eight to fourteen years imprisonment;
• membership of an armed gang or terrorist organisation: six to twelve years imprisonment;
• terrorist murder: twenty to thirty years;
• the effective maximum prison sentence for a person convicted of two or more terrorist offences is now 40 years.

**Article 574 is a residue regulation that criminalises any crime that is not specifically described in the Criminal Code but that has the same conditions and the same goals as the rest of the crimes of terrorism.**

Article 575 outlines the sanctions for crimes against property (such as stealing) that are committed in order to aid or support a terrorist organisation.

Article 576 outlines the crime of **'collaboration with an armed group or terrorist organisation'**. A crime of 'collaboration' generally implies **every act of surveillance over persons, goods or installations**. Also included under 'collaboration' are the following: **To**

**build, arrange, use or cease lodging or depots**; **to hide or transport persons** who hold a link with an armed group or terrorist organisation; **to organise or assist in training**; and, in general terms **any other method of collaboration, help or cooperation with these groups and with their activities**. The crime of collaboration with an armed group or terrorist organisation carries the penalty of 5 to 10 years imprisonment (fines included). This sanction can be increased when the collaboration risks the life, health, freedom or property of any person especially if such actions result in an actual injury. The law would consider 'the collaborators' as authors of the crime.

Article 577 of the Criminal Code concerns **acts designed to disturb the constitutional order and the public peace**. The perpetrator of such acts does not necessarily have to act as a member of an armed group or a terrorist organisation. In fact, **if a person commits a serious crime** (such as homicide, personal injury, destruction, arson, illegal detention, threats, coercion or the keeping of an arsenal) **but does not belong to an armed group or terrorist organisation, s/he will be punished under the standard sanctions**. **However, if the goal of the perpetrator is to disturb the public order and peace, the penalty will be increased** by one-half.

The Spanish Criminal Code criminalises preparatory acts (article 579) – such as **provocation, conspiracy and proposition** – only in exceptional cases. Sanctions are minor compared to the rest of sanctions for terrorist offences. Nevertheless, there is one special act that is considered 'preparatory' and which carries a major sanction: this is the **apology for terrorism** (article 578). The apology consists of either directly addressing a large group of persons, or by using a subversive medium that includes ideas or doctrines that exalt the crimes and its authors. It has proven very difficult to apply this sanction in practice.

Article 579 gives Judges and the Courts the **discretion to reduce the sanction** for any 'crime of terrorism'. This exceptional treatment is **conditioned upon the terrorist voluntarily giving up his/her criminal activities and presenting himself/herself before the authorities to confess his/her crimes**. Furthermore, s/he has to collaborate with the authorities in order to (i) stop new crimes from happening and, (ii) obtaining evidence aimed at hindering the activities of the group and/or organisation or stopping the recruitment of new members.

**Liability of minors**

Terrorism is also a case for specific treatment under juvenile criminal law. Organic Law 7/2000 of 22 December, extends the period of incarceration in 'closed conditions' for young offenders found guilty of acts of terrorism.

**Dissolution of political parties**

The Organic Law 6/2002, of 27 June outlaws a new form of action or conduct which does not carry any criminal or administrative sanction, but allows for the dissolution of political parties which pursue activities damaging to the foundations of democracy, particularly where the aim of these activities is to destroy or undermine individual freedom, eliminating or disabling the democratic system (Article 9).

The commission of certain "serious and repeated" acts is deemed to be a demonstration of this form of unlawful conduct. Evidence is provided by means of the repetition or accumulation of acts included in a long list such as: **express or tacit support for terrorist acts, exculpating or minimizing the significance of terrorist acts, encouraging a culture of civil conflict and confrontation (or aimed at intimidating, reversing the opinion, neutralizing or socially isolating those who oppose terrorism), allowing individuals who have been found**

**guilty of acts of terrorism and who have not publicly denounced terrorism to sit as members of the executive bodies of the party, including such individuals in their electoral lists or allowing individuals who have a dual political affinity to remain members of the party; using symbols, messages or other items representing, or identified with, terrorism, violence or other associated conduct as tools for the party's activities; making over electoral rights or privileges enjoyed by political parties to terrorists or those collaborating with terrorists; regular collaboration with groups or entities acting systematically in concert with a violent or terrorist organization, or protecting or supporting terrorism or terrorists; giving support to terrorism through institutions of government by means of administrative, economic or other measures; promoting, giving coverage to, or participating in activities rewarding, paying homage to, or honoring terrorist or violent acts or those who commit them or collaborate with them; giving coverage to acts of disruption, intimidation or social duress relating to terrorism or violence.**

On the basis of this new legislation – which was declared constitutional by the Constitutional Court (Judgment of March 12, 2003) – the Special Division of the Supreme Court (Judgment of March 27, 2003) formed for this purpose, held that Batasuna, the political party which forms part of the so-called Basque National Liberation Movement, of which ETA is a member, was unlawful.

**Keeping communications data**

The (Ordinary[23]) Law 34/2002, of 11 July on the Services of the Information Technology (IT) and Electronic Commerce Society, sets out the obligation for Internet suppliers and telecommunications operators to keep, for a period of twelve months, the traffic data related to electronic communications. This back-up obligation also applies to criminal investigations and, thereby, to any investigations connected with terrorist crimes.

In any event, the communication of these data to the law enforcement agencies shall follow the provisions for the protection of personal data, with due respect for privacy.

**Prevention and Freezing of Terrorist Funding**

The (Ordinary) Law 12/2003, of 21 May on the Prevention and Freezing of Terrorist Funding, establishes the possibility to **freeze any kind of financial flow or account** in order to prevent the funds being used for the carrying out of terrorist acts, while being able, at the same time, to identify and block the terrorist financial channels, and whilst allowing for the verification of the true nature of these funds, of their origin, localization, disposition and movements, and of the identity of the actual person responsible for these transactions. The possibility to freeze and to examine operations liable of being particularly connected with terrorist funding is carried out through the attribution of specific powers aimed at freezing the funds and financial cash flows of particular individuals. These powers are granted to a specialized qualified body, the Commission for the Surveillance of Activities of Terrorist Funding. **This is considered a preventive measure, without a sanctioning value, since it is not articulated to determine culpability, but to prevent the carrying out of criminal acts** that, if committed, would have to be prosecuted by the corresponding magistrate. Thus, an early alert may prove fully operative. These powers can be applied to any individuals or operations, whenever there are reasonable indications of their possible implication in the funding of terrorist acts. This could be due to the inclusion of the said individuals or operations on international lists to which Spain has access. This could also be through the concurrence of a series of subjective and

[23] Ordinary Laws are all the laws whose subject matter is not reserved to Organic Laws by the Constitution. They require a simple majority of the Congress and of the Senate, with the Congress adopting the final decision.

objective elements[24], specified by the Law, that reasonably lead to the conclusion that its aim is the funding of terrorist activities. The measures provided in the law can be in force beyond the deadline considered indispensable, if complex verification operations are to be performed; they will require a judicial warrant. Moreover, all the decisions adopted in the application of this law shall be under the ordinary control of the judicial authority.

**Penitentiary law**

The Organic Law 7/2003, of 30 June on the Measures to Reform the Full and Effective Serving of Sentences, has amended the Criminal Code, the Organic Law on Judicial Authority, the Organic General Penitentiary Law and the Law of Criminal Procedure, to add a series of reforms regarding the serving of sentences related to terrorism, organized crime, and other highly serious offences. In particular:

- In the case of some especially serious offences (including terrorism), the convict shall be denied access to the third degree of penitentiary treatment[25], unless he or she has not served one half of the sentence imposed.
- The maximum limit for serving a sentence shall be extended to 40 years in those cases wherein two or more terrorist offences have been committed, and one of them is punished with a sentence of imprisonment for a period longer than 20 years. The same shall apply to those cases wherein two or more offences deemed especially serious have been committed, and the law punishes them with sentences of imprisonment for a period longer than 20 years.
- In the case of especially serious offences (including terrorism), penitentiary benefits, release on licence, the passing to third-degree status and the time calculation for the granting of parole shall be applied taking as a reference the total number of years imposed when the sentences were issued.
- The circumstances to be considered shall be specified whenever parole should be granted in the cases of offences related to terrorism and organised crime (active collaboration, actual dissociation from the terrorist organisation, participation in programmes of assistance to the victims, etc.).
- The granting or entering into the third degree of penitentiary status shall require, in addition to the conditions legally foreseen, that the convict should have fulfilled the civil liabilities and duties entailed by the offence, and that he should give unequivocal proof of having given up any terrorist activity, while actively collaborating with the authorities in fighting terrorism.

**Control of explosive or otherwise dangerous substances**

The Organic Law 4/2005, of 10 October (amending Organic Law 10/1995, of 23 November (Criminal Code) Regarding Serious Crimes Caused by Explosives) amends Article 348 of the Criminal Code which foresees the violation of the safety regulations regarding the **manufacture, manipulation, transport, possession or marketing of** (i) explosives, (ii) flammable, corrosive, toxic or asphyxiating substances, or (iii) any other matter, device or artifice that may cause destruction. It **also** holds criminally liable those who, **in their duty of overlooking and controlling the effective use of explosives, fail to report** any loss or

[24] In Dutch legal doctrine, subjective elements relate to the concepts of guilt and intent. Objective elements refer to all of the other elements of the offence (in Dutch: 'bestanddelen van de delictsomschrijving). There is no reason to believe that this would be otherwise in Spain.

[25] According to Ana Cerezo the third degree of penitentiary treatment means that the prisoner stays inside the prison by night and works outside by day. It is the first step before parole.

subtraction and/or conceal/forge any information related to the safety regulations in terms of explosives.
In the light of the terrorist attacks committed in Madrid on 11 March 2004 which, involved the alleged failure to overlook the effective storage of explosives, the Government of Spain has strengthen the penalties for those who violate safety regulations in terms of explosives.

**The FCA-report complements the report of our Spanish colleagues especially when it comes to measures in relation to deportation:**

Spain permits dual nationality and it is not possible to revoke Spanish nationality from a citizen who is thought to present a threat to national security.

The Spanish Aliens Act 4/2000 Art. 57 (read with Arts. 53 and 54) provides for deportation of a non-Spanish national when that person has participated in activities prejudicial to the external security of the state, foreign relations or in activities contrary to "public order" specified in the Protection of Public Safety Law 1/1992 Art 23. These activities specified are: possession of explosives and arms when not amounting to a criminal offence, failure to keep arms and explosives safely, unauthorised public meetings and demonstrations, refusal to disperse at such meetings, unauthorised public entertainments, performing actions which could provoke public disorder, permitting consumption of drugs in premises open to the public, failure to observe speed boat restrictions, provision of false materials to obtain identity documents where not otherwise criminal, obstruction of searches and controls provided for by law, creating public disorder or damage where not otherwise criminalised, running a business without the required license, repeat offending (albeit of a minor nature).

The appropriate authority, generally Police competent for immigration matters, may seek deportation orders. The decision to grant the order is made by a senior government official in the region where the individual was taken into custody (Delegado or Subdelegado del Gobierno), acting under the authority of the Minister of the Interior. The subject has the right to comment on the draft deportation order and submit documents refuting the grounds on which it is based. He has the right to assistance from a legal adviser and an interpreter. Once finalised, the order may be appealed, either by a request for reconsideration by the administrative authority that issued it, i.e. the regional government official, or through the courts.

Deportations may be authorised under one of two procedures: the ordinary or fast track procedure. The latter may be applied to foreign nationals accused of having participated in activities contrary to Spanish national security or public order as set out in Art. 54, 1(a) of the Aliens Act. The fast track significantly reduces the duration of proceedings and determines that any **appeal is non-suspensive**. **The only way to suspend a fast-track deportation is for the deportee to claim asylum. The asylum authorities may refuse to consider an asylum claim if it is judged manifestly unfounded, including if they judge it was entered only as a delaying tactic**. This last phrase on is remarkable in comparison to Dutch law because of the fact that this possibility is explicitly stated in the law.

The procedures for fast track deportations are set out in Reglamento 2393/04. In fast track cases the police arrest the subject and initiate deportation proceedings by applying to the administrative authority (the regional government officer). The foreign national must be brought before a court if he is to be remanded for longer than 72 hours. The judge may order his detention in an internment centre pending deportation for up to 40 days. The individual is legally represented both at the internment hearing and when the administrative procedures are followed. He has 48 hours to comment on the draft notice. If he comments, the investigator decides whether the comments have substance and if so arranges for enquiries to be held within three days. An investigator's decision to proceed is notified to the deportee who has 48

hours to prepare any documents he wishes to rely on. The competent authority, generally a senior government officer in the region, then decides on the basis of the papers whether or not to approve the deportation. Since deportation is classified as an administrative sanction, the only role for the judicial authorities is to decide whether there are grounds for internment. Judicial review of an administrative deportation is possible, following an appeal by the deportee. The appeal does not in itself have suspensive effect and should normally be lodged at the Spanish consulate in the country to which the individual is returned.
However, deportation proceedings can be suspended if the detainee claims asylum, since the latter procedure takes precedence over deportation. As a result, if asylum is claimed deportation proceedings must stop until a decision is taken as to the admissibility of the claim. If the claim is judged unfounded, deportation continues. Spanish law does not allow the deportation or extradition of an individual who would face the death penalty in his country of origin.

> The ordinary procedure (Reglamento 2393/04, Arts. 122-129) is used for less serious immigration breaches. A report is drawn up containing details of the person, breach, proposed sanction and preventative measures to be taken. The foreign national has 15 days to reply and propose a defence. There is a further period of between 10 and 30 days to conduct any enquiries which the immigration officer deems appropriate. A draft order is then drawn up to which the foreign national has 15 days to reply. There need not be a hearing when all issues have effectively been covered in writing. The senior official who is to decide the issue may seek further information from the parties, which have seven days to raise any matters they consider relevant. Enquiries on such matters must be completed within 14 days, and the ruling made within a further 10 days. If the senior official considers that the breach is more serious than previously thought, he can notify the foreign national who has fifteen days in which to comment. There is provision for appeal by judicial review.

The principles that guide a Spanish court in extradition and deportation cases are:
• the applicant must provide specific material which shows a risk to himself, not generic assertions;
• courts should bear in mind that an applicant's ability to provide information is often limited by his being away from his country of origin;
• the applicant's arguments cannot be refuted by the sole fact that his country is a signatory to a human rights instrument;
• being a signatory may be sufficient to reject generic but not specific allegations of possible torture;
• Courts have a duty to consider the material presented by the applicant and to make reasonable enquiries based upon it;
• Substantial grounds for believing that there is a risk of torture is sufficient to bar extradition, as Spain is bound by Art. 3 of the CAT;
• Certain assurances may be considered sufficient (e.g. no death penalty, limits to the concept of life imprisonment). However, a simple assurance that torture would not take place is insufficient.

Similar principles apply to cases where criminals sentenced to less than 6 years imprisonment are ordered to be deported under Art. 89 of the Criminal Code, and in asylum cases.

# 5 Anti-terrorism laws in Germany

This chapter entails an overview of the key provisions of anti-terrorism laws that have been adopted in Germany. The overview is derived primarily – mainly by simply 'cutting and pasting' – from the documents delivered by Michael Kilchling from the Max-Planck-Institut für ausländisches und internationales Strafrecht. The material he supplied also contained interesting comments relating to the effects of some of the measures in practice[26], which we felt should be contained in this overview as well.

**Overview**

**First Counterterrorism Package**

The German government passed a so-called 'first counterterrorism package' shortly after the attacks in New York and Washington. These first measures are primarily designed to control immigrants, especially those coming from Arab or Muslim countries.[27]

The core of this first package is as follows:

-Article 129b was introduced into the Criminal Code. The article complements articles 129 and 129a, which prohibit the **formation or support of an association whose objectives are directed towards committing murder, genocide, or certain other criminal acts against personal liberty or endangering the public**. Convicted persons can be **barred from holding public office and acquiring rights from public elections**. Article 129b allows for the **prosecution of members of associations, which are established exclusively abroad**. Thus, it enables the prosecution of individuals who belong to a foreign terrorist organisation. It represents an internationally oriented response to border-crossing crime. In 1998 the European Union had already compelled member States to introduce such a criminal offence in their legislation to allow for terrorists, their supporters and organisations who reside in one of the member States, to be prosecuted in every other country in the EU as well. The German article 129b goes beyond this obligation in showing an international approach. It came into force on September 1st 2002.

-**Abolition of the 'religion privilege'** (Paragraph 2, section 2, Nr. 3 Associations Act): a change in association law was agreed, so that radical groups could be forbidden, even if they appear in public as merely religious or philosophical associations. Radical religious communities could avoid a prohibition hitherto invoking this 'privilege'. Religious communities and churches were not comprehended up to this point in the Associations Act, which protected them against prohibition under association law. Other types could be tackled by prohibition enactments (paragraph 3 Associations Act). The abrogation came into force on December 8th 2001.

- A proposal concerning the drying up of terrorist financial sources: It concerns, among other things, an **obligation for banks to inform the authorities about suspicious organisations' accounts and the prohibition of money collection for certain organisations**. The efforts

[26] The source of those comments being the German Federal Government Report on the Evaluation of the International Terrorism Counter Fighting Act. See: http://www.bmi.bund.de/cln_028/Internet/Content/Common/Anlagen/Themen/Terrorismus/Bericht__BReg__Auswirkung__Terrorismusbekaempfungsgesetz,templateId=raw,property=publicationFile.pdf/Bericht_BReg_Auswirkung_Terrorismusbekaempfungsgesetz.pdf consulted on November 12th 2005.

[27] The 'German connection' involved in the New York and Washington attacks made the government aware that radical Jihadists were at work on German soil, camouflaged as 'sleepers', and made the search after these apparently harmless young men a priority.

against the financial network of criminal and terrorist organisations in Germany failed up to now, among other reasons, because of the data protection in banks. Furthermore, it could seldom be proved in court that organisations, which collected money for humanitarian purposes, had given it to terrorists.
The Federal Government also agreed to **disapprove tax fraud more strongly** within the context of criminal offences.
- Dragnet investigation: the **electronic comparison and transmission of sensitive personal data** is regulated in the Criminal Procedure Act, paragraph 98a, b and c. When serious crimes are committed – such as weapons or drugs traffic – it is permitted to compare electronically personal data of people, who fit a determined profile (same as the probable suspect), with other data. The former Hamburg Home Secretary, Olaf Scholz (SPD) demanded a wider approach to the dragnet investigation. He wanted to use it even if there was no committed crime yet.
The dragnet investigation was already used in the ´70s against terrorism. It is a so-called 'police crime preventive measure' which is carried out per judicial disposal. Almost every German state ordered a dragnet investigation at the beginning of fall 2001. However, instead of the expected 'sleepers' the police discovered some minor social security offenders. Although ordinary judges had approved the measure, second instance tribunals in Berlin, Wiesbaden (Hessen) and Düsseldorf declared it, in the last case at least partially, unlawful. The reason being that the necessary requisite of clear and present danger included in Police Acts was not sustained.
- **Fingerprints when granting visa**: foreigners should be generally taken fingerprints when they are granted a visa. The federal Home Office expects to enforce this measure soon. The **same procedure with passports** is said to take longer. This action would be very expensive burocratically. It is now under examination by the Home Office.
- Regular inquiry to the Federal Office for the Protection of the Constitution: the Federal Home Office announced an immediate introduction of regular inquiries to the Federal Office for the Protection of the Constitution for immigrants, instead of every State deciding for itself whether or not it wishes to do so. The Federal Home Office considers this measure helpful because the Federal Office for the Protection of the Constitution is informed not only about the *inland* situation. Through this inquiry it could be discovered, **whether potential immigrants are already in contact with known active radicals in Germany**.
- Information exchange: **all long-term resident immigrants in Germany are listed in a central file** of the Federal Administration Bureau in Cologne, in which file for instance the residence status and eventually criminal offences are recorded. The federal data protection commissioner believes that police, secret service and immigration office already have considerable **access to these records**. A special commission is to decide what measures the Home Office is to take.
- Treatment of foreign criminal offenders: the Federal Home Office wants to **banish radical and criminal foreigners, who cannot be expelled to their home countries for humanitarian reasons**, the countries being so called 'third countries'.

**<u>Second Counter Terrorism Package</u>**
The aim of the second package was to provide security agencies with the necessary legal competences to fight terrorism. The Parliament assumed, that these agencies would accomplish a better job, if they could exchange information more easily.
In the field of Aliens and Asylum Law, the measures aimed at intercepting potential foreign terrorists before they could enter the country, or at least identify them faster once they were already in Germany. To achieve this goal it was necessary to improve the border patrol and

reform the early visa and identification procedures. Changes in Aliens and Asylum Law represent a substantial part of the second counter terrorism package.
The second counter terrorism package is also known as "International Terrorism Counter fighting Act" (Gesetz zur Bekämpfung des internationalen Terrorismus). It contains 23 paragraphs, which reform 17 laws and 6 decrees. The Act was passed very quickly in November 2001 and enforced on January 1st 2002. It has an expiration date for some of its measures until January 11th 2007 (art. 22 par. 2).
The Act increases the networking intensity between police and secret services and gives more powers to the Federal Police, the Federal Border Guard and the Secret Services.

The reforms in detail are the following:
-Changes in Police and Secret Services Law (art. 1-3):
The competence fields of the Federal Office for the Protection of the Constitution (Bundesverfassungsschutz), the Military Counter Intelligence (Militärisches Abschirmdienst) and of the Secret Services are enlarged.
The Federal Office's **observation powers are to reach those who interfere with the spirit of mutual cultural understanding, even if they do not qualify as violence-ready radicals** (§3 par. 1 Nr.3 BVerfSchG). The Office should act early in fore field; when the appropriate ground is given for the rise of extremist ideas. The primary goal was to relax the purely domestic competences of this office and enable it to prevent extremism outside Germany as well.[28]
In fulfilling the task to observe any attempt to interfere with the spirit of mutual cultural understanding, the Federal Office for the Protection of the Constitution and the Military Counter Intelligence have observed 6 Islamic organizations with over 800 members and supporters in Germany. The Federal Home Office prohibited the Hizb ut-Tahrir all activity on January 15th 2003 thanks to the new achieved information.
The Federal Office obtains great additional **powers to request banks, post offices, telephone companies, airlines etc. for information about bank accounts or telecommunications**. Although the legal requisites to request such information became higher in comparison to the original draft and strict guidelines demand the existence of a qualified risk, these are typical police powers and not structure-oriented secret service information. This differentiation is important because the German Constitution prohibits the Secret Services to become involved in domestic affaires, the natural police task, as a consequence of the Nazi-era.
The evaluation showed that the request powers of the Federal Office for the Protection of the Constitution related to post offices has no practical application. It affects only circumstances such as who owns a post-office box, but has the same requisites as the G 10 Act measures, which allow the examination of the content as well. Therefore it is probably not to come to practical cases of this empowerment in the future.
The Military Counter Intelligence and the Secret Services get similar requesting powers for financial institutions and telephone companies.

Security agencies must know, whether and in which bank the suspect has an account in order to be able to request banks. This issue would be cleared with a central accounts master data organised by the Federal Institute for Financial Services Supervision. This procedure was established to counter fight terrorism, but limited to criminal prosecution. Security agencies should have the right to use it also with preventive purpose.
Information from banks helped to reveal the financial network of Hamas in Europe and cleared some personal implications. This was especially relevant in the proscription of Al

[28] Extension of § 3 par. 1 Nr. 2 and 3 BVerfSchG.

Aqsa, a former money collector. Travel movements of Islamic terrorist have been discovered using information from airlines. Telephone and teleservice companies (the most requested sources with a total of 52 inquiries) provided information about conversations, which led to the discovery of Islamic terrorist structures.

The controversial IMSI-Catcher (International Mobile Subscribe Identity) **allows for investigators to know a person's position and the card and telephone number of his/her cell-phone**. Unknown mobile telephone numbers could be identified and wiretapped. People who are not involved in this procedure are affected by a temporary technical storage. Several measurements are made and compared with each other to assess the IMSI-number of the object person. The mobile telephone company is requested first when the intersection produces a clear strike and only with this purpose. The people who are not involved remain anonymous and their data unknown. Its use is legally interdicted. The information must be immediately erased. The Federal Office for the Protection of the Constitution led the most IMSI-Catcher procedures: 21.

-Modification in the Security Inspection Act
The Federal Security Inspection Act (SÜG) was enlarged, so that **people who work in security high sensitive fields** could be **checked to avoid sabotage acts**. The Act states which areas and which institutions qualify as 'security high sensitive', to avoid ineffective huge amounts of inspections. The necessary provision to precisely identify such areas was first enforced on August 9th 2003. The worker's partner (i.e. husband or wife) is excluded in order to honour the proportionality principle.
In governmental domain the experience is positive. In non-governmental field, though, some organizations were not very cooperative. Concrete results of these inspections are secret, to avoid terrorists getting any clues. The main focus of these checks lies in military security followed by the Federal Agency for Labour, whose IT-system (it deals with the payment of social benefits which are in some cases essential for families and individuals) must be protected against sabotage. Just 2% of the staff needed to be checked.

-Modification of the Federal Police Office Act (BKAG)
The Government wants to enlarge the possibilities of the Federal Police to act as a Central Office. **The Federal Police will be able to request any governmental or non-governmental office for information to fill in eventual gaps in their own investigations or for evaluation purposes,** no matter whether this data might be already available for the local or State Police.
This Act would strengthen the Federal Police role so much that the constitutional division of competences in the field of police law would not be upheld. The Federal Police would be entitled to lead preventive investigations, in which coordination with the originally competent local police would not always take place, especially in relation to data collection. This entails the risk of a double data collection by federal and local police.

-Modification of the Social Code's 10th Book
The **social data will no longer be protected against dragnet investigation requests** after the amendment of § 68 par. 3 Social Code's 10th Book. Social data belong to the most sensitive information in State's power. It involves everything from medical data to data of a very personal nature, touching the individual's sphere.

-Modifications in the field of Alien and Asylum Law

-Data transmission between Aliens' and Asylum's Offices and the Federal Office for the Protection of the Constitution

The Federal Office for the Recognition of Foreign Refugees (renamed to Federal Office for Migration and Refugees by the new Immigration Act) and the Aliens' Offices all over the country should spontaneously **transmit personal information about matters covered by § 3 par. 1 BVerfSchG** to the Federal Office for the Protection of the Constitution, when they assume, that this is necessary to fulfil its obligations. **§ 3 BVerfSchG is not limited to counter terrorism and violent endeavours, that might endanger Germany's interests abroad, but comprises mere radical endeavours as well**. Thus simple and legal political activity of non-Germans may legitimise the data transfer.

The Federal Office for Migration and Refugees thus had to transmit more information to the Federal Office for the Protection of the Constitution than before. The amount of information doubled due to this norm and reached a magnitude of 376% in the last 3 months of 2004.

-Modification of the Aliens and Asylum Procedure Act

a) Aliens' ID (§§ 5; 39 par. 1, 56a, 69 par. 2 AuslG[29], § 63 AsylVfG)
   The new ID documents include besides photo and signature other "biometrical features" of fingers, hands or face as well as a "zone for automatic reading". All governmental offices are allowed to record, pass and use these data to fulfil their tasks.
b) Provenance assessment by speech analysis (§§ 41 par. 2 sentence 2, 78 par. 3, 4 AuslG; [30] § 16 par. 1 sentence 3, par. 5, 6 AsylVfG)
   The public recording and analysis of the foreigner's voice is allowed in order to assess the asylum seeker's homeland or at least the region where he/she comes from.
c) Identity safeguard by fingerprints (§§ 41 par. 3-6, 78 par. 2-4 AuslG;[31] § 16 AsylVfG)
   The old prerequisites were enlarged (civil war refugees and asylum seekers were already taken their fingerprints and these were centrally stored by the Federal Police). From now on further aliens will also be taken their fingerprints when:
   -They are rejected or put back in a 'third country' (§ 26a par. 2 AsylVfG)
   -Denial reasons for a residence permit were assessed due to suspicions of radicalism (§ 8 par. 1 Nr. 5 AuslG)[32]
   -In case of visa applications of nationals from States with problematical repatriation, and situations stated in § 73 Art. 1 Immigration Act (additional visa investigation in specific situations)
   All at least 14-year-old foreigners, who enter Germany without permission, should be taken their fingerprints, same as illegal residents or those aliens, who are suspect of having applied for asylum in another EU-country.
d) **Storage and use of identification marks** (§ 78 par. 2-4 AuslG; [33] § 16 par. 5,6 AsylVfG)

[29] The AuslG was replaced by the Immigration Act (Zuwanderungsgesetz) in 2003. The latter simplified enormously the former unintelligible permit-of-residence system. The amendments are now to be found under § 78 Art. 1 Immigration Act.
[30] §§ 49 par. 5 and 89 Art. 1 Immigration Act.
[31] §§ 49 par. 2-4 and 6-8 and 89 Art. 1 Immigration Act.
[32] §§ 5 par. 4 und 54 Nr. 5 and 5a Art. 1 Immigration Act.
[33] § 89 Art. 1 Immigration Act.

The fingerprints and other identification features should remain in custody of the Federal Police for 10 years. Their use is allowed generally for identity assessment or evidence allocation in police or criminal procedures.

e) Participation requirement in visa procedures (§ 73 Art. 1 Immigration Act)

**Agencies which distribute visas (i.e. German embassies) are to query the secret service, the Federal Office for the Protection of the Constitution, the Military Counter Intelligence, the Federal Police and the Customs Office about *particular groups* of immigrants** to assess radical endeavours (visa denial reasons, § 5 par. 4 Art. 1 Immigration Act). The Federal Home Office decides through administrative fiat according to the actual security scenario and with the consent of the Foreign Office, that groups of particular nationalities or "in some other way" (§ 73 par. 4 Art. 1 Immigration Act) determined individuals must be closely examined before they are granted a visa. The new **data can be stored by the security agencies without restriction** to fulfil their legal tasks.

-Modification of the Aliens' Central Record Act (Art. 11)

The Aliens' Central Record (Ausländerzentralregister - AZR) was given a legal ground in 1994. It thus already contain a huge amount of information about non-German residents.

a) Storage content (§ 3 Nr. 5 AZRG)

**Spontaneous information about the foreigner's religion or belief should be included in the Aliens' Central Record.**

b) **Group references and dragnet investigation** (§§ 12, 31 AZRG)

Requisite for the dragnet investigation with AZR-data (including the visa-data) is no longer the existence of a danger in a particular case, but the averting of danger in general. Thus the **"concrete danger" requisite is eliminated**. The secret service will also be able to accomplish a dragnet investigation to encounter an eventual (military or similar) aggression, or the impairment of monetary stability by foreign money forgery and international money laundering.[34] **The exclusion of people with an ensured residence status of this sort of procedure does not apply any more.**

c) Data transfer to State aeronautical authorities (§ 15 AZRG)

It is planned to **allow the State aeronautical authorities unlimited access** at request to the Aliens' Central Record in order to accomplish the security check ("reliability check" for the staff working at special sensitive areas in airports) established under § 29d Air-Traffic Act (LuftVerkehrsG).

d) Recall in automatic procedures (§ 22 AZRG)

In the past the secret services could gain online access to particulars and administrative data only. An unlimited recall is now permitted. The restriction to urgent cases and the obligation to justify the urgency, are to be eliminated.

**Third Counter Terrorism Package**

In spring 2005 the Federal Home Office prepared a draft on a so-called 'Third Counter Terrorism Package'. It consists in general of more preventive powers for the Federal Police (BKA), new databases for counter terrorism and a better communication and cooperation among security agencies. Specific examples are the **storage of telephone and Internet data for a year instead of the present three months and introduction of biometrical features in identity papers**. Some modifications in the Federal Police Act and the Federal Office for the Protection of the Constitution could be eventually introduced.

[34] § 5 par. 1 sentence 3 of the "G10" Act.

However, the fact that the general elections were advanced by one year changed the scenario, since all draft papers which could not be passed within the legislative period, are subject to the 'discontinuity principle'. It is expected, however, that the new government will pick up the draft again and develop it further.

**Crown Witness**

At the moment there is a 'small' crown witness regulation for narcotics related crimes and money laundering. A norm will be introduced in the Criminal Code soon, expanding the use of crown witnesses in the sense that it will not be a specific solution for merely certain types of crimes like it is at present. A draft is expected before the end of the first half of 2006.

**Air Traffic Control Act**

The Air Traffic Control Act responded on the one hand to the terrorist attacks on 9/11 in New York and Washington, and on the other hand, to the episode in Frankfurt on January 5th 2003 when an ill-minded pilot threatened to crash his small sport-airplane against a skyscraper. On that day a few fighters started in Frankfurt and tried to bring the apparently suicide pilot back to land. But it was not clear, what to do, if it were necessary to shoot the airplane down. An intentional plane crash against a nuclear power station or a very densely populated area constituted the worst-case scenario. Paragraph 14 of the Act gives the legal background for an eventual shooting down.

Controversial is paragraph 14 par. 3 of the Act. It **enables to shoot down an airplane, even a regular commercial flight full with passengers**, if it is to assume, that the plane will immediately be used as a weapon against the lives of other persons, and the shooting down is the only possibility to stop it. The order is given by the Federal Defence Minister or his representative and is carried out by the Air Force. The order may only be given when an aircraft is either out of control or intentionally 'transformed' into a weapon, and the risk that it may cause great harm to people on the ground cannot be avoided otherwise.

The Act was enforced on January 11th 2005.[35]

[35] BGBl I 2005, 78. Modified by art. 49 of the Act of June, 21st 2005 I 1818. However, in its judgement of 15 February 2006 – 1 BvR 357/05, the Federal Constitutional Court declared paragraph 14 unconstitutional and thus void.

# 6 Anti-terrorism laws in France

This chapter entails an overview of the key provisions of anti-terrorism laws that have been adopted in France. The overview is derived partially from the report 'Overview of the French anti-terrorism strategy' by Didier Bigo – mainly by simply 'cutting and pasting' – and to a great extent from the website http://www.legifrance.gouv.fr/ . Incidentally, www.hrw.org[36] was consulted.

**Overview**
The present counter-terrorism apparatus of the French state results from a long process, which is far from straight and initially integrated. The September 9th anti-terrorism Law of 1986 is considered the cornerstone of the juridical anti-terrorism system:

**The September 9th anti-terrorism Law n° 86-1020 of 1986**
Under this Law, terrorism is defined as an offence under ordinary criminal law, the 'aim' of which 'is to cause a serious disturbance to public order by means of intimidation or terror'.[37] There is no specific 'terrorism' incrimination; the problem is tackled from the procedural point of view. The law of 1986 provided for many organizational changes. However, since this is not the subject of this overview, these organizational changes will not be discussed. The overview is confined to provisions of criminal law and a few related matters as already explained in the first chapter of this report.
In this context, the law of 1986 foresees in:

- **Postponement of lawyer intervention** until after 72nd hours of police custody;
- Strengthening of the penalties system: article 706-25-1 provides **increased penalties** in case of terrorism. The maximal sentence for terrorism crimes is of 30 years, the offence of **participation to a criminal conspiracy** to commit terrorism can lead to a ten-years-sentence;
- Extension of **random identity checks** by police.

In addition to a strong intelligence and police capability, France strategy includes using a visible police presence to prevent acts of terrorism. In France, when there is a specific terrorist threat, law enforcement increases its public presence in a visible show of force, through the Vigipirate Plan (1986). This plan foresees in the **securing and surveillance of public places** so as to prevent bomb attacks. The physical presence of army in public places aims above all at setting population's mind at ease.

The following anti-terrorism laws (1992, 1995-1996, 2001, 2003 and 2004) do nothing but prolong and deepen the law of 1986. The trend is to maximize existing capabilities, rather than create new programs or capabilities. Nevertheless, the latest political initiatives and the new anti-terrorism bill in particular, imply some important changes in the way of tackling the terrorist phenomenon.

**The July 22nd law n° 92-683 of 1992**
This law relates to the **reform of the French Penal Code** (enforced in 1994) and has defined terrorism acts into autonomous offences, punishable by increased penalties (art. 421-1 to 421-5 of the PC). **Ecologic terrorism** is also recognized as an act of terrorism since then.

[36] To be precise: http://hrw.org/english/docs/2005/12/09/france12182.htm
[37] Article 421-1 Criminal Code

**The July 22nd Law n° 96-647 of 1996 aiming to reinforce terrorism repression**

New legislative initiatives in 1995 and 1996, while not making any major changes to the French counter-terrorism system, helped the magistrates to target the logistics networks by codifying the notion that "conspiracy to commit terrorism" was itself terrorism. The legislator extended the 1986 provisions to acts of terrorism committed abroad against French nationals, and introduced through the law of 1996, the specific offence of '**criminal conspiracy in relation with a terrorist organisation'**. The February 8th law of 1995 **extended the prescription period for public action and sentence** in criminal matters (thirty years) and in delinquency matters (twenty years). This law also provides increased sentences depending on the level of intention.

The law of 1996 foresees furthermore in

- the introduction in the penal code of the offence of **hiding a perpetrator of an act of terrorism** (providing the perpetrator or accomplice to a felony or an act of terrorism punished by at least ten years' imprisonment with accommodation, a hiding-place, funds, the means of existence or any other means of evading searches or arrest, is punished by three years' imprisonment and a fine of € 45,000. The penalty is increased to five years' imprisonment and a fine of € 75,000 where the offence is committed habitually. Exempted from the above provisions are:

1° the relatives in a direct line and their spouses, and the brothers and sisters and their spouses, of the perpetrator or accomplice to the felony or terrorist offence;

2° the spouse of the perpetrator or accomplice to the felony or act of terrorism, or the person who openly cohabits with him. Art. 434-6)

- the introduction in the penal code of the offence of **participating in a terrorist organisation** (the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism[38] (…) shall in addition be an act of terrorism. Art. 421-2-1). This offence is punished by ten years' imprisonment and a fine of € 225,000.
- the introduction in the penal code of the offence of **the introduction into the atmosphere, on the ground, in the soil or in waters, including territorial waters, of any substance liable to imperil human or animal health or the natural environment**. This is considered an act of terrorism where it is committed intentionally in connection with an individual or collective undertaking whose aim is to seriously disturb public order through intimidation or terror. (Art. 421-2) The act is punished by twenty years' criminal imprisonment and a fine of € 350,000. Where this offence causes the death of one or more persons, it is punished by criminal imprisonment for life and a fine of € 750,000.
- It allows for (**house) searches and seizure of exhibits without the concerned person's / owner's consent**. The December 30th law n° 96-1235 of 1996 would later permit **night searches**.
- It provides **special provisions for state witnesses, perpetrators or accomplices of an act of terrorism, « who had warned administrative or juridical authorities, preventing the offence to come off and then had permitted to identify, where appropriate, the others guilty."**

The Penal Code contains the following articles on crown/ state witnesses:

Article 422-1 states that: Any **person who has attempted to commit an act of terrorism** is **exempted from punishment** where, having informed the judicial or administrative authorities, he makes it possible to prevent the offence taking place and, where relevant, to identify the other offenders.

[38] The various acts of terrorism are defined in different parts of this overview.

Article 422-2 states that: **The custodial sentence incurred by the perpetrator or the accomplice to an act of terrorism is reduced by half** where, having informed the judicial or administrative authorities, he has made it possible for the criminal behaviour to be stopped or for human fatalities or permanent injuries resulting from the offence to be avoided, and, where relevant, the other offenders to be identified. Where the penalty incurred is criminal imprisonment for life, this penalty is reduced to twenty years' criminal detention.

**Post 2001**
New legislatives measures were introduced in view of modernisation of the anti-terrorism tools. This was done mainly by the November 15th Law of 2001, the March 18th Law of 2003 and the March 9th Law of 2004. France just recently (January 2006) implemented the new anti-terrorism law which entails substantial changes.

- **The November 15th Law on Everyday Security n° 2001-1062 of 2001 (the LSQ law)**

This law provides a reinforcement of the national anti-terrorism legal system through the following measures:
-Car searching, moving or parking on a public highway ;
-House searching and seizure of exhibits during a preliminary enquiry, without the owner's consent, after authorisation of a judge ;
-Preventive searching of planes, vehicles, luggage or parcels within pears and airports ;
-Private security agents allowed to proceed to security palpations and bag searches ;
-Obligation for telecommunication operators to keep personal data connections allowing users' identification, for a maximum of one year, and to put them at the judiciary authority's disposal;
-Use of audiovisual means of communication with recording during proceedings (possibility to question by videoconference);
-Hearing of anonymous witnesses;
-Extension of terrorism incriminations, focussing on terrorist (financial) sources (see below) and the use of 'NTIC'(see further below):
- It constitutes an act of terrorism **to finance a terrorist organisation by providing, collecting or managing funds, securities or property of any kind, or by giving advice** for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place (art. 421-2-2, chapter I (acts of terrorism) of titel II (on terrorism)).
- Natural and legal persons convicted of act of terrorism shall in addition incur the complementary penalty of **confiscation of all or part of their property**, whatever its nature, movable or immovable, separately or jointly owned. (Article 422-6)
- The product of a financial or property sanction imposed on a person convicted of an act of terrorism is allocated to the contingency fund for victims of act of terrorism and other offences. (Article 422-7)

**Other acts of terrorism** are defined in art. 421-1 of the penal code, introduced by not only Act no. 2001-1062 of 15 November 2001, but also Act no. 96-647 of 22nd July 1996 and Act no. 98-348 of 11th May 1998.
Art. 421-1 states: The following offences constitute acts of terrorism where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb the public order through intimidation or terror:

1° wilful attacks on life, wilful attacks on the physical integrity of persons, abduction and unlawful detention and also as the hijacking of planes, vessels or any other means of transport, defined by Book II of the present Code;
2° theft, extortion, destruction, defacement and damage, and also computer offences, as defined under Book III of the present Code;
3° offences committed by combat organisations and disbanded movements as defined under articles 431-13 to 431-17, and the offences set out under articles 434-6[39], 441-2 to 441-5[40];
4° the production or keeping of machines, dangerous or explosive devices, set out under article 3 of the Act of 19th June 1871 which repealed the Decree of 4th September 1870 on the production of military grade weapons;
- the production, sale, import or export of explosive substances as defined by article 6 of the Act no. 70-575 of 3rd July 1970 amending the regulations governing explosive powders and substances;
- the purchase, keeping, transport or unlawful carrying of explosive substances or of devices made with such explosive substances, as defined by article 38 of the Ordinance of 18th April 1939 defining the regulations governing military equipment, weapons and ammunition;
- the detention, carrying, and transport of weapons and ammunition falling under the first and fourth categories defined by articles 4, 28, 31 and 32 of the aforementioned Ordinance;
- the offences defined by articles 1 and 4 of the Act no. 72-467 of 9th June 1972 forbidding the designing, production, keeping, stocking, purchase or sale of biological or toxin-based weapons;
- the offences referred to under articles 58 to 63 of the Act no. 98-467 of 17th June 1998 on the application of the Convention of the 13th January 1993 on the prohibition of developing, producing, stocking and use of chemical weapons and on their destruction;
5° **receiving the product of one of the offences set out in paragraphs 1 to 4 above.**

According tot article 421-3 the **maximum custodial sentence** incurred for the offences provided for under article 421-1 **is increased** where those offences constitute acts of terrorism.[41]

- **<u>The March 18th Law on Internal Security n° 2003-239 of 2003 (the LSI law)</u>**

The 7th chapter of this law contains the provisions on anti-terrorism.
It introduced in the penal code **the offence of being unable to account for resources corresponding to one's lifestyle** when habitually in close contact with a person or persons who engage in one or more of the activities provided for by articles 421-1 to 421-2-2. The offence is punishable by 7 years' imprisonment and by a fine of €100,000.

[39] This provision is discussed on page 38 of this report.
[40] Relating to forgery of documents.
[41] 1° it is raised to criminal imprisonment for life where the offence is punished by thirty years' criminal imprisonment;
2° it is raised to thirty years' criminal imprisonment where the offence is punished by twenty years' criminal imprisonment;
3° it is raised to twenty years' criminal imprisonment where the offence is punished by fifteen years' criminal imprisonment;
4° it is raised to fifteen years' criminal imprisonment where the offence is punished by ten years' imprisonment;
5° it is raised to ten years' imprisonment where the offence is punished by seven years' imprisonment;
6° it is raised to seven years' imprisonment where the offence is punished by five years' imprisonment;
7° it is raised to twice the sentence incurred where the offence is punished by a maximum of three years' imprisonment.

Article 31 of the law merely extends 2005 the provisions 24 to 26 of the LSQ law relating to home searches and airport and seaport zones' controls till December 31st, and perpetuates the rest of the legislative device.

- **The March 9th Law to adapt justice to the evolutions of criminality n° 2004-204 of 2004 (also known as Law Perben II)**

This law was adopted to introduce in the Code on Criminal Procedure **the specific offence of criminal organisation or organized crime (affiliation offence)** as well as **the procedure of the guilty-plea** (or "appearance on preliminary guilty plea"). It establishes exceptional proceedings relating to terrorism, which is put in the same category as organized crime.
It is characterized by:

- **The creation of preliminary investigation: (during which) searches may take place without the concerned person being informed and proceeds from a secret procedure, without the presence of the parties involved (without contradiction) and during an unlimited period of time.**
- Policemen may implement special investigation skills, such as tapping, filtering networks, closed surveillance through setting of micro and video in private places.

- **The March 15th Law to implement the secular principle n°2004-228 of 2004**

This law implements the secularity principle at schools[42]. It aims at fighting extremism and radicalisation by means of the prohibition of wearing signs and clothing of a clearly religious character, such as the Islamic headscarf, the Jewish yarmulka or the Christian cross.
The principle, as laid down in the French Educational Code, is applicable to students. Teachers and other employees of the teaching institution are already subjected to the prohibition, like any other public worker in France.
Disobedience of the principle leads to disciplinary sanctions of the same (proportional) nature as the sanctions applicable to students which have been disobedient in another sense.

**The new anti-terrorism law of January 23rd 2006 n°2006-64**

This law inscribes itself in the continuity as it comes to complete the existing arsenal, deepening the preventive and proactive side by an intensive use of new information and communication technologies. The law forsees in the following major changes:

*On the repressive side*

- **To hold suspected terrorist in police custody without charge for six days** (instead of four). This also implies that the suspect's right to a hearing with a magistrate is implemented after this period. Detainees are **not informed of their right to remain silent**. Police may interrogate the detainee without the presence of a lawyer during the entire period of custody. The detainee has access to a lawyer after 96 hours (contrary to the initial possibility of access after 72 hours) and then again after 120. Each interview may last for thirty minutes, and lawyers do **not have access to the case file** before these meetings. The bill stipulates that detainees who have been **denied the right to notify a third party** about the detention may reiterate their request to do so after **four days** in custody.
- It creates, for bombings which aim at killing, an aggravating circumstance to the incrimination of 'criminal conspiracy in relation with a terrorist organisation';

[42] "…les écoles, les collèges et les lycées publics".

- **Longer sentences**: 30 years instead of 20 for masterminds of terrorist plots; and 20 years instead of 10 for helping in a terrorist enterprise;
- **Very fast procedure to freeze assets** by means of a decision from the Economy Minister;
- Clause on **naturalization and on loss of nationality;**

*On the preventive side*

- **Movement controls** in general and control of individuals travelling to 'risky' countries, i.e. Iraq, Pakistan, Syria, Iran in particular;
- **Cyber cafes and Internet providers are required to keep for one year all their connection data;**
- Major **expansion of video surveillance;**
- **Easier access for anti-terrorists investigators to various files** (registrations, passports, residence permits) and to specific information such as train, plane or ship passenger's data or related to Internet connexions.

According to the government, the preventive measures aim firstly at controlling jihadists' networks. The most sensitive measures are subjected to a 'rendezvous clause': in 2008, the Parliament will evaluate them and will decide on whether to keep it or not.

**Apart from the chronological overview above, the penal code also contains the following interesting provisions in Chapter II (on special provisions) of Titel II (on terrorism):**

**Forfeiture of rights**

Article 422-3 states that: Natural persons convicted of any of the offences provided for under the present Title also incur the following additional penalties:

1° **forfeiture of civic, civil and family rights**, pursuant to the conditions set out under article 131-26[43]. (…)

2° **prohibition**, pursuant to the conditions set out under article 131-27[44], **to hold public office or to undertake the social or professional activity in the course of which or on the occasion of the performance of which the offence was committed**. (…)

3° **area banishment,** pursuant to the conditions set out under article 131-31[45]. (…)

**Banishment of convicted aliens**

Article 422-4 states that: Any alien convicted of any of the offences referred to under the present Title may be **banished from French territory either permanently or for a maximum period of ten years** in accordance with the conditions laid down under article 131-10[46].

[43] Article 131-26 states, among other things, that the forfeiture of the named rights covers the right to vote, the right to be elected, the right to hold a judicial office, or to give an expert opinion before a court, or to represent or assist a party before a court of law, the right to make a witness statement in court other than a simple declaration. The forfeiture of the right to vote or to be elected also entails prohibition or incapacity to hold public office.

[44] Article 131-27 states, among other things, that the prohibition is not applicable to press misdemeanours.

[45] Article 131-31 states, among other things, that the penalty of banishment from an area entails the prohibition to appear in certain places determined by the court. It carries in addition supervision and assistance measures. The list of the prohibited places and the supervision and assistance measures may be modified by the penalties and enforcement judge.

[46] Article 131-10 states that a felony or a misdemeanour may be punished by one or more additional penalties sanctioning natural persons which entail prohibition, forfeiture, incapacity or withdrawal of a right, the impounding or confiscation of a thing, the compulsory closure of an establishment, posting a public notice of the decision or

The provisions of the last seven paragraphs of article 131-30 do not apply[47].

**Liability of legal persons**

Article 422-5 states that: Legal persons may incur criminal liability for acts of terrorisms set out under the present Title, pursuant to the conditions set out under article 121-2.

The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38[48];

2° the penalties referred to under article 131-39[49].

The prohibition referred to under 2° of article 131-39 applies to the activity in the course of which or on the occasion of the performance of which the offence was committed.

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disseminating the decision in the press or by broadcasting. This could for example mean that a (small) retail-business of the banished alien may be have to be closed down and confiscated, which measures would then affect his right to property as well.

[47] These last paragraphs are the following:

The court may only order banishment from French territory by a specifically reasoned judgment dealing with the seriousness of the offence and the personal and familial situation of the foreign convicted person, where the case concerns:

1° a convicted foreign father or mother of a French child residing in France, provided that the parent exercises, even if only in part, parental authority over that child or effectively attends to its needs;

2° a convicted foreigner who has been married to a French national for at least a year, provided that the marriage was concluded prior to the offence that led to his conviction, that the community of marital life has not ceased and that the spouse has retained French nationality;

3° a convicted foreigner who establishes that he has lawfully resided in France since the age of ten or less;

4° a convicted foreigner who establishes that he has lawfully resided in France for over fifteen years.

5° a convicted foreigner who is in receipt of a work injury or sickness annuity paid by a French organisation and of which rate of permanent incapacity is 20 % or more;

6° a convicted foreigner habitually resident in France whose health condition requires a medical assistance the lack of which could involve exceptionally serious consequences, and provided that he cannot receive appropriate treatment in his country of origin.

[48] Article 131-38 states that the maximum amount of fine applicable to legal persons five times the sum laid down for natural persons by the law that sanctions the offence.

[49] The penalties referred to are among others dissolution (this penalty does not apply to those public bodies which may incur criminal liability, nor to to political parties or associations, to unions or to institutions representing workers), prohibition to exercise, directly or indirectly one or more social or professional activity, permanent or temporary closure of one or more of the establishments of the enterprise that was used to commit the offences in question, permanent or temporary prohibition to make a public appeal for funds, prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the (temporary) prohibition to use credit cards.

# 7 Anti-terrorism laws in Italy

This chapter entails an overview of the key provisions of anti-terrorism laws that have been adopted in Italy. The overview is derived – mostly by simply 'cutting and pasting' – firstly from the report by TRANSCRIME (Joint Research Centre on Transnational Crime, Università di Trento-Università Cattolica di Milano). The (project which resulted in this) report was directed by Ernesto U. Savona[50], coordinated by Dr. Barbara Vettori[51] and written by Martina Montauti[52] and Barbara Vettori[53]. Secondly, the report 'Counter-Terrorism Legislation and Practice: A Survey of Selected Countries'[54] (hereafter: the FCA-report) of the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom served as a complementary source.

**Overview**

**Criminalising terrorist or subversive associations (associazioni con finalità di terrorismo anche internazionale o di eversione dell'ordine democratico)**
Article 270 bis of the Criminal Code, introduced by law n. 15 of 1980 and modified by Law 438 of 15 December 2001 on Urgent Measures Against International Terrorism, criminalised the associations with purposes of terrorism, also international, or purposes of subversion of the democratic order.
The article states that:
1. Anyone who **promotes, constitutes, organizes, heads or finances associations which aim at the commission of violent acts with the purpose of terrorism** or of subversion of the democratic order is sentenced from seven to fifteen years of imprisonment.
2. Anyone who **takes part in these associations** is sentenced from five to ten years of imprisonment.
3. Under penal law, the purpose of terrorism recurs **also when violent acts are against a foreign State, institution and international body**.
4. In the case of conviction for this offence, the assets which were used for its commission and those representing the price, product, profit of the offence or the use thereof are mandatorily confiscated."

It is worth noting that the article, following the 2001 amendment, covers now cases of international terrorism (comma 3).

**Criminalising the harbouring or assisting of associates (assistenza agli associati)**
Article 270 ter (art. 270 tris, according to the FCA-report) of the Italian Criminal Code punishes not only people who are included in article 270 bis, but also those who help to these people. It states that:
1. Anyone […] who **gives shelter, board, lodging, transport means and communication facilities to those who take part in criminal associations** listed under articles 270 and 270 bis is punished by imprisonment up to 4 years.

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[52] Ph.D. candidate in criminology at the Università Cattolica del Sacro Cuore and researcher at TRANSCRIME. She elaborated a first draft.
[53] She revised the first draft by Martina Montauti.
[54] See http://www.fco.gov.uk/Files/kfile/QS%20Draft%2010%20FINAL1.pdf

2. The sanction is increased if the assistance is provided in a continuative way.[55]
3. It is not punishable the one who acts in favour of a close relative".

It remains unclear how the legal doctrine in Italy deals with the concept of guilt in this context. According to the report of our Italian colleagues problems could occur in relation to proving the guilt of a person who has given refuge, food, hospitality, transport means and communication facilities.

**Urgent measures to combat international terrorism (Disposizioni urgenti per contrastare il terrorismo internazionale)**
Law nr. 438 of 15 December 2001 on Urgent Measures Against International Terrorism, as strengthened by Law 155/2005, foresees in various increased powers for the police and other investigating authorities to pursue terrorists.

-Article 2: **residence permits** with investigating purposes ("Permessi di soggiormo a fini investigativi"): a special residence permit can be granted to those foreigners who collaborate with Justice. The permit is also useful for investigative activities. According to the FCA-report residence permits are discretionarily granted and either one-year renewable (and also rescindable), or allow for full residence. The existing law pertaining to Italian residence permits for foreign nationals was updated to provide for **compulsory electronic cards** containing information on the individual.

-Article 3: new rules for **expelling foreigners** in order to prevent terrorism (" Nuove norme in materia di espulsioni degli stranieri per motivi di prevenzione del terrorismo"): competent authorities can request the administrative expulsion of those immigrants **who are suspected of terrorism**.

-Article 6: new rules on **telephone traffic data** ("Nuove norme sui dati del traffico telefonico e telematico"): those who buy a phone-card or a sim-card have to show a document of identification; the **phone-tabulations have to be kept up to twentyfour months** for investigation purposes, and **the data about net surfing have to be retained up to thirty months** by the companies which offer the network services. Furthermore, competent authorities have the authority to **intercept telephonecommunications** of suspected terrorists. According to the FCA-report the interception of communications by law enforcement agencies is allowed where necessary to gain information for the prevention of terrorism. The maximum period of interception permitted by the Procurator is 40 days, which may then be extended for further 20-day periods. There must be clear justification of the need, and the information so acquired can be used only for investigative purposes, not in criminal proceedings.

-Article 10: new rules on personal identification ("Nuove norme sull'identificazione personale"): is permitted to **take samples of saliva or hair** of suspected terrorists, for their identification through DNA. The FCA-report adds that the taking of samples may take place without consent, however the dignity of the individual must be respected. Suspects may also be **held for up to 24 hours without access to a lawyer to enable identification** to be verified. Those using false documents may be imprisoned for 1 to 4 years, longer if they help others to use false documents.

[55] Ms. Martina Montauti explained that the sentence is increased if the assistance is not only deliberate and occasional, but also deliberate and frequent.

-Article 13: new dispositions for arrest and custody ("Nuove disposizioni in materia di arresto e di fermo"): the police can **question suspected terrorists**, who can be kept by the investigative officers and also **without an attorney.** Article 104, paragraph 2 of the Italian Criminal Procedure Code states that the arrested person has the right to have a consultation with his lawyer immediately after the arrest (article 386, par. 1). At the moment of the arrest, the police must inform the arrested person of such right, and then immediately inform his lawyer (article 386, par. 2: a duty solicitor may be nominated by the prosecutor). Article 104, par. 3 and 4 allow an exception to the exposed rule: during preliminary investigations, for exceptional and specific precautionary reasons, the examining justice may delay this right **for no longer than five days**; in case of arrest, this power is exercised by the prosecutor until the validation hearing.
In Italy the arrest must be immediately communicated by the police to a public prosecutor (article 386, par. 1); the prosecutor must request validation by the examining justice within 48 hours (article 390, par. 1; article 13, par. 3 of the Italian Constitution). The Judge must convey a validation hearing within 48 hours (article 390, par. 2; article 13, par. 3 of the Italian Constitution). By this act, the examining justice has to inform the defender of the arrested person.[56]

-Article 15 on new offences of terrorism ("Nuove fattispecie di delitto in materia di terrorismo") can be considered as a supplement of article 270 bis and article 270 ter of the Italian Criminal Code. It introduces:
article 270- quater: which states that anybody who **enrols** people in order to commit acts of violence aimed at terrorism, also against a foreign State, institution or organization, is sentenced from seven to fifteen years;
article 270- quinquies: which states that anybody who **trains** up people in order to commit acts of violence aimed at terrorism, also by giving instruction about the preparation/use of dangerous weapons, is sentenced to five to ten years of imprisonment.

According to the FCA-report, the law (438/2001 as strengthened by 155/2005) also allows for the authorities to **make use of false identities** or **receipt of money or drugs**, subject to safeguards.
Furthermore, the law gives the Interior Minister new powers to **control the movement and sale of certain types of detonator and explosive**. Those who unlawfully instruct in the use of explosives or other dangerous substances, including over the internet, may be imprisoned for 1 to 6 years.

[56] Ms. Martina Montauti further explained that it is not possible to hold somebody in custody without a specific charge (article 13, par. 3 of the Italian Constitution). Arrest and custody may be carried out when there is the evidence of the commission of a crime or serious clues of that. The length of the remand period depends on:
- the phases of the proceedings;
- the maximum sentence prescribed for the offence or the actual sentence inflicted in the previous grade trials;
Article 303, par. 4 fixes an overall maximum limit also depending on the maximum sentence prescribed for the offence. For some extremely serious crimes, including terrorist offences, a special discipline is prescribed:
- the time limits for remand in custody are always at the maximum level (despite of the maximum sentence) before the beginning of the first grade trial;
- they are increased by up to six months before the first grade sentence.
E.g. a person charged for participating to a terrorist association (article 270 bis, par. 2 of the Italian Criminal Code, sanction to between five and ten years imprisonment) may be held on remand in custody for up to one year before the beginning of the first grade trial; one year and six months before the first grade sentence; one year between the first grade sentence and the appeal sentence; one year between the appeal sentence and the final appeal. However, the amount of these remand periods exceeds the overall limit of four years. This implies that whenever the four year is reached, the accused person will be freed.

The report states that the Minister is also empowered to make **licensing or training of pilots subject to the prior authorisation** of the Chief of Police for six months to two years while the latter verifies that there are no contra-indications for public or state security.
The report further states that law 438/2001 made the **confiscation of assets of convicted terrorists obligatory** when the assets were destined for use in the commission of crimes or were the profit, product, price or work of crime.

**Precautionary operations in 'hot spots' (prevenzione del terrorismo: operazioni di controllo delle forze dell'ordine in vari ambienti frequentati da radicali islamici)**
The Ministry of Interior introduced the measure of monitoring places which are considered 'hot spots' for terrorists, such as meeting places for fundamentalists. This counterterrorism policy is aimed at avoiding/removing the rising of fundamentalists' cells by monitoring all places which can be considered as 'hot spots'.

**Severer penitentiary regime (modifica degli articoli 4-bis e 41-bis della legge 26 luglio 1975, n. 354, in materia di trattamento penitenziario)**
Law n.279 of December 2002 which modified article 4 bis and 41 bis of the Italian Criminal Code aggravates the penitentiary regime of those convicts linked to a criminal association. It applies to all criminal associations, including terrorist ones. In order to reduce the sharing of information between the convicts and their affiliated criminal organizations, the convicts are **excluded from external contacts connected to the organization**. In addition, their **correspondence is subject to strict controls, and the objects they can receive in prison are limited**.

**Preventive actions against 'dangerous' individuals (espulsione dell'Imam di Carmagnola e dell'Imam di Torino per rischio di turbamento dell'ordine pubblico e pericolo per la sicurezza dello Stato)**
The expulsion of Carmagnola's Imam and the **expulsion** of Turin's Imam are two examples of preventive actions against **individuals who spread hard feelings and dissidence** with relation to the national social, political and religious values. The legal basis of these decision is art.11 (administrative expulsion) of the law 6/3/1998 n.40, which states that the Italian Ministry of the Interior can decide for the expulsion of a foreigner for 'order and security reasons'.

**Expulsion in general**
According to the FCA-report, Italy permits dual nationality and once a non-Italian has acquired Italian citizenship it can only be revoked where the individual accepts public or military service for a foreign State against the express wishes of the Italian authorities or bears arms against Italy.
The report adds that expulsions of non-Italian nationals have been expanded to encompass terrorism related grounds. Legislative Decree 286/1998 as amended by Law 189/2002, Law 271/2004 and by Law 155/2005, specify how expulsions can be carried out. There are **three sets of circumstances under which administrative expulsions are possible**.

First, the Interior Minister may order the expulsion of a foreign national – whether resident in Italy or not – on the grounds of a **threat to public order or State security** or where there are good reasons to believe that the continued presence of such foreign national may in any way facilitate terrorist activities or organisations, including of an international nature. The Prime Minister and the Minister of Foreign Affairs must be informed prior to the expulsion. **This expulsion order prohibits the expelled person from re-entering Italy for at least five years, and usually for ten years.** In general, such expulsions are permitted when

there is information to show that an individual is a threat to national security but the evidence is not considered sufficient for prosecution. Individuals have been expelled from Italy by the Interior Minister following investigations into certain Islamist groups and reported attendance at training or combat courses.

This type of expulsion may be appealed only to the Regional Administrative Court of Lazio or, if based on Law 155/2005, to the local Regional Administrative Courts. The Administrative Court's decision is subject to two further appeals to the Council of State and, only on points of law, to the Court of Cassation. The **appeal is non-suspensive** and the expulsion order is **immediately enforceable**. Furthermore, under Law 155/2005, **if the information based on which the expulsion was ordered derives from secret investigations or involves state secrets, the information may be withheld for two years** thus, effectively, suspending the appeal process for that period. Both of these provisions will expire automatically on 31 December 2007.

Second, a Prefect can expel **a foreign national not complying with the conditions under which they were permitted to stay** in Italy (for example an expired visa, working illegally).

Third, a Prefect can expel a foreign national if he **habitually engages in criminal activity; lives wholly or in part from the proceeds of crime; behaves in a way that offends or puts at risk the moral or physical wellbeing of young people, public health or the public peace; or belongs to a mafia type organisation**. Since 2 August 2005 a Prefect may also expel a foreign national **if he is operating in a group or alone to carry out criminal acts aimed at subverting the democratic order of the state**.

Appeals against an expulsion order made by the Prefect may be made only to the Justice of the Peace (Giudice di Pace). Such **appeals have no suspensive** effect on the expulsion and can also be lodged through Italian consulates overseas. However, under Law 286/1998, as amended by Law 271/2004, the enforcement of such **expulsion orders must be made through escort orders to the frontier**, adopted by the local Chief of Police, **which are subject to prior judicial review** by the Justice of the Peace through a judicial ratification process (convalida). Thus, within 48 hours of the adoption of the escort order the judge must be informed and a hearing in the presence of the subject of the escort order and their legal representative must be held. The judge then ratifies or annuls the order within 48 hours of the hearing. The judge's decision is appealable by both the individual and the State, but only to the Court of Cassation on points of law. Such an appeal is nonsuspensive.

Law 155/2005 states that expulsions ordered for reasons of public order and security, or involvement with terrorist activity, should be carried out immediately. The Interior Minister's ability to rapidly expel individuals has been demonstrated in several cases, for example the cases of the expulsion of Carmagnola's Imam and the expulsion of Turin's Imam.

The Italian legislation (1998) provides **explicit protection against expulsion in circumstances** where the individual may be persecuted for reasons of gender, language, citizenship, religion, political opinions or social conditions, or **where they may risk being extradited to another country where such protection from persecution may not exist**.

# 8 Conclusie

Sinds de aanslagen in New York, Madrid en London en in ons eigen land de moord op Theo van Gogh is ook ten onzent de noodzaak krachtig gevoeld een samenhangend relevant pakket aan maatregelen te nemen om terrorisme te bestrijden. Velen wijzen terecht op het belang van de aanpak van de fundamentele oorzaken van terrorisme en de daaraan voorafgaande radicalisering. Engagement met buitenlandse politieke gebeurtenissen (niet in de laatste plaats de oorlog in Irak), sociale ontevredenheid vanwege etnisch te interpreteren achterstellingen en religieuze inspiratie mede uit een verlangen naar spirituele zingeving zijn onderwerpen die onder ogen moeten worden gezien bij elke bespreking van preventie van terrorisme. In dit rapport moet evenwel aan dergelijk etiologisch belangrijke punten voorbij worden gegaan. Hier gaat het niet zozeer om bijvoorbeeld maatschappelijk relevante aanpassingen (meer banen voor kwestbare groepen), maar om aanpassingen die van direct belang zijn om repressief te kunnen optreden.
Een belangrijk deel van die maatregelen is van organisatorische of institutionele aard. Een ander deel betreft het recht. Uiteraard zal elk van die maatregelen geplaatst moeten kunnen worden in de voor ons land relevante rechtscultuur. Inmiddels zijn er zowel organisatorisch als normatief juridisch heel wat antiterreurmaatregelen genomen, maar nog steeds leeft de vraag of met al deze maatregelen een afdoend pakket bestaat. Die vraag kan worden beantwoord door te bezien waar in de praktijk problemen rijzen. Een andere methode is het maken van een vergelijking met wat in andere landen is gebeurd. Deze laatste methode is in dit rapport ter hand genomen.
De suggesties die uit de voorgaande overzichten op grond van die rechtsvergelijking zijn aan te dragen verdienen een nadere blik. Zij zijn niet altijd een-op-een over te nemen. Anderzijds zijn er uiteraard met een beetje creativiteit suggesties te doen die minder zijn uitgewerkt, maar toch nuttig zouden kunnen zijn. Te denken is aan de Amerikaanse variant waarbij bepaalde advocaten een clearance krijgen, welke hen de bevoegdheid geeft om anders dan hun collega's inzage te nemen in confidentiële dossiers. Met het oog op de toepassing van voorlopige hechtenis zou dat zowel vanuit instrumenteel als uit rechtsbeschermend oogpunt zinvol kunnen zijn. Te denken is voorts aan de verdere ontwikkeling naar Canadees model van financieel inlichtingenwerk, waarvoor met het oog op de daarvoor benodigde datamining (onder meer in gegevens van non profitorganisaties) vermoedelijk nog enkele juridische obstakels moeten worden geslecht en enige checks and balances ontwikkeld: ontdekken wij nu wel de lokale slager die grote sommen geld exporteert richting (trainingskampen in) turbulente gebieden? En ten derde noem ik de suggestie – wellicht in Israëlisch spoor – om met doorbreking van het normale strafrechtelijke regime de mogelijkheid te openen om nabestaanden van daders van zelfmoordacties zwaar te straffen. Wij noemen deze drie varianten niet omdat wij op dit moment reeds overtuigd zijn van derzelver wenselijkheid, maar omdat zij de vinger raken van nog steeds problematische onderwerpen (de positie van de verdediging in het licht van de vrijheidsrechten; de financiering vanuit Europa en Nederland van terreur in andere landen; de problematiek van de zelfmoordterroristen).
Er zijn met andere woorden wetenschappelijk bezien nog tal van terreinen nader te exploreren, maar dat is afhankelijk van de vraag. Wij kregen niet de opdracht nieuwe ideeën aan te dragen, maar de opdracht in kaart te brengen (een 'scan') wat er in een aantal landen aan juridische mogelijkheden bestaat. Dat is een relevante vraag, want we moeten in de internationale context uiteraard niet achterlopen. Het zou zonde zijn, als we de door de Europese partners ingeslagen wegen niet zouden volgen louter omdat we ze niet kenden.

## 8.1 Nieuwe strafbaarstellingen en uitbreiding van reeds bestaande strafbaarstellingen

Evenals in Nederland (via het nieuwe artikel 140a Sr) is deelname aan een terroristische organisatie strafbaar in het Verenigd Koninkrijk. De vereisten die in laatstgenoemd land worden gesteld aan deelname zijn echter anders geformuleerd dan in Nederland. Het is niet zozeer het deelnemen aan een organisatie met een terroristisch oogmerk in de wetenschap dat men met een terroristische organisatie te maken heeft, maar het ondersteunen of bevorderen van de activiteiten van de verboden organisatie, op wat voor manier dan ook. In Nederland is de wetenschap ('niet in de zin van voorwaardelijk opzet') essentieel, in plaats van gedragingen die bestaan in ondersteunen of bevorderen – al lijkt de rechter bijvoorbeeld in het Hofstadproces wel enig bewijs van gedrag te verlangen. Het Britse ondersteunen of bevorderen lijkt op zich al een iets zwaardere eis dan het Nederlandse deelnemen, maar het feit dat terroristische organisaties daar reeds verboden moeten zijn maakt de eis zeker strenger dan de Nederlandse eis.
Wél gaat verder de Britse strafbaarstelling van het bijwonen van een al dan niet openbare bijeenkomst, welke uit minstens drie personen dient te bestaan, indien men bekend was met het feit dat de bijeenkomst diende ter betuiging van steun aan of bevordering van de activiteiten van de verboden organisatie.[57] Ten slotte is opmerkelijk de strafbaarstelling van het dragen of zichtbaar maken van een voorwerp of kledingstuk dat een redelijk vermoeden oplevert van deelname of steun aan een verboden (terroristische) organisatie.
Los van bovengenoemde strafbaarstellingen in relatie tot *verboden* terroristische organisaties, is het strafbaar leiding te geven aan of binnen een terroristische organisatie op welk niveau binnen die organisatie dan ook. Naar Nederlandse begrippen zou dit simpelweg kunnen worden vertaald als deelname aan een terroristische organisatie, hetgeen echter zoals gezegd reeds strafbaar is op grond van artikel 140a Sr.
Het is eveneens strafbaar in het Verenigd Koninkrijk enig goed te bezitten in omstandigheden welke een redelijk vermoeden opleveren dat het bezit verband houdt met een terrorismegerelateerd doel. Het verschil met onze strafbaarstelling van voorbereidingshandelingen (artikel 46 Sr) is dat niet bewezen hoeft te worden dat degene die het voorwerp voorhanden heeft ook daadwerkelijk kwalijke bedoelingen had met het voorwerp; deze worden verondersteld aanwezig te zijn. Ditzelfde lijkt te gelden voor de strafbaarstelling van het verzamelen of voorhanden hebben van informatie die nuttig zou kunnen zijn voor de uitvoering of voorbereiding van een terroristisch misdrijf.
Een andere strafbaarstelling in het Verenigd Koninkrijk die we in Nederland niet kennen is het aanzetten vanuit eigen grondgebied, van personen buiten het grondgebied, tot terroristische misdrijven. Opvallend is dat degene die aanzet, veroordeeld kan worden tot de straf die is gesteld op het feit waartoe hij aanzette. Via uitlokking naar Nederlands recht is vermoedelijk deels hetzelfde te bewerkstelligen, maar een aparte strafbepaling ten dezen kennen we niet en bovendien eist aanzetten niet zoals ons art. 47 giften, beloften e.d.
In het Verenigd Koninkrijk bestaat verder een plicht voor burgers tot melding van alle hen bekende informatie indien men vermoedt dat een ander een terroristisch misdrijf heeft gepleegd. Deze plicht – die verder gaat dan ons art. 135-136 Sr waar het gaat om voorgenomen misdrijven; maar past in de lijn van art. 160 Sv en diverse meewerkingsplichten – geldt niet voor informatie verkregen binnen familierelaties, maar is anderzijds niet beperkt tot financiële instellingen; het geldt voor relaties binnen alle werkgelegenheden.

[57] Zie ook O. Ribbelink, *"Apologie du terrorisme" and "Incitement to terrorism"*, analytical report by the T.M.C. Asser Institute of The Hague: Council of Europe publishing 2004, p. 191.

In de Terrorism Bill 2005 wordt de strafbaarstelling van het aanmoedigen van of aanzetten tot terroristische misdrijven voorgesteld. Opvallend is dat wordt voorgesteld de culpoze variant[58] – waarbij schuld moet worden begrepen in de zin van roekeloosheid – expliciet strafbaar te stellen en dat slechts is vereist dat derden bijvoorbeeld een verheerlijking van een terroristisch misdrijf als aanmoediging dan wel aanzetting zouden aanmerken. Niet vereist is dat ze ook daadwerkelijk zijn aangemoedigd door de gewraakte uitlating.
Een tweede voorstel betreft de strafbaarstelling van het verspreiden van terroristische publicaties, met inbegrip van het voorhanden hebben van de publicaties teneinde deze te verspreiden. Een publicatie wordt als terroristisch aangemerkt indien deze direct dan wel indirect aanmoedigt tot het plegen van terroristische misdrijven dan wel volgens (een deel van) degenen voor wie het beschikbaar is, als nuttig of bruikbaar zou kunnen worden aangemerkt in relatie tot terrorisme. Of sprake is van aanmoedigen wordt eveneens beoordeeld door genoemde groep van personen.

Tevens wordt voorgesteld strafbaar te stellen het trainen van personen terwijl degene die de training geeft, weet of vermoedt dat de training zal worden gebruikt voor terroristische doeleinden. Degene die aanwezig is op de plaats waar de training wordt verzorgd, is eveneens strafbaar, ook zonder dat sprake is geweest van daadwerkelijke deelname aan de training.
De Terrorism Bill voorziet verder in verbodenverklaring van niet-gewelddadige organisaties die terrorisme verheerlijken.
Ten slotte beoogt het voorstel de aanmoediging van terrorisme in het buitenland, dat wil zeggen indien het aanmoedigen is gepleegd in het buitenland, te beschouwen als zijnde gepleegd in het Verenigd Koninkrijk.

Wat antiterrorismemaatregelen in Spanje betreft valt op dat de strafbaarstellingen relatief ruim geredigeerd zijn. De definitie van terroristische misdrijven is ruimer, aangezien elke vorm van hulp strafbaar wordt gesteld: degene die een auto verhuurt aan bekende ETA-aanhangers lijkt aldus strafbaar op voet van deze bepaling, terwijl het de vraag is of dat ook geldt ex art. 140a voor degene die ten onzent een zaaltje verhuurt aan de PKK (zie pagina 23). Ook enkele meer concrete strafbaarstellingen zijn ruimer. Noemenswaardig in dit verband is de vangnetbepaling die stelt dat elk misdrijf dat niet expliciet als (terroristisch) misdrijf is omschreven in het Spaanse wetboek van strafrecht, doch dezelfde elementen bevat en doeleinden heeft, eveneens strafbaar is.
Medeplichtigen aan terroristische misdrijven worden in Spanje beschouwd als plegers van het hoofdfeit. De maximumstraffen zijn echter niet gelijkgesteld, waardoor de praktische relevantie van dit stuk wetgeving geringer is. Wel is interessant dat via het Spaanse ‘collaboración’ meer gedragingen – zie pagina 23/24 – als strafbaar lijken te kunnen worden aangemerkt dan op grond van de Nederlandse deelnemingsvorm medeplichtigheid.
In Spanje is verder het verheerlijken of bagatelliseren dan wel vergoelijken van terroristische misdrijven expliciet strafbaar gesteld. Ook in Frankrijk is de ‘apology du terrorisme’ expliciet strafbaar gesteld.
Ten slotte was opvallend dat de Spaanse wetgeving expliciet[59] strafbaar stelt hij die, verantwoordelijk voor de controle over explosieve stoffen, nalaat[60] melding te maken van het ontbreken of het verlies van deze stoffen.

[58] Dat wil zeggen dat slechts ‘schuld’ is vereist voor strafbaarheid in plaats van opzet.
[59] In Nederland zou deze gedraging als medeplichtigheid kunnen worden gekwalificeerd indien het feit opzettelijk zou zijn gepleegd.
[60] Niet duidelijk is of schuld voldoende is, dan wel opzettelijk nalaten is vereist.

Het Franse wetboek van strafrecht bevat een uitdrukkelijke strafbaarstelling van ecologisch terrorisme. Een andere strafbaarstelling betreft het behulpzaam zijn van terroristen in de zin van het bieden van onderdak, geld dan wel andere middelen om in hun levensonderhoud te kunnen voorzien of door welke andere manier dan ook teneinde aanhouding te voorkomen. Deze Franse bepaling komt weliswaar overeen met het Nederlandse artikel 189 Sr, zij het dat de Franse bepaling uitdrukkelijk spreekt van behulpzaamheid aan 'terroristen' en een aanzienlijk hoger strafmaximum kent (3, eventueel 5 in geval van gewoonte, jaren gevangenisstraf, in tegenstelling tot 6 maanden in artikel 189 Sr).
Als terroristisch misdrijf wordt in Frankrijk – anders dan in Nederland – tevens aangemerkt opzetheling, indien gepleegd met terroristisch oogmerk.
Een andere wederom opmerkelijke strafbaarstelling betreft het niet kunnen verantwoorden van de eigen (dure) levensstijl terwijl men regelmatig contact heeft met personen die verdacht worden van of veroordeeld zijn voor terroristische misdrijven.

De Italiaanse strafwet stelt strafbaar het bieden van onderdak, levensonderhoud, vervoer(smiddelen) en communicatiemiddelen aan (onder meer) terroristische organisaties. Deze strafbepaling vertoont gelijkenis met haar Franse tegenhanger, zij het dat het in Frankrijk vereiste opzet lijkt te ontbreken in de Italiaanse bepaling.
Andere strafbaarstellingen uit het Italiaanse wetboek van strafrecht betreffen het verzorgen van training aan personen met het doel terroristische aanslagen te plegen en het wederrechtelijk bieden van uitleg met betrekking tot het gebruik van explosieven of andere gevaarlijke stoffen.

### 8.2 Uitbreiding van (bijzondere) opsporingsbevoegdheden

In het Verenigd Koninkrijk bestaat de verplichting voor alle publieke instellingen informatie te verschaffen op verzoek van politie of inlichtingendiensten. Het verzoek tot informatieverlening hoeft echter niet gegrond te zijn op een verdenking. In die zin gaat deze bevoegdheid verder dan waarin de onlangs in Nederland in werking getreden Wet bevoegdheden vorderen gegevens voorziet. Overigens beoogt het wetsvoorstel tot opsporing en vervolging van terroristische misdrijven (30 164) de Wet bevoegdheden vorderen gegevens te verruimen in de zin dat aanwijzingen van een terroristisch misdrijf voldoende zullen zijn om gegevens te vorderen. Het is vooralsnog niet duidelijk in hoeverre de Nederlandse wet zich dan zou onderscheiden van de Britse regeling. Wat deze laatste betreft moet de informatie overigens wel worden gevraagd met het doel deze te gebruiken in een (eventueel) strafrechtelijk onderzoek (in de toekomst). De informatie kan betrekking hebben op patiënteninformatie, afgenomen bancaire diensten, belastingafdracht enzovoorts. Wat fiscale informatie betreft geldt dat inlichtingendiensten deze kunnen opvragen ondanks de geheimhoudingsplicht die belastingdiensten normaal gesproken hebben. Het medisch beroepsgeheim lijkt geen hindernis op te werpen in het Verenigd Koninkrijk. De Wet bevoegdheden vorderen gegevens is in elk geval in dit opzicht minder verreikend dan haar Britse tegenhanger.

In Spanje is de Minister van Binnenlandse zaken c.q. de Staatssecretaris van Veiligheid in geval van een noodtoestand bevoegd onderzoek aan telecommunicatie te bevelen in het kader van strafrechtelijke onderzoeken naar misdrijven gepleegd (of beraamd) door terroristische organisaties. Deze variant heeft uiteraard enige verwantschap met de bevoegdheid krachtens de Wet op de Inlichtingen- en Veiligheidsdiensten. Vanwege de gecompliceerdheid van de materie verdient het nader onderzoek hoe in de diverse landen exact wordt omgegaan met 'preservation' respectievelijk 'retention' van telecommunicatie, alvorens te kunnen bepalen in

hoeverre de buitenlandse regelingen tot nieuwe toepassingsmogelijkheden in Nederland zouden kunnen inspireren.

In Frankrijk is het toegestaan doorzoekingen (ook in woningen) buiten de aanwezigheid van betrokkenen en eventuele raadsman te doen plaatsvinden.

### 8.3 Uitbreiding van de mogelijkheden rondom preventieve hechtenis

*Hechtenis zonder concrete verdenking, beperken van aanwezigheidsrecht bij verlengingszitting en onthouden van informatie aan verdediging*
In het Verenigd Koninkrijk is het mogelijk personen aan te houden en vast te houden voor in beginsel maximaal 48 uren, zonder dat sprake is van een concrete verdenking. Althans, niet concreet in de zin dat een vermoeden van schuld bestaat aan enig specifiek strafbaar feit. Het is voldoende wanneer een Britse opsporingsambtenaar vermoedt dat de betreffende persoon een terrorist is. Deze detentie zonder concrete verdenking kan worden verlengd na machtiging door een rechter, waarbij de maximale duur van de detentie in totaal niet meer dan 7 dagen mag bedragen. De machtiging kan worden verleend met het doel nieuw bewijs te vergaren dan wel collusiegevaar te voorkomen, dat wil zeggen bestaand (maar nog onbekend) bewijsmateriaal te behouden. De rechter kan beslissen dat verdachte en zijn advocaat niet aanwezig zullen zijn op de zitting ter behandeling van het verzoek tot de genoemde verlenging van de detentie. Bovendien kan de informatie op grond waarvan het verzoek tot verlenging wordt gedaan, worden onthouden aan de verdachte en zijn advocaat.
Deze gang van zaken toont gelijkenis met het Nederlandse wetsvoorstel waarin onder meer uitstel van inzage in processtukken wordt beoogd. Dit laatste betreft echter de zaak in zijn volledigheid (de bewijsmiddelen) en dus niet de stukken op basis waarvan de verdenking en dus de preventieve hechtenis wordt gerechtvaardigd. Hierbij is het overigens moeilijk aan te geven in hoeverre de stukken ter staving van de verdenking en de overige stukken (bewijsmiddelen) elkaar inhoudelijk overlappen.
In Italië is het in uitzonderingsgevallen mogelijk een verdachte gedurende 5 dagen preventief te hechten en te verhoren zonder bijstand van een advocaat.

*Preventieve hechtenis zonder aanklacht*
De Britse Terrorism Bill 2005 voorziet verder in een verlenging van de preventieve hechtenis zonder aanklacht van 14 dagen naar 28. Dit voorstel laat zich echter moeilijk vertalen naar de Nederlandse situatie waarin een concrete verdenking is vereist alvorens tot vrijheidsbeneming over te kunnen gaan. In het Verenigd Koninkrijk (en op het eerste gezicht tevens in Spanje en Frankrijk) is het – anders dan in Italië – zoals gezegd mogelijk verdachten eerst op grond van een niet-concrete, dus lichtere verdenking (‘aanwijzingen’) vast te houden voor de duur van in beginsel 2, maar maximaal 7 dagen. In het Verenigd Koninkrijk kan de verdachte vervolgens preventief worden gehecht zonder aanklacht gedurende (vooralsnog) 14 dagen. Overigens is vrijheidsbeneming van bij terorisme betrokken personen nog onderwerp van debat in het Verenigd Koninkrijk. Dit mede naar aanleiding van de uitspraak van de Law Lords op 16 december 2004[61] waarin de ongelimiteerde detentie zonder aanklacht of veroordeling van negen buitenlandse *'suspected international terrorists'*[62] onrechtmatig werd geacht.
In Spanje bestaat na de eerste 5 dagen van detentie op grond van een relatief lichte verdenking de mogelijkheid van ‘pre-trial detention’ (welke overeen lijkt te komen met het Britse ‘pre-

[61] House of Lords [2004] UKHL 56.
[62] Het ging om lieden die de regering wilde uitzetten maar die in hun thuisland dreigden te worden gefolterd.

charge detention') die nog eens maximaal 8 dagen kan duren. Vervolgens volgt na de aanklacht preventieve hechtenis voor de duur van maximaal 4 jaren.
In Frankrijk bedraagt de periode van hechtenis zonder aanklacht maximaal 6 dagen. Niet duidelijk is welke mate van verdenking vereist is voor toepassing van dit dwangmiddel. In ieder geval dient sprake te zijn van 'un risque sérieux de l'imminence d'une action terroriste en France ou à l'étranger ou que les nécessités de la coopération internationale le requièrent impérativement'.
Een werkelijk bruikbare, verantwoorde vergelijking met het Nederlandse systeem voor preventieve hechtenis laat zich echter niet goed maken vanwege de onderlinge fundamentele verschillen in het systeem van de verschillende landen. Gezien de lage eisen die ten onzent worden gesteld aan de betrouwbaarheidstoets van de bron van de verdenking (een anonieme tip kan voldoende zijn) is het verschil tussen aanwijzingen en andere lichtere criteria die in het buitenland worden aangetroffen en onze verdenkingseis in wezen klein.

*Uitstel van rechtsbijstand*
Opvallend is wel dat de preventief gehechte in het Franse systeem pas na 4 dagen mag worden bijgestaan door een advocaat. In Nederland kan de verdachte weliswaar zonder bijstand van een raadsman worden verhoord tijdens het in beginsel maximaal 6 uren durende dwangmiddel van ophouden voor onderzoek (artikel 61 Sv), maar een aansluitende inverzekeringstelling is slechts mogelijk nadat verdachte is verhoord door de (hulp)officier van justitie, tijdens welk verhoor de verdachte bevoegd is zich door een raadsman te doen bijstaan (artikel 57 lid 2 Sv).
De nieuwe Franse wet in de strijd tegen terrorisme voorziet in de mogelijkheid terreurverdachten 6 dagen lang (in plaats van 4) preventief te hechten zonder aanklacht, gedurende welke tijd de verdachte kan worden verhoord buiten de aanwezigheid van een raadsman en zonder gewezen te worden op zijn zwijgrecht. Tevens kan hem worden ontzegd derden op de hoogte te brengen van zijn arrestatie. Een herhaald verzoek daartoe kan hij na vier dagen hechtenis indienen. De verdachte heeft wel de gelegenheid zijn raadsman te raadplegen na respectievelijk 96 en 120 uren hechtenis. De raadsman heeft ter voorbereiding van deze gelegenheden echter geen toegang tot het zaaksdossier.

## 8.4 Beperking van personen in hun bewegingsvrijheid en keuzemogelijkheden wat betreft beroepsuitoefening

De zogenaamde 'control orders' uit het Verenigd Koninkrijk vertonen gelijkenis met het Nederlands wetsvoorstel Bestuurlijke maatregen nationale veiligheid. De control orders beperken de bewegingsvrijheid echter aanzienlijk verder dan de in Nederland voorgestelde meldplichten of gebiedsverboden. Een control order kan namelijk onder meer inhouden een avondklok, elektronisch toezicht, beperking van communicatiemiddelen zoals internet en telefonie, beperking van het gebruik van computers en in uitzonderingsgevallen zelfs huisarrest. Control orders kunnen echter slechts worden opgelegd ten aanzien van personen die worden verdacht van terrorisme. In hoeverre deze eis materieel gezien echter verschilt van de eisen die in het Nederlandse wetsvoorstel worden gesteld aan de mate van verdenking, namelijk als zijnde gebaseerd op feiten en omstandigheden die op zich zelf *onvoldoende* zijn voor strafrechtelijk optreden, is vooralsnog niet duidelijk. Duidelijk is wel dat de rechtsbescherming tegen control orders minder groot is dan tegen de Nederlandse voorgestelde maatregelen. Deze verminderde rechtsbescherming komt tot uitdrukking in de uitsluiting van verdachte en zijn advocaat van (delen) van de behandeling door de rechter van de gegrondheid van (de handhaving van) de control orders, en het gebruik van geheime informatie in deze procedure.

In zowel Spanje, Frankrijk als in Duitsland kunnen personen die deel uitmaken van dan wel verband houden met terroristische organisaties worden ontzet uit het recht enige openbare functie te bekleden.[63]
Hoewel voor Nederland praktisch gezien van geringe orde, is niettemin interessant te vermelden dat het in Spanje tevens mogelijk is de rechten van preventief gehechte verdachten tot uitoefening van hun publieke functie op te schorten.

### 8.5 Bewijslast

Als er een thema is waar te gemakkelijke rechtsvergelijking gevaren in zich draagt dan is het wel het bewijsrecht. Juist op dat terrein vergt vergelijking bijna altijd het in ogenschouw nemen van allerlei verschillende manieren waarop in diverse landen checks and balances tegen onterechte veroordelingen zijn ingebouwd: bijvoorbeeld de mogelijkheden van de verdediging om inhoudelijk kwesties ter discussie te stellen, willen nogal eens variëren – en dat kan eventueel lichtere bewijsposities voor het OM compenseren. Toch wagen wij een paar rechtsvergelijkende notities 'kort door de bocht'.
In het Verenigd Koninkrijk is in enkele gevallen sprake van omkering van de bewijslast. Verdachte dient dan te bewijzen dat hij een verdacht goed zonder kwalijke bedoelingen voorhanden had. Of dat hij geen idee had van het feit dat zijn werknemer of collega een terroristisch misdrijf had begaan. Dit in verband met de plicht voor burgers alle hen uit werkkring bekende informatie hieromtrent te delen met de politie. Wat betreft het misdrijf van deelname aan een terroristische organisatie is zelfs geen verdediging mogelijk in de zin van het bijvoorbeeld niet hebben geweten met een dergelijke organisatie te maken te hebben gehad.
In dit verband is tevens opmerkelijk dat in geval van een noodtoestand (met betrekking tot Noord-Ierland) in het Verenigd Koninkrijk de verklaring van een opsporingsambtenaar inhoudende dat verdachte lid is van een verboden organisatie geldt als voldoende bewijs daartoe. Bovendien mag de rechtbank conclusies trekken uit het feit dat verdachte bleef zwijgen tijdens politieverhoren. Deze conclusies kunnen echter slechts als bewijs worden gebruikt in samenhang met andere bewijsmiddelen en verdachte voor aanvang van het betreffende verhoor zijn advocaat heeft kunnen raadplegen.

### 8.6 Kroongetuigen

Spaanse rechters zijn bevoegd strafvermindering te verlenen aan bekennende terroristen die bovendien medewerking verlenen aan politie en justitie in de strijd tegen terrorisme. Deze regeling komt overeen met onze Kroongetuigenregeling (Wet toezeggingen aan getuigen in strafzaken), met als verschil dat de Spaanse rechter volledige vrijheid lijkt te genieten in het bepalen van de omvang van strafvermindering.
De Franse wet gaat in een bepaald opzicht verder dan zowel de Spaanse als Nederlandse wet door personen die een – naar Nederlandse begrippen – niet-strafbare poging tot een terroristisch misdrijf hebben gepleegd, immuniteit van straf te verlenen indien ze behulpzaam zijn geweest bij het voorkomen van het terroristische misdrijf en willen getuigen tegen de oorspronkelijke mededaders, indien aan de orde. Had de tot inkeer gekomen terrorist wellicht al wel strafbare handelingen verricht, dan heeft hij recht op vermindering van zijn straf met de helft.

[63] Voor Duitsland gaat het hierbij om de zogenaamde 'Berufsverbote'.

De Italiaanse wet bevat een creatieve variant op de bovenstaande regelingen. Buitenlanders kunnen een al dan niet tijdelijke verblijfsvergunning verkrijgen in ruil voor samenwerking met de autoriteiten.

### 8.7 Verbodenverklaring en ontbinding van terroristische organisaties en politieke partijen

In het Verenigd Koninkrijk is het expliciet mogelijk terroristische organisaties verboden te verklaren. Dit in tegenstelling tot het Nederlandse algemene artikel 2:20 BW op grond waarvan rechtspersonen waarvan de werkzaamheden in strijd zijn met de openbare orde, verboden kunnen worden verklaard en ontbonden. Er is echter reeds een wetsvoorstel aanhangig dat de civielrechtelijke mogelijkheden tot het verbieden van terroristische organisaties beoogt te verruimen (Kamerstuknummer 28764).
De Spaanse wetgeving bevat de mogelijkheid politieke partijen te ontbinden op grond van zeer ruim geformuleerde gronden, waarvoor zij verwezen naar pagina's 24 en 25 van dit rapport.

### 8.8 Overig

In Frankrijk zijn de verjaringstermijnen voor vervolging en executie van straffen verlengd tot dertig jaren voor misdrijven en twintig jaren voor overtredingen.

### 8.9 Slotopmerkingen

In de inleiding van dit rapport is er reeds op gewezen dat vanwege het inventariserende karakter van dit onderzoek niet met zekerheid is te stellen dat de bevindingen in dit rapport ook daadwerkelijk als noviteiten kunnen gelden. Om die reden verdient het dan ook uitdrukkelijk aantekening dat dit rapport ons inziens niet als uitgangspunt kan dienen voor strafrechtelijk beleid.
Een tweede beperking die dit inventariserende onderzoek kenmerkt betreft het feit dat niet uit het oog moet worden verloren dat het onderzoek slechts vanuit (voornamelijk) strafrechtelijk oogpunt is verricht.
Juridisch gezien blijkt de omvang van deze beperking uit het feit dat veel van de mogelijkheden die hierboven zijn gesignaleerd, vanuit mensenrechtelijk oogpunt problematisch kunnen zijn. Enkele van de noviteiten ontleend aan het Verenigd Koninkrijk of Italië bijvoorbeeld lijken op het eerste gezicht niet de toets van de voorzienbaarheidseis voor strafbaarstellingen (artikel 7 EVRM) te kunnen doorstaan. Ook lijken de onschuldpresumptie en de eis van gelijkheid van wapenen (artikel 6 EVRM) in het gedrang te komen. Het verdient aldus aanbeveling nader mensenrechtelijk onderzoek te verrichten ten aanzien van nieuwe interessante straf(proces)rechtelijke maatregelen die uit dit onderzoek zijn gebleken alvorens deze eventueel toe te passen op de Nederlandse situatie. Voordat echter een degelijk mensenrechtelijk onderzoek mogelijk is, dient zoals gezegd de werking van de betreffende bepaling volledig in kaart te worden gebracht. Zonder af te doen aan het belang van het overzicht zoals deze is verkregen aan de hand van de serieuze scan, is het goed te beseffen dat de waarde van de resultaten uit dit onderzoek enigszins beperkt blijft indien een dergelijk nader onderzoek achterwege zou worden gelaten.
Bij een nader onderzoek zou eveneens kunnen worden ingegaan op de vraag hoe in het buitenland wordt omgegaan met voor Nederland actuele wetgevingskwesties zoals met name het gebruik in het strafproces van informatie afkomstig van inlichtingendiensten. De serieuze

scan heeft geen informatie opgeleverd over dit onderwerp.[64] Een nader onderzoek valt vanwege de omvang buiten het bereik van de in dit rapport uitgevoerde scan.
Hetzelfde geldt bijvoorbeeld ook voor de vraag hoe in het buitenland exact wordt omgegaan met 'preservation' respectievelijk 'retention' van telecommunicatie. In de hierboven opgenomen overzichten is daar enige helderheid over verschaft. De gecompliceerdheid van de materie eist echter nader onderzoek om te kunnen bepalen in hoeverre de Nederlandse regeling nu verschilt van de buitenlandse tegenhangers.
Tevens zou bijzondere nadere aandacht moeten worden besteed aan antiterreurmaatregelen op basis van het vreemdelingenrecht. Dit rechtsgebied is voor bijvoorbeeld het Verenigd Koninkrijk, Duitsland en Italië een belangrijk middel gebleken in de strijd tegen terrorisme.

Ten slotte kan buiten het strikt positiefrechtelijke kader worden gedacht aan de sociaal institutionele verschillen in een land, de verschillende rechtstradities binnen welke context de betreffende maatregelen moeten worden beoordeeld en de politieke constellatie in een land. Ook het feit dat in dit rapport geen aandacht is geschonken aan deze voor wetgevingsprocessen relevante thema's, onderstreept het belang van nadere studie die daadwerkelijk als basis zou kunnen dienen voor strafrechtelijk beleid in Nederland.

Er is kortom nog behoorlijk veel nuttig onderzoek te verrichten. Met dit rapport is geprobeerd alvast een goede aanzet te geven.

30 januari 2006, Nijmegen

[64] Afgezien van de onze Minister van Justitie reeds bekende regels over 'disclosure' uit het Verenigd Koninkrijk, welke regels uiteen worden gezet in de conclusie van A-G Fokkens bij het arrest HR 25 juni 2005, *NJ* 2002, 518.