



Summary of Proceedings

Workshop on the conduct of criminal trials against, and the prosecution of, foreign terrorist fighters, including returnees and relocators

11-12 June 2019, Madrid

The Council of Europe, the Ministry of Justice of Spain and the Ministry of Foreign Affairs, European Union and Co-operation of Spain co-organised a “Workshop on the conduct of criminal trials against, and the prosecution of, foreign terrorist fighters, including returnees and relocators”. The Workshop took place in Madrid at the Centre for Legal Studies (Centro de Estudios Jurídicos) on 11 and 12 June 2019.

The Workshop gathered together over 100 specialised judges, prosecutors and legal experts with relevant and hands-on experience on criminal cases concerning foreign terrorist fighters, returnees and relocators and with solid understanding of the complexity and challenges involved conducting criminal trials and prosecutions in this field. Member States of the Council of Europe, observer States, the Council of Europe’s closest partners and international organisations took part in the Workshop.

Ms Dolores Delgado, Minister of Justice of Spain, opened the meeting by emphasising the commitment of the Spanish government in the fight against terrorism together with its strong collaboration with the Council of Europe in activities in this field. She also highlighted the excellent work of the Council of Europe through the Counter-Terrorism Strategy 2018-2022 and mentioned with great enthusiasm the full alignment of the Spanish legislation with the Council of Europe instruments.

In his opening remarks, Mr Carlo Chiaromonte, Head of Counter-Terrorism at the Council of Europe, noted that the threat that terrorism poses is still very high and amongst the many challenges which remain significant, the successful prosecution of

foreign terrorist fighters is one of the most crucial. He highlighted that while States are urged to find legal ways of bringing to justice those responsible for the commission of terrorist crimes, fundamental democratic values, the rule of law and human rights should be fully respected.

The Workshop was divided into five sessions, each guided by one moderator and featuring the presentations of several key speakers.

What follows is a summary of the results of these two days of case studies and open discussions.

Session I: Presentation of concrete cases dealt with at national level involving foreign terrorist fighters, including returnees and relocators

This session focused on concrete examples/cases of the prosecution of foreign terrorist fighters. The importance of the **sharing of information and data** (including, where feasible, biometric data) as a tool to gather evidence and link suspects with terrorist offences committed abroad was underlined. In addition, **e-evidence, telecommunication sources and financial transactions** by suspects could often provide significant indications for crimes having been committed, and in some cases direct evidence. It was pointed out that **making use of existing mutual legal assistance instruments** to obtain this evidence is key to a successful prosecution of foreign terrorist fighters, but States should be aware that in some cases **crucial evidence may be available in their own jurisdictions** as well, even if the terrorist offences in question were committed abroad.

It was emphasised that the sometimes important role played by women in Daesh should not be overlooked and hence **gender stereotyping should be avoided** in order to ensure an efficient prosecution of foreign terrorist fighters regardless of their gender. It is thus necessary to look into the actual role and involvement of women in Daesh in order to decide whether or not the threshold for prosecution has been reached.

The issue of **prosecutorial strategy** was also touched upon. Prosecutors will sometimes have to choose between alternative legal bases for prosecution, e.g. for war crimes, crimes against humanity or murder instead of for a terrorist offence. These choices should be based on an assessment of what is most efficient in terms of ensuring a conviction.

Participants also emphasized the **benefits of centralising the prosecution of foreign terrorist fighters**, pooling expertise and having specialist judges and prosecutors.

Session II – Key elements for an effective prosecution

In Session II the importance of the principle of **bringing terrorists to justice** was underlined and, the fact that in order to be able to do so, **a clear legal basis in domestic legislation** for prosecuting terrorist offences, including preparatory acts should be provided.

As cases against foreign terrorist fighters by definition concern more than one jurisdiction, the usefulness of **establishing joint investigation teams (JITs)** was mentioned.

Proving that a suspect has actually travelled abroad for the purpose of terrorism is often the challenging part of prosecuting this type of case. The activities of suspects on the internet and social media, as well as information concerning their flight bookings, telephone communications, provisions for the settlement of their financial affairs, the termination of their jobs, as well as documents related to their last will and testament may all be indicative of, or in some cases provide direct evidence for, foreign terrorist fighter activities. Likewise forensic evidence obtained from clothing or other personal belongings of suspects may prove useful.

Finally it was pointed out, that in those cases where criminal prosecution would have to be ruled out for reasons of lack of solid evidence that could be admitted in court, **alternative control measures** to prosecution could be considered.

Session III – Respect of human rights and the rule of law in counter-terrorism-related cases

This Session was devoted to discussing the basic legal safeguards applicable to all criminal prosecutions, including for terrorist offences.

The fundamental principle that all measures taken by States to fight terrorism must **respect human rights and the principle of the rule of law**, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision, was emphasised.

It was further underlined that respecting this fundamental principle does not exclude the application of **more flexible procedures in terrorism cases**, as long as the right of the defendant to a fair trial (as well as observance of his or her human rights) was not put in jeopardy.

Though, in the European region, the European Court of Human Rights remains the final arbiter on all questions related to the interpretation of the European Convention on

Human Rights, it is for the national courts to apply and implement the Convention correctly in the first place, in accordance with the **principle of subsidiarity**. It is accordingly important to make sure that procedures applied in terrorism cases, as well as other counter-terrorism measures, at national level are in conformity with the Convention and the jurisprudence of the Court.

Session IV – Gathering and admission of evidence for the purpose of criminal prosecution

Session IV dealt with the challenges related to the gathering of evidence and its admission in court in relation to the prosecution of foreign terrorist fighters.

It was pointed out that there are significant **practical and procedural problems related to the carrying out of criminal investigations in other jurisdictions**. There may be language and cultural barriers involved which require the involvement of experts on these issues. Again the **usefulness of mutual legal assistance instruments and letters rogatory** was underlined.

In terms of the gathering of evidence needed for a successful prosecution, **various types of evidence were identified**, including e-evidence (in particular relating to social media platforms), which to a large degree is “open source” material. Moreover, credit card records and phone records of suspects are often of particular interest in cases involving foreign terrorist fighters.

When it comes to the **classified sources** the need to have in place procedures for handling this sort of evidence was emphasised. Concerning the so-called “**battle field evidence**”, close co-operation between civilian and military authorities is necessary to secure this particular type of evidence, bearing in mind that the primary task for military personnel is not the gathering of evidence for criminal trials. It is crucial to use efficient procedures to make this kind of evidence (generally classified) available in court proceedings.

Given the nature of activities of foreign terrorist fighters it may also be necessary to have procedures in place for taking depositions from witnesses abroad.

Session V – Children involved in terrorism-related offences

Session V provided an overview of the multifaceted issues involved in the prosecution of children for terrorist offences.

Children involved with Daesh should, as a starting point, **be considered as victims and provision should be made for their social rehabilitation and reinsertion into society**, all in the best interest of the child.

Depending on the seriousness of offences allegedly committed by them, their age and their mental development, the **prosecution of children for terrorism and terrorism-related offences may exceptionally be an option**, where feasible in accordance with national legislation on the minimum age for criminal responsibility of children. In this context the question of **whether terrorism should be dealt with as a juvenile delinquency matter or under the ordinary criminal law** was raised. This remains an issue to be revisited in the future when there is a more comprehensive overview of the extent to which children of foreign terrorist fighters, or children who have joined Daesh of their own volition, may have been involved in terrorist offences or other serious criminal offences.

It was pointed out that there is a **need to gain more information about the various roles played by children in the activities of Daesh**. A possible model for dealing with child terrorists could be how child soldiers have been dealt with in the past. However, the context of Daesh may be too specific to allow for comparison with the use of child soldiers in other conflicts.

The need to take **all relevant measures to prevent any radicalisation of children leading them to become terrorists** was repeatedly underlined. In case of an actual prosecution against a child for involvement in terrorism, States must **put in place a special procedural regime adapted to children in order to ensure a fair trial**. Participants were strongly invited to consider the benefits of establishing specialised courts staffed with judges, prosecutors and defence lawyers trained in how to deal with children in the context of criminal proceedings.
