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Analysis of the first court ruling made on the basis of the Belgian Law of 27th December 2005 on the modes of investigation in the fight against terrorism and serious and organised crime

By
Denis Bosquet

Lawyer
Assistant Lecturer at the Université Libre de Bruxelles, Law Faculty

Introduction

Mister Chairman, Ladies and Gentlemen, the first idea that sprang to my mind when I was contacted by the organisers of this conference was that I would examine the issues adjacent to the fight against terrorism i.e. "parallel" legislation if I may use such an expression, which aims to implement the methods of repression not specifically targeting terrorism. (I am talking here among others about the European arrest warrant and the law on particular methods of investigation.)

And then, two weeks ago, Brussels' Criminal Court 54a made a ruling (that was several hundred pages long) applying for the first time the law on terrorist crimes.
After a quick read of the ruling, which is obviously not final and which, according to the information I have received, is already being appealed against by some of the accused parties, I can already say that this ruling is bound to go down in the legal history of our country and will be a key decision as it contains several considerations on criminal law and criminal procedure about which one cannot remain indifferent.

As an introduction, and this will also be my conclusion, I remain firmly convinced of the fact that a democracy which is attacked by the violence of terrorism will only respond effectively to this violence if, basically, it sticks to the rules it is facing. And I will not hide the fact that neither the news nor the way it seems the court has responded to certain considerations argued by the defence seem to be in line with what I would like to see developing. Let me explain.

I am extremely surprised by the more and more obvious revelation that certain states systematically practice torture in what is visibly an institutionalised manner, torture which is naturally kept hidden, and in some cases, torture which is tolerated by certain states but is kept half-hidden, so to speak, when we hear about 'planes landing on our territory, apparently with the authorisation of the authorities of our country. This type of practice worries me, and you will see that the 54th courtroom's ruling alludes among other things to the problems mentioned by the defence, which were at the same time suspicions and evidence that torture is being practiced in Moroccan prisons, among them a ruling that

appears in the case file of the Court of Casablanca, which reproves such practices. You will see what the Brussels criminal court has to say about this.

Three points will be looked into regarding the decision by Brussels' criminal court: the court's competence, the taking of evidence and the liability of the prejudice

1. The competence of the court

An exception was underlined by the defence of certain accused persons which considered that the terrorist infringements stipulated in Article 137 of the Penal Code were in fact political misdeeds. The court's response was extremely clear with regard to judicial precedents and to the doctrine that is applied today.
Allow me to read to you now some excerpts that are, unfortunately, somewhat fastidious but which, to me, make it possible to have a clearer idea of the way issues were handled. After having rejected with extreme firmness the argument according to which a number of the accused considered that the acts they had committed were political acts and therefore came under the jurisdiction of the Court of Assize, the Court could not help going beyond this simple rejection of the argumentation and wrote this: "*Whereas the development of international law also imposes very abundantly but also in a particularly enlightening manner that the political character of the offence should not be recognised for the offences provided for in the Law of 19th December 2003. Whereas present-day terrorism reveals on the contrary blind crime characterised among other things by the deliberate will to harm a very large number of victims, whether the latter are involved or not in the conflict that generated the terrorist act and by the wish to bring about a state of terror propitious for upsetting the balance of power, and whereas even if they stem from political mobiles and whatever the political form of the nation that is fought against, such actions may not benefit from a different treatment than violations of common law" (our translation).*

My feeling on reading these few considerations which are all in all strictly legal considerations is that, in a way, it is a trend at the moment to simply not apply the law with extreme strictness but to add to it considerations that are maybe more of a moral or political nature. If one follows this hypothesis through, then one pulls out of the judicial debate a bit too quickly.

2. Problems concerning the taking of evidence

In this court case (in which I took no part, otherwise I would not have taken the liberty of speaking here today about this case), the defence brought to the fore a number of problems of criminal procedure that concern i.a. the admissibility of the legal proceedings.
It has to be known that the case brought before the court started out on elements from i.a. the observations and electronic eavesdropping carried out by the "Sûreté de l'Etat" (State security service). And, most strangely, the Court mentions that in the present case, two reports were submitted that had been written by the "Sûreté de l'Etat", dated 25th November and 24th December 2002.

Besides these grievances regarding means of proof being obtained irregularly in Belgium according to internal law and to directly applicable supranational legislation, the defence of certain accused persons maintains that "*at the very least, the taking of evidence by the judiciary of means of proof required by the "Sûreté de l'Etat" would contravene the right to a fair trial in view of the fact that the "Sûreté de l'Etat" has not revealed the sources of the information it has provided, making it therefore impossible to verify their regularity upstream. That it is by taking this fact into consideration that the legislator recently introduced rules concerning the systematic observations carried out by a police body in the framework of the Law of 6th January 2003 on particular investigation techniques which inserted an Article 47 in the Criminal Investigation Code".* And the Court said that "*It is therefore clear in the legislator's mind, the legislator who adopted the organic law on the information services, that the Sûreté de l'Etat was competent to carry out observations based on Article 13 of the aforementioned law. That the Court must produce an equal text in the way the legislator intended".* The Court concluded in the following curious way: "*That it is therefore rightfully that the defence of the accused X argues that the systematic observations that the Sûreté de l'Etat is said to have carried out in this case are irregular in view of the requirements of Article 8 §2 of the Convention safeguarding human rights and fundamental freedoms, and that the "comité R" rightfully conveyed to the legislator numerous warnings in this respect, which, however, remained unanswered".*(our translations)

If we were to stop here, what would be the conclusion to these sharp considerations? Simply that the elements collected by the Sûreté de l'Etat and added to the file and that are at the origin of the prosecutions should, in a way, discredit them. And the Court responds like this: "*That even though many pieces of information communicated by the Sûreté de l'Etat cannot be used as proof as such, it remains pertinent to apply in their respect the principles that must govern the taking of evidence in court"* and to return to the ruling made by the Court of Cassation on 16th November 2004 which makes it possible in pretty much any situation to accept upstream of the prosecution irregularities in the taking of evidence. It will of course be interesting to see what will be the position of the European Court of Human Rights regarding this type of consideration but it is not completely over yet.

The Court says: "*That by analogy, all of the principles that have just been recalled, all of the information provided by the Sûreté de l'Etat does not therefore have the vocation of being used as proof but constitutes simple pieces of information which, even if they may justify a future investigation that might confirm them, may not in themselves and in a determining way found the judge's conviction. That this restriction is a procedural guarantee that counterbalances the prejudice, for legitimate motives, to the integrally adversarial character of a criminal trial".* But we are overjoyed with this consideration, aren't we? But the following is upsetting: "*That to conclude, nothing justifies doing away with the information provided by the Sûreté de l'Etat, which could not in any way prejudice the investigation that followed."* (our translation)

A series of considerations concerning irregular evidence with respect to foreign law need to be expressed here. One should know that in this case – as you will have all guessed, this is the GICM case – some information comes from Morocco, from France and also Italy.

These pieces of information are of various types: telephone tapping, observations, documents, hearings from Moroccan prisons in particularly obscure conditions…

A certain number of problems were posed, and the court responds systematically by stating that it is necessary, whenever a problem is mentioned regarding the regularity of proof obtained abroad, to determine, in the context of Article 6 of the European Convention of Human Rights, whether this Article is observed or not, and therefore to ask whether the trial is a fair trial or not in the sense of this Convention.

Then, important problems were analysed: the duration of custody, the timeframes for detention and judgment in Morocco, the suspicion of generalised torture in Morocco… When I say suspicion of generalised torture, this was not only a suspicion. There were objective pieces of evidence in the case file that made it reasonable to believe that in Moroccan prisons, statements had purely and simply been obtained under torture.

I hope you will allow me to read what the Court had to say in this respect: "*That, however, the Court is neither equipped, nor competent, nor habilitated to give out good and bad marks to a State in the matter. Its approach can therefore only be a general one but must remain focussed on the facts of the case since the court is only referred to for one case in particular. That the mandated court must be particularly attentive when it comes to examining the required proof in a country that does not offer the same standards of protection in terms of human rights as those that are in force in Belgium. That however, in this case, there is no concrete element of a nature to lead one to believe that the accused X, Y and Z were tortured, in particular the complaint expressed by the accused X at the hearing*

whereby he is said to have been heard under constraint and pressuring. Also, the fact that he retracted from the hearing, which is in itself extremely usual, is not an indication of torture, the Belgian jurisdictions being confronted daily with the attitude of accused people revising their statements." Finally, "*the declaration of the Moroccan prisoner's spokesperson produced by the accused Y's defence is not by nature convincing. Whereas in view of the preceding elements, there is no reason to consider that the litigious hearings conducted in Morocco are contrary to the principle of international and supranational law directly applicable in our national judicial system. There is therefore no reason to remove them from the debate for this motive."* (our translations)
This means, therefore, that if in doubt, one keeps the evidence that has been collected.

Other problems arose: the absence of confrontation, the elements of proof collected in France, the oath, the contradiction with internal law, the problems regarding custody in France…
The Court did not take them into consideration: it ignored the non-application of certain principles: the absence of notification of the right to silence, the duration of the custody, the brutality, the lack of sleep… These rules, which apply in France, seem to us to be absolutely essential and are printed in all manuals on criminal procedure. Whatever the case, using this type of method must never be accepted.

3. The legal conditions of imputability of the different accusations

I shall now deal with more specific problems of criminal law, judicial security and the definition of participation as stipulated in Article 66 of our Penal Code (the participation of several people in the same crime or offence).
The Court declares: "*For the accusation of belonging to a group to be declared to be established, it is necessary to demonstrate the intention of adhering to and effectively collaborating in a group, and it must have been demonstrated elsewhere that this group has the vocation of perpetrating terrorist acts. In such a hypothesis, the violation of Articles 139* [definition of a terrorist group] *and 140* [participation in an activity of a terrorist group] *will remain established even if the vocation of the group has not yet been turned into action by the slightest preparatory act in view of a terrorist attack",* so in a way, we are now leaving the notion of attempt… "*or, if the participant ignores everything about the terrorist acts in question that might be carried out abroad by other members of the group, as long as he has adhered and contributed to this group, and knowing that in doing so he will contribute towards creating if only on a very small scale or very indirectly conditions enabling the group as a whole to become operational."* (our translations)
This is what is known, in my book, as borrowed crime. For me, there is here a problem of judicial insecurity.

In view of what precedes in the judgment, the Court concludes with a moral consideration: "*The use of force by individuals to materialise their opposition, even it is their political opposition to the regime of the sovereign State recognized as such by the international community embodied by the United Nations Organisation, must be considered, as long as it meets the specifications of the Belgian Penal Code's Article 137, to be a terrorist act unless it is a fight for self-determination against a colonising State or if it is a fight aimed at preserving or re-establishing democratic values. However, the last two reflections must be subject to exception when the means employed, such as the deliberate murder of unarmed civilians, are odious to such an extent that they are reproved by morality at any time and in all nations".*

I do not know what the Court of Appeal will do with this judgment, nor what the Court of Cassation will say about a certain number of considerations regarding the procedure and criminal law, nor what the European Court of Human Rights will have to say about all this.

Conclusion

My initial feelings on this issue, that I mentioned to you earlier on, while they are slightly excessive, certainly did not cool down on reading this ruling. (I read it quickly as this decision is very lengthy and extremely tedious.) But I do not have the feeling that to mix morals with justice is a productive confusion. Furthermore, neither do I have the impression that to broaden to such an extent the receivability of several methods which are by definition and by their very nature inadmissible, in the name of the fight against terrorism, serves justice in its fight against this terrorism.
That is what I wanted to tell you this evening. Thank you for your attention.