



CREOGN Research Note

French Gendarmerie Officers Academy Research Centre

TERRORISM IN LIGHT OF THE "TARNAC AFFAIR"

Currently, French law on terrorism is subtle and rather complex. For thirty years policymakers have multiplied the number of normative texts¹ on terrorist acts but they have left a lot of leeway for judiciary services to adapt this concept and they have entrusted case law with the task of defining the limits of its legal classification?. France refuses to establish a specific and general incrimination of terrorism like Germany and Italy, for instance. That is the reason why the Tarnac trial is highly awaited. Indeed, according to the defense attorneys, the case is likely to be brought to the court of cassation. Through this case, the High Court could render a seminal judgment on the classification of terrorism. The criminal court will once again have the opportunity to define the terrorist act and to provide clarifications.

Tarnac affair in a nutshell²

In 2008, a preliminary investigation was opened by the Paris public prosecutor's office at the request of the Judicial police division of anti-terrorism (SDAT). This investigation was based on a "clandestine anarchist and autonomous structure maintaining conspiratorial relations with militants of the same ideology located abroad and planning to commit violent actions".

In the fall of 2008, concrete reinforcing bars were placed on the catenaries of five TGV lines, causing many delays in several "départements". Nine people were arrested and taken into custody. Julien Coupat was indicted for "being at the head of a structure with terrorist aims", "Criminal conspiracy in planning terrorist acts" Gang property damage in connection with terrorist activity".

After seven years of investigation, eight people were brought to justice for the whole case. In its closing speech on May 6, 2015, the public prosecutor asked that the aggravating circumstance of "terrorist undertaking" be the charge brought against the three main defendants, Julien Coupat, Yildune Lévy and Gabrielle Hallez. The prosecution considers that "crime against property" can constitute terrorist acts if they have "the aim of seriously disturbing public order by intimidation or terror". The ideology and relations of the members of the Tarnac group with "the international anarchist movement". The cornerstone of the accusation lies in a pamphlet published in 2007 by the Invisible Committee³ whose alleged main author " is Julien Coupat.

On August 7, 2015, the investigating judge disclaimed the classification of "terrorist undertaking" and took four members of the group back to court for "criminal conspiracy"⁴ and four others for "failure to submit biological samples", as well as for "attempted forging of administrative documents" and "receiving stolen documents".

Finally, on August 10, 2015, the Paris public prosecutor's office appealed the referral order to the investigation chamber of the Paris Court of Appeal. It required the classification of a terrorist undertaking⁵.

1 For a chronology of French anti-terrorist laws see : <http://www.vie-publique.fr/chronologie/chronos-thematiques/trente-ans-legislation-antiterroriste.html>

2 For an in-depth analysis of the case and the criminal characterization of terrorism see : « L'affaire Coupat : Droit commun ou terrorisme ? », SLT Lucie Alamargot, EOGN, 2010.

3 *L'insurrection qui vient*, Comité invisible, la Fabrique éditions, 2007.

4 Association de malfaiteurs Art. 450-1 CP.

5 Article 421-2-1 of the Criminal Code states that "Participation in a group or an agreement established with a view to preparing, as characterized by one or more material acts, one of the terrorist acts mentioned in the preceding articles, shall also constitute an act of terrorism ; punishable by article 421-5 CP

Terrorism, an elusive concept?

Terrorism is a neologism that appeared during the French Revolution and was used to refer to The Terror, a period during which a regime of exception was set up. This regime was characterized by arbitrary decisions and mass executions. This was state-sponsored terrorism, carried out by the state against its population.

In the 19th and 20th centuries, terrorism became the work of clandestine organizations which fought against the State through terror. Terrorist acts were committed by anarchists, "nihilists" or nationalists or separatists.

In the 21st century, terrorism took on new forms. Alain Bauer and Christophe Soulez emphasize the fact that there is not "a single" but "many" forms of terrorism⁶. The different forms of terrorism can be linked to separatist regionalist movements, revolutionary movements or fundamentalist groups that have appeared on the international scene, such as ISIS, who massacres populations, destroys emblematic places of earlier civilizations or religious sites in the name of a fantasized original Islam. These actions are reinforced through the media and social networks that enhance the violence of their acts and their scope.

Whether they consider the forms it takes, its effects or its political, religious or ideological purposes, States do not embrace the same definition of terrorism. For example, the United Nations has not succeeded in having the international community come up to an agreed-upon definition. The 1937 Geneva Convention refers to "criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public". This definition has not been unanimously accepted; however, legal instruments do exist. At the European level, a consensus exists. As a result, the European Convention on the Suppression of Terrorism of 27 January 1977, although it does not define the notion, considers the extradition procedure⁷ for a limited list of offences considered to be terrorism-related. These offences listed by the European Council are expressly differentiated from political offences in order to ensure the prosecution of perpetrators of terrorist acts. Secondly, the Framework Decision of 13 June 2002 on combating terrorism is the first international text to define a terrorist act with reference to the aim pursued. Finally, the Convention on the Prevention of Terrorism of 16 May 2005 defines terrorist acts as acts which, "by their nature or context, are intended to seriously intimidate a population, or to unduly compel a government or an international organization to do or to perform or refrain from performing any act, or to seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization. At first glance, this is an obvious notion. However, upon reflection, it remains difficult to circumscribe it. Indeed, its meaning is not constant and does not cover the same issues according to times. Thus, yesterday's terrorists can become today's heroes, like Nobel Peace Prize winner Nelson Mandela, whose name was removed from the terrorist blacklist in the United States on June 28, 2008. In this sense, the terrorist label is sometimes used as a tool by political discourse in order to discredit opponents of the current regime. In short, the notion of terrorism is subjective, depending on its emotional potential and the emotional resonance of the word. Its conceptualization remains inaccessible in several respects.

Difficulties of classification

Currently, in French criminal law, lawmakers operate with two modes of legal classification: borrowed or derived terrorism, on the one hand, and qualified terrorism, on the other. Borrowed terrorism is not an autonomous classification, it corresponds to a separate legal system applied to common law offences aggravated by special malice⁸. In fact, the principle is to borrow the constituent elements of pre-existing offences and to apply a terrorist qualification if the act is committed in a particular context, i.e. "in relation to an individual or collective undertaking whose aim is to seriously disturb public order through intimidation or terror"⁹. The qualification is based on a specific context, purpose and specific means. It is an "enterprise", a premeditated scheme, a concerted plan with a minimum of organization and preparation. The aim is to "seriously disturb public order and the rule of law, by using "intimidation or terror" since terrorist acts strike in peacetime against persons or property protected by criminal law. Terrorist acts show the vulnerability of everyone at all times and spread a feeling of insecurity on the national territory. This particular intention of

6 *Les terrorismes*, Alain Bauer, Christophe Soulez, Dalloz, 2015, 229 pages.

7 A legal procedure provided for by agreement or convention, by which a signatory State delivers the perpetrator of an offence to a requesting State for trial or punishment, to be judged or to serve his or her sentence there. Many states, such as France, do not extradite political offenders.

8 The special statute of limitations was introduced into positive law through the first French anti-terrorism law in 1986 (Law n° 86-1020 of September 9th, 1986 relating to the fight against terrorism).

9 Art. 421-1 CP.

intimidation and terror differentiate terrorist offences from political offences. Terrorist offences are also to be distinguished from organized crime, even if terrorism has been considered as a particular form of organized crime since the so-called Perben II law of 2004.¹⁰ In fact, organized crime is a profit-driven crime, whereas terrorism is a crime of ideology. However, the borders between the two tend to be blurred because ideology and profit overlap in both types of crime.

As a result, many common law offences¹¹ can be classified as terrorist offences thanks to a legal mechanism of juxtaposition to existing offences.

In reaction to various terrorist incidents, lawmakers have set up an autonomous incrimination such as ecological terrorism, through criminal conspiracy, financing or not justifying any resources¹². This demonstrates a desire to intervene upstream from the terrorist act, i.e. even prior to the act, because this is the very nature of the act that is penalized.

The terrorist qualification allows for a procedural and repressive system that derogates from common law throughout the various phases of the criminal trial. The *Direction Générale de la sécurité intérieure* (DGSJ) collaborates with specialized police services : the *Union de Coordination de la Lutte Anti-Terroriste* (UCLAT), the *Bureau de la Lutte Anti-Terroriste* (BLAT) and the *Sous-Direction Anti-Terroriste* (SDAT). France has also created a Judicial Pole bringing together magistrates with expertise in the fight against terrorism at the Paris TGI.

Questions that remain unanswered

The law of July 22, 1996 was intended to better define terrorism in order to avoid prosecutions on uncertain legal grounds. Nowadays, who could define terrorist activities? As it broke out in a context in which the ultra-left was a police priority, the investigation has become, throughout the evolution of the case, a highly publicized affair which fuelled countless debates. As the facts were reclassified, the terrorist imprint disappeared in the order meant to bring Julien Coupat back to court.

Thus, the Tarnac case, once dispassionate, highlights the difficulties of qualifications and interpretation of the definition of terrorism in positive law. The case highlighted large “grey areas” which contribute to a certain legal insecurity in that matter. Thus, whether the installation of concrete reinforcing bars on SNCF catenaries can harm the physical integrity of travelers or not raises questions about the seriousness of the attacks to qualify terrorism: Are casualties a compelling reason or do we simply need to the will to cause a large number of victims, regardless of the result? Or even a single victim, if their death is likely to undermine or destroy the fundamental structures of the rule of law, can this justify the qualification of terrorism? There were no victims in the Coupat case. The experts have even stated that in no instance the process which was used could harm the physical integrity of the passengers. Thus, can the fact that there were no victims but just a will to seriously disturb public order by intimidation or terror be qualified as a terrorist act? Under what conditions? The question arises as to what is likely to objectively prove the terrorist intent, beyond the firm conviction of the judges.

These questions are not exhaustive and prove in this respect that too many questions remain. There is a lack of a precisely defined line of conduct that would delimit the margin of assessment of the judges and would not allow the type of polemic related to the Tarnac affair. Especially since politicians seem inclined to extend the notion of terrorism, which, legally, is not viable.

The key question posed by the detractors of this trial lies in the penalization of dissenting thoughts. Let's take the example of the anti-capitalist work, *The Coming Insurrection*, which nonetheless openly criticizes the functioning of the current society and evokes "an organized blocking of the axes of communication" as a mode of action. Does it bring sufficient evidence for criminal conspiracy intended to prepare terrorist acts? Was there really "a Tarnac way of thinking"? Moreover, the book has never been prosecuted, it is over-the-counter. Thus, some people wonder whether marginal ways of thinking can/should be associated with terrorism? It does not seem so right now.

10 Law of March 9th, 2004 on the adaptation of justice to changes in crime.

11 Art. 421-1 to 421-6 CP. The article 421-1 CP aims at the offences against persons (homicide, violence, ...), crime against property (theft, extortion, property damage, ...) but also offences against justice (Hiding criminals, forgery in public writing, ...) as well as money laundering and insider trading.

12 Art. 421-2, 421-2-1, 421-2-2 et 421-2-3 CP.

Conclusion

The Tarnac affair has the advantage of raising the question of the circumscription of the classification of terrorist acts. At a time when this protean threat hits the headlines, beyond the facts of the case which, in other circumstances, would be simple "malicious mischiefs" as in the case of the Lyon-Paris TGV line in August 2014¹³, this affair raises questions that go beyond the strict judicial framework.

In 2015, France experienced eight events classified as terrorist and not all of them were the work of a collective criminal conspiracy. The commission of terrorist acts by isolated individuals, on their own initiative and without the support of any organized structure, has led the lawmakers to incriminate, in parallel to criminal conspiracy, the individual preparation of certain terrorist acts. Thus, the law of November 13, 2014 is in line with the evolution of terrorism by criminalizing the individual preparation of radicalized persons, even though lone actors had already been criminalized since 1986. Lawmakers reacted to the emergence of terrorism resulting from self-radicalization.

According to the adviser to the criminal chamber of the Court of Cassation, Gildas Barbier, "we are perhaps entering a new period of strong terrorist pressure which will spread over a long period of time, due to geopolitical developments in the Middle East, the weakening of the states in this region and the changes in Western societies (individualism and communitarianism). The series of terrorist attacks in France which occurred last January go along this. The many challenges that arise will undoubtedly require creativity and pedagogy in a renewed dialogue between judges and actors involved in the fight against terrorism¹⁴."

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13 The public prosecutor's office of Chalon-sur-Saône has opened a preliminary investigation following the installation of a hook on a catenary. The counter-terrorism section of the Paris public prosecutor's office has not taken up the case.

14 « *La lutte contre le terrorisme du point de vue du juge de cassation : défis et perspectives* », Gildas Barbier, Constitutions, 2015, p. 214.