Abstract: The terrorist attacks suffered by the United States of America on 11 September 2001 have caused a considerable increase in legislation at national and European level with the same objective: the fight against terrorism. The special nature of this crime makes judicial cooperation among states indispensable. In this context, both kinds of instruments are contemplated in order to provide the necessary measures especially—and not especially—addressed to prevent and repress terrorism: they give place to substantial and procedural rules, such as the European Arrest Warrant in the territory of the European Union. But in this claimed fight against terrorism there are also two important risks, namely the creation of a kind of ‘Security Criminal Law’ from a material point of view and the arguable breach of human rights infringed by some of those procedural measures.

I Introduction

Just a month before these lines were written a press comment about the prosecution against the only person in the United States to have been charged so far in connection with the September 11th terror attacks was precisely entitled ‘Are the rules being bent again?’.1 That is to say, maybe the legislative and judicial measures adopted in this fight against terrorism have gone too far and are not always ‘proportionate’2 to the aim pursued—despite the undoubtedly worthy aim of the fight against terrorism—as is
required in every State which respects the rule of law. But even so, in our opinion, the most ‘disproportionate’ measure is and has been, without doubt, war itself as an answer to terrorism.3

The purpose of this study is to describe some brief examples of the new legislation provided at national level in order to prevent and repress such terrorist crimes. These state rules include not only substantial or material measures (criminal law) but also procedural ones (procedural criminal law), often far more disputed than the former because of their character of ‘invasion’ in the sphere of private and civil liberties. Besides, they are very often especially addressed to foreigners4 and hence the risk of converting this fight against terrorism into a kind of ‘protection against security’5 in a disproportionate way. In this context we will examine the most significant national rules; the USA Patriot Act, and the UK Anti-Terrorism, Crime and Security Act 2001, as well as various legislative examples in Spain.

The European Union has also shown its complete solidarity with the government of the United States and the American people, in the international campaign to eradicate terrorism.6 Not only that, but the European Union itself has become involved in the fight against terrorism, producing a large number of rules. Second, we will examine these European rules specifically—and not specifically—addressed to prevent and repress crimes of terrorism. European rules also dedicated to both aspects, substantive or criminal and procedural; among the latter is, undoubtedly, the European Arrest Warrant,7 the ‘star’ rule.

In this context it must be remembered that most of the European rules are adopted in the field of judicial cooperation in criminal matters.8 Judicial cooperation between Member States is essentially about the nature and characters of terrorism, a kind of crime that does not observe territorial borders at all. Furthermore, non-territorial borders (i.e. jurisdictional ones) are also being modified (see the recent signature of the agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters by Council Decision of 6 June 2003).9 And lastly, at an international level, one must not forget the United Nations Convention against Transnational Organized Crime, signed in New York, on 15 November 2000,10 which also contemplates criminal and procedural measures in addition to extradition and mutual legal assistance.

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6 To see EU actions in this respect, <http://europa.eu.int/comm./justice_home/news/terrorism/index_en.htm>
10 Spanish Official Journal (BOE) n 233, 29 September 2003, 35280. It must be said ‘international’, and not ‘transnational’, also unusual in Spanish.
In conclusion, we will look at the proposed provisions of the draft EU Constitution on material and procedural instruments in the fight against terrorism in the sphere of this judicial cooperation in criminal matters. In this context we consider essential the adoption of some instruments from an alternative point of view, i.e. in protection of the civil liberties and human rights of the citizens. Only then will it be possible to obtain fair judicial cooperation in criminal matters between the different Member States.

II Substantive and Procedural Measures Provided in National Law Against Terrorism: Some Examples

Most of the recent measures adopted in states to fight against terrorism have a procedural character. These measures are also usually established by special laws or acts instead of being included in ordinary legislation. This special legislation constitutes a kind of ‘emergency legislation’. In addition, the procedural measures adopted are quite similar among states, in all of them more or less harmful to civil liberties and human rights nationally and internationally guaranteed. Special procedural measures such as delayed or indefinite preventive custody/detention with or, more often, without legal counsel, interference with personal communications, entry and search of house etc, even when practised with judicial control and the observance of other formal guarantees such as parliamentary control, often become improper and in addition discriminatory, when they are addressed to foreigners.

In this context we will describe two relevant examples of this kind of emergency legislation promulgated in the USA and the UK, as well as some substantive and procedural Spanish rules; the latter, although not so well-known, reflect the national expertise of the author. From a sociological and criminological point of view, it has been argued that ‘crime waves always carry with them calls for more law enforcement authority’ and, accordingly, ‘September 11 represents the most immediately salient crime wave in the nation’s history’. The fight against terrorism is the justification then of emergency legislation.

A USA Patriot Act

The Uniting and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, the short title of which is the USA Patriot Act, was promulgated by the 107th Congress of the United States of America on 24 October 2001. It contains ten titles and two of them, title II (enhance surveillance procedures) and title IV (protecting the border), are now the legal sources or basis of procedural measures provided to fight against terrorism, and which create tensions...
as regards the respect of human rights. Moreover, this emergency legislation led to the amendment of the Federal Rules of Criminal Procedure (FRCP) on 11 December 2001.\textsuperscript{14}

Title II, ostensibly dedicated to Enhanced Surveillance Procedures, in particular contemplates amendments in the context of intercepting wire, oral, and electronic communications, is now available in respect of terrorism crimes.\textsuperscript{15} To achieve this, it provides in sections 201 and 202 some partial amendments of ordinary legislation as regards the authority charged with intercepting those wire, oral, and electronic communications relating to terrorism.\textsuperscript{16}

But this title also includes other amendments providing exceptional measures in relation to other aspects, such as the authority to share criminal investigative information. In this context, section 203 establishes the possibility for any Federal official to share such information with a grand jury without any judicial control when it is a matter of ‘foreign intelligence service or counterintelligence . . . or foreign intelligence information’ (as defined in clause (iv) of this subparagraph)\textsuperscript{17} and comes from any ‘intelligence, protective, immigration, national defense, or national security official’, with the purpose: ‘in order to assist the official receiving that information in the performance of his official duties’. This regulation constitutes an important exception to the prohibition of disclosure provided by Rule 6(e)(3)(C) FRCP until now, any other exception to this prohibition of disclosure was only possible with judicial permission, in connection with another judicial proceeding, at the request of the defendant in order to dismiss the indictment, by an attorney for the government to another Federal grand jury or at the request of an attorney for the government in order to investigate a possible violation of state criminal law.

There is another important amendment, this time to the United States Code,\textsuperscript{18} in relation to the notice of the execution of a warrant, which can be delayed and therefore not communicated to the person to whom the warrant is addressed ‘to search for and seize any property or material that constitutes evidence of criminal offence in violation of the laws of the United States’ (Section 213). This delay of notice of the execution of a warrant is now allowed when any of the three situations legally contemplated occur, i.e.

\begin{quote}
the court finds reasonable cause to believe that providing immediate notification of the execution of the warrant may have an adverse result; the warrant prohibits the seizure of any tangible property, any wire or electronic communication or . . . any stored wire or electronic information . . . the warrant provides for the giving of such notice within a reasonable period of its execution, which period may thereafter be extended by the court for good cause shown.
\end{quote}

\textsuperscript{14} See full text at \texttt{<http://www.law.ukans.edu/research/frcriml.htm>}.  
\textsuperscript{15} See Pérez Cebadera, \textit{op. cit.} note 13 supra, at 5.  
\textsuperscript{16} Over all, section 2516 United States Code (USC).  
\textsuperscript{17} ‘The term ‘foreign intelligence information means: (I) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power; sabotager or international terrorism by a foreign power or an agent of a foreign power; or clandestine intelligence activities by an intelligence service or network of a foreign power or an agent of foreign power; or (II) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to the national defense or the security of the United States; or the conduct of the foreign affairs of the United States’.  
\textsuperscript{18} Section 3103a of title 18.
In this context the rights contained in the Fourth Amendment to the US Constitution are relevant as they protect the individual against unreasonable searches and seizures except the issuing of a warrant upon probable cause as well as the mandatory notice to the interested person. The only express exceptions are strictly specified as when notice would result in destruction of the evidence sought.

Lastly, among other procedural measures concerning, for example, the access to records and other items by non-judicial authorities as well as the provision of a single-jurisdiction search warrant for terrorism, this title includes rules especially addressed to foreigners. Specifically, section 214, amending section 402 of the Foreign Intelligence Surveillance Act (known as FISA) provides for the intercepting of communications by phone and now also electronic communications through measures such as ‘pen register’ and ‘trap and trace’ for any investigation to obtain foreign intelligence information not concerning a United States person. Not only does it now permit ‘the searches and seizures of groups’ instead of individuals, but also the grounds on which an investigation of such a group may take place have been lowered: the FRCP requires a ‘probable cause’ to justify issue of a search and seizure warrants, the FISA only mentions ‘relevance to an ongoing investigation’ as a justification to apply this ‘pen register’ and ‘trap and trace’ to foreigners.

In relation to title IV, entitled Protecting the Border, it contains measures addressed to foreigners too as, for example in subtitle A, the access by the Department of State to certain identifying information in the criminal history records of visa applicants and applicants for admission to the United States (section 403). But perhaps the most

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19 ‘The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized’.

20 Ker v Cal. (1963), 374 US 23, by analogy with the notice prior to entry for purposes of making an arrest, being assumed that this case is also applicable to search warrants. See, summarily, J. H. Israel and W. R. Lafave, Criminal Procedure, Constitutional Limitations (West Publishing Company, 1990), 55 (88) as well as, by the same authors, Criminal Procedure (West Publishing Company, 1992), at 163.

21 Section 215 inserts a new paragraph in section 501 Foreign Intelligence Surveillance Act of 1978 providing the possibility for the Director of the Federal Bureau of Investigation or a designee of the Director to make ‘an application of an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities’. That implies a new exclusion to the judicial control of investigation.

22 Section 219 also inserts a new paragraph, this time in Rule 41 FRCP, instauring the possibility to search warrants in an investigation of domestic terrorism or international terrorism by ‘a Federal magistrate judge in any district in which activities related to the terrorism may have occurred, for a search of property or for a person within or outside the district’.

23 Stuntz, op. cit. supra, at 2163.

24 Rule 41(c)(1) and (2), exactly, ‘if the federal magistrate judge or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist’.

25 Section 402(c)(2), amended, allowing a certification by the applicant that the information likely to be obtained is foreign intelligence information not concerning a United person or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities’.

26 Section 105 (b)(1) of the Immigration and Nationality Act (USC 1105) is amended as follows: ‘The Attorney General and the Director of the Federal Bureau of Investigation shall provide the department of State and the Service access to the criminal history record information contained in the National Crime Information Center’s Interstate Identification Index (NCIC-III), Wanted Persons File, and to any other files maintained by the National Crime Information Center that may be mutually agreed upon by the Attorney General and the agency receiving the access, for the purpose of determining whether or not a visa applicant for admission has a criminal history record indexed in any such file’.
arguable provision is included in subtitle B, section 412, relating to ‘mandatory detention of suspected terrorists, habeas corpus and judicial review’ which inserts a new regulation in section 236A of the Immigration and Nationality Act with a considerable enlarging the detention powers of immigration authorities placed under the supervision of the Attorney General. Specifically, ‘the Attorney General shall take into custody any alien who is certified under paragraph (3)’, i.e. in last case, ‘is engaged in any other activity that engages the national security of the United States’.

Furthermore, the new section 236A(a)(6) of the Immigration and Nationality Act also now provides for the indefinite detention of aliens certified in such a way, and allows the detention of aliens for additional periods of up to six months when ‘the release of the alien will threaten the national security of the United States or the safety of the community or any person’, without further indication. Although a review of certification is provided every six months by the Attorney General as indicated in section 236A(a)(7), no kind of judicial arrest warrant or formal indictment is required here as it is by ordinary criminal procedural rules. It is true that section 236A(a)(5) regulates the charge of an the alien with a criminal offence ‘not later than 7 days after the commencement of such detention’, otherwise the suspect must be released; but it also contemplates an exception to that rule when the detained alien is placed under ‘removal proceedings’ and, precisely, this indefinite detention without charge will take place when the detained alien cannot been removed within a fixed time period.

Finally, habeas corpus and judicial review of such detention is only provided on ‘the merits of a determination made under subsection (a)(3) or (a)(6)’, i.e. the reasons for the certification, but never to consider the indefinite detention itself. For all these reasons, this precautionary measure is, without doubt, the most questionable from the point of view of protection of civil liberties and the non-discrimination principle. Unfortunately, it is not the only one in this subtitle B which contains these enhanced immigration provisions.

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27 See Pérez Cebadera, op. cit. note 13 supra, at 2.
28 As concrete examples, it is provided in the Immigration and Nationality Act that the certification of the alien who is believed to be involved in espionage or sabotage activities or illegal exportation of goods, technology and sensitive information (section 212(a)(3)(A)(i)), in any activity against government using the force or violence (section 212(a)(3)(A)(iii)), in terrorist activities (section 212(a)(3)(B)).
29 Exactly, according to Rule 4 (c)(1) FRCP, ‘the warrant shall be signed by the magistrate judge . . . it shall describe the offense charged in the complaint (and) shall command that the defendant be arrested and brought before the nearest available magistrate judge’. Meanwhile, Rule 7 establishes the conditions of the indictment as required for ‘any offense which may be punished by imprisonment for a term exceeding one year’ except the defendant waives the indictment in open court. On the detention in USA, see in Spain, S. C. Thaman, ‘Detención y prisión provisional en los Estados Unidos’, in P. Andrés Ibañez (ed.), Detención y prisión provisional (Consejo General del Poder Judicial, 1996).
30 90 days according to section 241(a)(1)(A) Immigration and Nationality Act.
31 For example, section 414 (a)(1) provides the implementation by the Attorney General of ‘the integrated entry and exit data system for airports, seaports, and land border ports of entry, as specified in section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 with all deliberate speed and as expeditiously as practicable’ as well as the ‘establishing of the Integrated Entry and Exit Data System Task-Force, as described in section 3 of the Immigration and Naturalization Service Data Management Improvement Act of 2000’; section 416 creates a foreign student visa monitoring programme . . . and so on.
B The UK Anti-Terrorism, Crime and Security Act 2001

The Anti-Terrorism, Crime and Security Bill (ATCSA) 2001\textsuperscript{32} was enacted as a response to the attacks on New York and Washington on 11 September 2001. The Home Secretary, David Blunkett, advised the House of Commons on 15 October that: ‘strengthening our democracy and reinforcing our values is as important as the passage of new laws . . . the legislative measures which I have outlined today will protect and enhance our rights, not diminish them’. The speech is surprisingly similar to one given by Jack Straw, when Home Secretary, when he introduced the Terrorism Act 2000 and sought to justify enlarging measures on the basis of the very nature of terrorism, ‘designed to strike at the heart of our democratic values’. This approach indicates again a disproportionate risk of counter-terrorist measures which ‘undermine rather than defend democracy’.\textsuperscript{33}

The Act includes 14 Parts. The most controversial measures are contained particularly in Part 4 (immigration and asylum) and Part 3 (disclosure of information). Both of them are reminiscent of the emergency legislation introduced in the USA Patriot Act. So, for instance, as regards disclosure of information, section 17 provides a wide extension of existing disclosure powers allowing the public authorities (mainly the police) to obtain information about citizens from other public authorities for the purposes of any criminal investigation or proceeding\textsuperscript{34} and not necessarily limited to the investigation or proceeding against serious crimes of terrorism. Despite the mention of the ‘proportionality test’ in section 17(5),\textsuperscript{35} the wide range of purposes to which disclosure can be applied found in the 66 statutory rules numerated in Schedule 4 produces a considerable risk to the rights guaranteed, for instance, in Article 8 Human Right Act (HRA) 1998;\textsuperscript{36} in this context personal information, sometimes very sensitive, can be disclosed for the stated purposes.


\textsuperscript{33} Fenwick, \textit{op. cit.} note 32 supra, at 724.

\textsuperscript{34} Textually, according to section 17 (2), ‘each of the provisions to which this section applies shall have effect, in relation to the disclosure of information by or on behalf of a public authority, as if the purposes for which the disclosure of information is authorised by that provision included each of the following: (a) the purposes of any criminal investigation whatever which is being or may be carried out, whether in the United Kingdom or elsewhere; (b) the purposes of any criminal proceedings whatever which have been or may be initiated, whether in the United Kingdom or elsewhere; (c) the purposes of the initiation or bringing to an end of any such investigation or proceedings; (d) the purpose of facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end’.

\textsuperscript{35} ‘No disclosure of information shall be made by virtue of this section unless the public authority by which the disclosure is made is satisfied that the making of the disclosure is proportionate to what is sought to be achieved by it’. That is the typical ‘proportionality test’, i.e. ‘to harmonize the general and individual interests, allowing exceptionnally—and if necessary—the restriction of last ones without harm their essence and with the requirement of not exceeding the strictly necessary to attain the pretended aim’, according to Pedraz Penalva, \textit{op. cit.} note 2 supra, at 342.

\textsuperscript{36} It reproduces also Art 8(1) European Convention of Human Rights: ‘everyone has the right to respect for his private and family life, his home and his correspondence’ as well as Art 8(2): ‘there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law, and is necessary on a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights of freedom of others’. Again the necessity of the ‘proportionality test’ between the disclosure of information as emergency provision and the aim achieved.
But it is Part 4, dedicated to immigration and asylum, which includes the most controversial measures addressed to aliens. In fact, section 2337 allows the indefinite detention of a non-British citizen suspected of international terrorism, who has been certified by the Home Secretary as ‘suspected international terrorist’ under section 21. The only possibility for the detainee to appeal is to the Special Immigration Appeals Commission (SIAC) in accordance with section 25(1). Here also, the certificate issues are contemplated every six months according to section 26 (1), which recalls a similar provision in the USA Patriot Act. Nowhere is it provided that the detained foreign person has access to a judicial authority as required by Article 5(3) European Convention of Human Rights (ECHR) as well as by UK legislation.

This provision allowing indefinite detention with no judicial intervention required the UK government to derogate from Article 5(1) ECHR (but not subsection (3)), which imposes the obligation to present the detained person to a judicial authority. The legal basis employed for such a derogation is section 14 HRA and Article 15 ECHR. In the context of violation of Article 5 ECHR the jurisprudence of the European Court of Human Rights (much of it also against the UK) the Aksoy v Turkey case is noteworthy. The judgment was pronounced on 18 December 1996. The Court of Human Rights considered that a delay of fourteen days of detention suffered by M. Aksoy, a Turkish citizen, without being brought before a judicial authority infringed the notion of ‘promptness’ required in Article 5(3) ECHR. Turkey had derogated from all of Article 5 ECHR. The Court of Human Rights accepted that there was serious

37 (1) ‘A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that this removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration’. (2) ‘The provisions mentioned in subsection (1) are detention of persons liable to examination or removal (Immigration Act 1971, Schedule 2 (16) and (b) detention pending deportation (Immigration Act, Schedule 3).

38 (1) ‘The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably (a) believes that the person’s presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist’.

39 ‘A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21’. The SIAC was set up as administrative Tribunal under the Special Immigration Appeals Commission Act 1997.

40 Briefly, the right to every detained person to be ‘promptly’ conducted before a judicial authority or an authority with judicial powers and to be judged or released in a reasonable delay. Among the Spanish literature, see E. Pedraz Penalva ‘El derecho a la libertad y seguridad’, La jurisprudencia del Tribunal Europeo de Derechos Humanos (Consejo General del Poder Judicial, 1993) 73, 135 in relation with Art 5(3) ECHR and, in comparison with the Fondamental Rights Charter in European Union, M. de Hoyos Sancho, ‘Carta de Derechos Fundamentales de la Unión Europea y privaciones de la libertad ambulatoria’, (2002) 30 Revista de Estudios Europeos, at 113.

41 The detainee must be brought before the court ‘as soon as is practicable’ under section 46(2) Police and Criminal Evidence Act 1984 (PACE). See J. Sprack, Emmins on Criminal Procedure, ninth edition (Oxford University Press, 2002), at 16.


43 First one gives power for the Secretary of State to make a ‘designation order’ in designation of any derogation from an Article or Protocol to the Convention; last one provides this derogation of any of the duties included in the European Convention in special situations, exactly, ‘war or another public risk to the national life’, both definitions, whose application can be, unless, arguable to the nowadays situation after 11 September 2001.

44 For instance, Branningan and McBride v UK (1993) 17 EHRR 539, about the detention of suspected terrorists in the context of the situation in Northern Ireland. See Sprack, op. cit. note 41 supra, at 481.
terrorist conflict in the South-East of Turkey since 1985 because of fighting between government security forces and members of PKK (Workers’ Party in Kurdistán). But even so, in the Court of Human Rights’ opinion, this special situation did not justify a ‘secret’ detention as was imposed on the appellant. The same Court came to a different conclusion in Branningan and McBride v UK (1993) where it found no infringement of Article 5 because judicial review through habeas corpus was provided according to British rules.

Legal challenges in the UK in relation to this indefinite detention of foreigners under section 23 ATCSA is giving rise to some jurisprudence as is pointed out by Guild elsewhere in this issue. First, the SIAC decision of 30 July 2002 in A, X and Y and Others v Secretary of State for the Home Department confirms that powers given to the executive in Part 4 are discriminatory and unlawful under Article 14 ECHR as they target non-British citizens and are disproportionate because there is not a reasonable relationship between the measures employed and the aims pursued with same provisions. The Court of Appeal overturned the SIAC decision on this ground, arguing that ‘nationals can never be subsumed to the position of foreigners as regards detention’.

C Spanish Legislation

Spanish legislation does not contemplate an isolated special rule, whose objective is specifically the fight against terrorism as in the previous examples of the USA and the UK. No ‘emergency legislation’ is immediately apparent after the regrettable events of September 11. But a careful examination reveals that several new laws promulgated as a consequence of those terrorist attacks, some of them, certainly, have as their main objective the fight against terrorism but not other (perhaps the majority) whose special purpose is to protect civil security. Stuntz’s general point is again relevant: ‘a sharp rise in one kind of crime inevitably generates demand for greater authority to deal with other crimes’.

Some examples of this Spanish legislation produced as a consequence of the terrorist attacks in New York and Washington with various content and character is set out below; some of them provide substantive measures to fight against terrorism in the field of criminal law and most of them address the protection of civic security of a substantive and procedural character.

a) Organic Law 7/2003, June 30th, For Integral Fulfilment of Punishments

Although not especially addressed to the terrorist menace, it is obvious that this regulation essentially falls upon terrorist crimes, and in this sense its Preliminary Recitals are drawn up. The new law amends the then Spanish Criminal Law and raises the maximum limit of punishment fulfilment to 40 years when two or more terrorist crimes

45 M. Aksoy was deprived of the right to the counsel, to be assisted by a medicin and to be visited by a familiar or friend, besides the absence of any opportunity to be brought to a court, to whom question the legality of his detention, as it is pointed.
47 See also Fenwick, op. cit. note 32 supra, at 762, editor’s note.
48 Again Guild, op. cit. note 4 supra.
50 Spanish Official Journal (BOE) 1 July 2003, n 156, 25274.

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are committed and one of them penalised now with more than 20-years imprisonment (terrorist crime with death outcome). What it is more surprising is that the so-called ‘Criminal Code of Democracy’ (1995) is now more regressive and even reactionary than the old Criminal Code (1973); not in vain it has been said that we are in the age of ‘Security Criminal Law’ because, under the security ground, new legislation as this one has profited to adopt restrictive measures related—and not always related—with terrorism, national, and civic security.

b) Organic Law 11/2003, September 29th, Containing Concrete Measures in the Field of Civic Security, Domestic Violence and Social Integration of Aliens

As it is also indicated in the Recitals, this law was adopted as an answer to the plan against delinquency presented by the Spanish government on 12 September 2002, which included legislative measures as well as executive ones in special fields. This legislation amends the Criminal Code by introducing new criminal offence including some related to domestic violence (unfortunately, well-known in Spain) and others specific to foreign communities established in Spain (for instance, genital mutilation). But at the same time the law includes other kinds of measures especially addressed to aliens, again under the pretext of ‘civic security’.

c) Law 38/2002, October 24, of Partial Amendment of the Criminal Procedural Law (LECrim), Regarding a New Procedure to Provide Fast and Immediate Trial of Specific Offences and Misdemeanours as well as Modifying the Abbreviated Procedure

The recent law, which was adopted only about a year ago and has already produced an enormous amount of literature—some of it very critical—is as yet the only regulation on this new concept of ‘civic security’, which has a procedural character. Commonly known as the ‘fast trials’ law, it provides essentially an unusual reduction of the stages legally provided in order to achieve a fast and immediate trial of some kinds for offence when the circumstances set out in the new law so require; second, it amends

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52 Remember that Franco’s death took place in 1975.
53 See criticisms by Landrove, op. cit. note 5 supra 2.
55 In fact and essentially, the substitution of the imprisonment by the expulsion according to the administrative proceeding created by Organic Law 4/2000, January 11th, about rights and liberties of the foreign persons in Spain and their social integration, whose constitutionality has been also argued; see C. Vidal Fueyo, ‘La nueva ley de extranjería a la luz del texto constitucional’, (2001) 21 Revista Española de Derecho Constitucional, n 62, 179.
57 Only among monographs, for instance, J. Delgado Martín (Ed.), Los juicios rápidos (Colex, 2002); F. Gascón Inchausti and M. Aguilera Morales, La reforma de la Ley de Enjuiciamiento Criminal: comentario a la Ley 38/2002 y a la Ley Orgánica 8/2002, de 24 de octubre (Civitas, 2003); J. Muerza Esparza, La reforma del procedo penal abreviado y el enjuiciamiento rápido de delitos (Aranzadi, 2003); A. Pérez Cruz Martín Las reformas del procedimiento abreviado, juicios rápidos y juicios de faltas (Comares, 2003).
59 According to new Art 795.1.2º LECrim, the list of offences includes a) Damages, coercions, threats or using physical violence against persons numerated in Art 153 CP (that is the case well known
two ordinary criminal procedures, so the so-called ‘abbreviated procedure’ (used for offences punishable by nine years imprisonment or less or other kinds of penalty)\(^{60}\) and the ‘misdemeanours trials’. Essentially in both cases, the objective is to reduce the stages of the oral hearing and public trial.\(^{61}\) Although some organic measures have necessarily been adopted, for example, new powers to investigative judges who now function also as custody judges,\(^{62}\) as is unfortunately common in Spain the procedural innovations have preceded the organic ones. It is now urgent to provide more judges\(^ {63}\) and prosecutors in every Spanish jurisdiction to achieve this ‘speeding up of justice’ possible. Furthermore, the compatibility of the measures with the protection of procedural guarantees constitutionally guaranteed is in question.\(^ {64}\)

### III Substantive and Procedural Measures Provided by the European Union against Terrorism: Some Examples

Following these examples of national regulations on the fight against terrorism through the adoption of substantive and procedural measures, we will consider the regulations existing in the sphere of the European Union. The European institutions have promulgated several measures as a reaction to the tragic attacks occurring on September 11th. It is still useful to analyse European Union regulations from the perspective of the differences between the substantive (criminal) and procedural measures, whose aim, in both cases, is also the fight against terrorism.

#### A Substantive Regulation

Different kinds of substantive regulations have been adopted in the context of the European Union depending on the Pillar whence they come and its nature, Community or intergovernmental. However, all of them are adopted, more or less, as implementing UNSC Resolutions 1373 (2001), on 28 September, and 1390 (2002), on 16 January and have as their main objective the fight against terrorism. To give a fair
explanation of such rules it is necessary to follow the division among European Union Pillars; we will then briefly comment on some examples in every Pillar.

a) First Pillar or Community Law

According to Article 249 EC, the regulations are the form of legislation used to provide rules in the fight against terrorism. The most interesting examples are the Council Regulations (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism\(^{65}\) and the Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaida network, and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freezing of funds and other financial resources in respect of the Taliban of Afghanistan.\(^{66}\) Both of them have been amended several times in order to update the list of persons or entities designated as terrorists.\(^{67}\) In addition, they have started to initiate jurisprudence in the Court of Justice. Among cases is Aden and others (T-306/01), in which an annulment appeal has been lodged before the Court of First Instance against Council Regulation (EC) 467/2001 and its fourth updating. (Its resolution was still awaited at the time of writing.)\(^{68}\)

- Council Regulation (EC) No 2580/2001 provides substantive measures to combat terrorism, for example, in Article 2, the freezing of all kind of funds, financial assets, and economic resources belonging to, owned, or held by any natural or legal person, group, or entity qualified as terrorist as well as the prohibition to make these funds, assets, or resources available to or for the benefit to those persons or entities, with the exceptions made in Article 5;\(^{69}\) as well, in Article 4, it provides the duty by banks, financial institutions, insurance companies, and other bodies or persons to provide immediate information about accounts and amounts frozen and transactions executed by the same persons or entities.
- Council Regulation (EC) No 881/2002, in a similar way, contemplates the application of previous measures to persons, groups and entities referred in an annex list.\(^{70}\) All of them have in common the connection or relation with Osama bin Laden, Al-Qaida network and Taliban group.

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\(^{65}\) OJ L 344, 28 December 2001, at 70.


\(^{68}\) Regulation 2199/2001 of 12 November, which added the three names of the individual claimants as well as the claimant body to the list annex of Regulation 467/2001. Until now, only the application for interim measures has been judged by Order of the President of the Court of First Instance of 7 May 2002 (2002) ECR II-02738, resulting in a dismissal of the request of stay for both Council Regulations. Thanks to Elspeth Guild for the jurisprudential information.

\(^{69}\) It contemplates the possibility for those persons or entities to obtain specific authorisation by competent authorities of the Member States also listed in another Annex to use the frozen funds for essential human needs (foodstuffs, medicines and medical treatment), payment of taxes and fees for public utilities services such as gas, water, electricity and telecommunications... and any other.

\(^{70}\) The list includes the names of 69 legal persons, groups and entities as well as the name of 213 natural persons.
b) **Second Pillar or Common Foreign and Security Policy (CFSP)**

Common Positions are the kind of rule used by Council in this field to ‘define the approach of the Union to a particular matter of a geographical or thematic nature”71 such as terrorism is now. In this context, several Common Positions have been adopted, as the following:

- **Council Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism:**72 it provides for the adoption of different measures by Member States of the European Union addressed to persons who commit, attempt to commit, or participate in the commission of terrorist acts, entities owned, or controlled by them and persons and entities acting on behalf of or under the direction of such persons or entities (Article 2). Such measures, specified in the articles, include the freezing of funds, financial assets, or economical resources (Article 3), the prevention of the commission of terrorist acts (Article 5), the denial of safe haven (Article 6), the bringing to justice (Article 8), the prohibition of free movement across borders (Article 10)...

- **Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism:**73 the aim of this rule is the provision of a definition of ‘persons, groups and entities involved in terrorist acts’ as well as of ‘terrorist act’74 and ‘terrorist group’ (Article 1) and, according to that, the inclusion of an annex list of persons, groups and entities qualified as ‘terrorists’.75 The first list designated 29 persons and 13 groups and entities, but the same list has been updated several times.76

- **Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Osama bin Laden, members of the Al-Qaida organisation, and the Taliban and other individuals, groups, undertakings, and entities associated with them:**77 such measures here provided include for instance and among others, the prohibition of direct or indirect supply, sale and transfer of arms and related material (Article 2) as well as the freezing of funds, financial assets, and economic resources (Article 3) of the mentioned persons elsewhere designated.

But the most interesting thing to note here is the European Court of Human Rights judgment of 23 May 2002, in _Segi and others v all Member States of European Union_,78

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71 Art 15 TEU in connection with previous Art 12 in enumeration of the kind of rulings used by European Union to pursue the objectives set out in Art 11.
74 It is, for instance, included the intimidating a population, the compelling a government or an international organisation to perform or abstain from performing any act, the seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation through attacks upon a person's life, kidnapping or hostage taking, seizure of aircraft...
75 Among them, 19 ETA activists as persons as well ETA (and other organisations like Kas, Ekin, Jarrai, Gestoras pro Amnistia... as part of it) and GRAPO as Spanish groups and entities. About a statistical view of the list of crimes committed by the Basque Country independent organisation, see the _Memory by the General Attorney_ (Ministerio de Justicia, 2003), at 53.
78 ECHR 2002/30, still unreported.
in relation to the two first Common Positions n° 930 and 931. Final judgment was
delivered in relation to the petitions lodged by some Basque entities, Segi and
Gestoras Pro Amnistía, against orders pronounced by one of the central investiga-
tive judges (Juzgado Central de Instrucción n° 5, occupied by Judge Baltasar Garzón),
which ordered the cessation of the activities promoted by these entities on the ground
that they belong to ETA, a designated terrorist entity in the Common Positions. But
the European Court dismissed the petition in limine litis on the ground that there must
be a real and effective violation of a human right protected by the ECHR for an entity
to constitute a ‘victim’ in the sense of Article 34 ECHR. This concept does not permit
any kind of ‘actio popularis’ or complaint ‘in abstracto’.79 The judgment, after a long
explanation of the European rules in the fight against terrorism, ends by arguing that
the appellants do not present evidence to prove that they have effectively suffered a
breach of an ECHR substantive right on the basis of measures contained in the
Common Positions. The fact of being included in the list of designated the groups and
entities related with terrorist activities can be, according to the Court of Human Rights,
at most, ‘annoying’ but it does not imply a formal breach. Although the Court of
Human Rights’ arguments may be right in general terms, this description is surprising
as expressing the consequences of being included in a list numerating the terrorist
groups or entities existing in the Member States of European Union.

c) Third Pillar or Justice and Home Affairs (JHA)

In this field, several Decisions and Framework Decisions have been adopted according
to Article 34.2(b) and (c) TEU, both of them without entailing direct effect. Especially
related with terrorism, the most interesting ones are as follows.

- Council Framework Decision 2002/475/JHA of 13 June 2002 on combating ter-
rorism:80 such rule provides a first exceptional measure, which is the brief term
conceded to the Member States to implement it in national law—six months
instead of the usual two years—on account of the special circumstances,81 the
period expired on 31 December 2002 (Article 11.1). As for its content, it provides
an initial definition of terrorist offences and terrorist groups extremely similar if
not identical to that included in previous Council Common Position n 931 men-
tioned above (Articles 1 and 2); new are the minimum penalties agreed to punish
such terrorist offences,82 which include extradition (Article 5) as well as the state

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79 See Klass v Germany (1979–80) 2 EHRR 214, para 33, as it is mentioned by the Court of Human Rights
and although here it was considered the notion of ‘potential victim’ because of the secret character of
the measures in national legislation included.
81 Not in vain, the negotiation between member States was this time reached in a speed time of three months
when normally the gestation proceeding of a Framework Decision needs one or two years. About the
history of negotiation, see the paper presented by I. Rosa Vallejo in the International Conference ‘El
Espacio Judicial Europeo’ (Toledo, 29 –31 October 2003), <www.uclm/espaciojudicialeuropeo.es>, as
direct participant in it.
82 It is required a custodial sentence with a maximum sentence of not less than 15 or 8 years, according to
the kind of offence committed among those provided in previous Arts 1 and 2. This one was one of the
most difficult points to reach an agreement between Member States.
jurisdiction provisions83 (Article 9) and, very importantly, protection and assistance to victims of such terrorist offences84 (Article 10).

- Council Framework Decision 2002/996/JHA of 28 November 2002 establishes a mechanism for evaluating legal systems implementation at national level of the fight against terrorism:85 the purpose of such rule is to create an evaluation team composed of two experts designated by each Member State, who will evaluate Member States other than the one of their nationality (Articles 3 and 4). This evaluation takes place through preparation of a questionnaire to be answered by the evaluated state (Article 5) as well as the preparation of the draft report by the evaluation team with a possible visit to the country in question (Articles 6 and 7); the final report will be adopted after a previous discussion between the members of the Article 36 Committee,86 always with a confidential character (Article 8 and 9).

- Council Decision 2003/48/JHA of 19 December 2002 on the implementation of specific measures for police and judicial cooperation to combat terrorism in accordance with Article 4 of Common Position 2001/931/CFSP,87 essentially this provides for a kind of organisation measure like the previous one, which consists this time of the designation by each Member State of a specialised service to have access to relevant information concerning investigations of terrorist offences (Article 2) as well as a Eurojust national correspondent for terrorism matters under Article 12 of the Eurojust Decision88 (Article 3). Reference is also made here to the possibility ‘to set up joint investigation teams in order to carry out criminal investigations into terrorist offences involving any of the listed persons, groups or entities’, a measure that we will comment on now, and already put into practice in some Member States.89

B Procedural Regulation

In this final section, we aim briefly to outline some of the procedural instruments to be used in this fight against terrorism. These instruments, although not specially created in relation with such terrorist crimes, of course make possible the achievement of this important objective. All of them have been adopted in the field of judicial cooperation in criminal matters (JHA). In fact, as they have been the subject of comment by us elsewhere90 and by another authors in this issue,91 we will only briefly describe two

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83 For the first time, enlargement of this state jurisdiction to the territory of another Member State was allowed; see Art 9.1 (a).
86 Formerly ‘Committee K.4’, now known as Coordinating Committee according to Art 36(1) TEU, precept which also enumerates its tasks.
87 OJ L 16, 22 January 2003, at 68.
89 For instance, between Spain and France as first Member States in European Union to negotiate the creation of such joint investigation teams in order to the investigation of terrorist offences caused by ETA in France and by Islamic and ‘mafia’ networks in Spain, respectively. See newspaper El País on 1 November 2003.
90 See note 8 supra at 625.
91 See Alegre and Leaf, op. cit. note 7 supra.
of them, which we consider in this context more representative and which, at least in Spain, have already been transposed into national law. There are of course some other measures also applicable in the investigation of terrorist acts committed in the territory of the European Union.92


The first Member State to implement it was Spain by Law 3/2003, 14 March,94 it is indeed considered the ‘star’ rule on judicial cooperation in criminal matters. Besides it must be remembered that the fast negotiation to reach the agreement among all Member States was precisely because of the deplorable attacks of 11 September 2001.95 Briefly, the essential objective of this new instrument of judicial cooperation is to substitute the old and obsolete extradition system (which has been unsuccessful in European Union territory)96 by a kind of exclusive judicial ‘system of surrender’, through the mutual recognition of judicial orders between Member States. The new legislation introduces innovative rules to abolish the classical principles of extradition, such as the double criminality of the act for the 32 offences listed in Article 2.297 as well as, where the arrested person consents, the ‘speciality rule’98 (Article 13.1). Despite the presumption of important problems of a juridical, technical and practical nature—at least according to Spanish legislation99—it represents, certainly, an effective measure in the field of judicial cooperation between Member States as an important procedural instrument in the fight against terrorism. It also provides a legal basis for some cooperation practices carried out by police, which at least in Spain have previously lacked such basis.100

95 Moreover, the proposal of such Council Framework Decision was presented on 19 September 2001, COM (2001) 522 final, exactly 8 days after the terrorist attempts in USA.
97 Observe that terrorism occupies second place in the indicated list; a list, by the way, which cannot be considered as numerus clausus but apertus because of the possibility to be extended or amended under the conditions required by Article 2.3.
98 That is, according to Article 27.2, the prohibition to prosecute or sentence the person surrendered for an offence committed prior to his or her surrender.
99 For instance and only in the juridical sphere, the detention term and the absence of appeal to the final decision of surrender, also exposed by us; see note 93 supra.
100 Between France and Spain a kind of police cooperation already operates, and according to it, the ‘direct’ surrender of ETA activists to the Spanish police border takes place, where they are arrested in order to continue the judicial investigation or trial in Spain. This proceeding was admitted as ‘constitutional’ by Spanish Constitutional Court in the ground of the discretional faculty of states of practice such direct surrenders instead of extradition proceedings; see SSTC 2084/2001, 13 December, and 304/2002, 15 February.
b) **Council Framework Decision 2002/465/JHA of 13 June 2002 on Joint Investigation Teams**\(^{101}\)

Also implemented in Spain—although late—by Law 11/2003, 21 May,\(^{102}\) it is accompanied at European level by a Council Recommendation of 8 May 2003 on a model agreement for setting up a joint investigation teams (JIT).\(^{103}\) In this context, the Framework Decision provides for the creation of joint investigation teams for ‘specific purposes and limited period’—which may be extended by mutual consent in both cases—by mutual agreement between the authorities of two or more Member States (Article 1). This first provision reproduces exactly Article 13.1 of the Convention relating to the mutual assistance in criminal matters between the Member States of the European Union established by the Council on 29 May 2000.\(^{104}\) For this purpose, both Member States sign an agreement set out in the annex which indicates, in addition to the objective and term of investigation, the country in which the team will operate as well as the composition of the team, which shall include the name of the leader of the team\(^{105}\) as well as the judicial and police authorities members of the team. Lastly, criminal and civil liability of the foreign officials acting in the other Member State are also provided for.\(^{106}\) A first project to create a JIT between Spain and France, is underway on the basis bilateral negotiations that took place last end of October.\(^{107}\)

**IV Conclusions**

We intend here to make a brief summary and some ‘pro futuro’ suggestions as to the effectiveness of all these regulations contained in national and European law in the fight against terrorism. In this context, it is essential to use material and procedural instruments of judicial cooperation in criminal matters between the Member States belonging to the European Union, because of the transnational character of such offences in the sphere of terrorism.

In this sense and even before the terrorist attacks of September 11th, this kind of criminal judicial cooperation was already rapidly growing. For instance, and besides the instruments described here, there is a European regulation to provide technical media to make judicial cooperation possible; since 1996 the exchange of ‘liaison magistrates’ between Member States has been possible\(^{108}\) and since 1998 there has been a...
European judicial net operating together with Eurojust. At that time there were also some proposals by the European institutions to create a single Corpus Juris at least in reference to some specific crimes as well as the introduction of some kind of common judicial authority in the European Union, the draft EU Constitution proposes the establishment of the European Public Prosecutor’s Office ‘in order to combat serious crime having a cross border dimension’ as is the case of terrorism (Article III-175.1).

We would conclude with some reflections in this field of European judicial cooperation in criminal matters, in the draft EU Constitution. This may also be helpful as a guideline to national legislation. The principle of mutual recognition of judgments and judicial decisions included in the draft Constitution Article III-171 foresees two important procedural instruments: the establishment of minimum rules concerning the mutual admissibility of evidence between Member States, because of the significance of the law of evidence in criminal procedure, and the establishment of minimum rules concerning the rights of individuals and victims of crime. This latter provision operates as an indispensable counterweight in the context of a ‘checks and balances’ theory in the field of judicial cooperation in criminal matters.

Although the steps in the context of the balances have proceeded more slowly, there is now pressure for a set of provisions to regulate minimum standards of procedural guarantees in the field of criminal proceedings. The Commission adopted a Green Paper about the ‘procedural safeguards for suspects and defendants in criminal proceedings’ throughout the European Union on 19 February 2003, including fundamental guarantees such as the right to ‘legal assistance and representation’, as well as ‘the right to a competent, qualified (or certified) interpreter and/or translator so that the accused knows the charges against him and understands the procedure’, both of which are also required by Article 6 ECHR. The Commission is currently working on a proposal for a framework decision in this field. It would also be desirable to widen such procedural guarantees in the context of the ‘due process of law’ rights in Article 6 ECHR and the EU Charter of Fundamental Rights to be included in the EU

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111 Initially also related with this protection of finance interests of the European Union; see Commission Communication in contribution to the Intergovernmental Conference about institutional reforms under the title ‘the criminal protection of the finance interests in the Community: the European public prosecutor’ on 29 February 2000, COM (2000) 208 final.
112 Presented to the President of European Council in Rome on July 18 th, 2003 (CONV 850/03). About that, our study and bibliography included in ‘La Constitución española como posible modelo para una futura ‘Constitución’ europea’, La Constitución española de 1978 en su XXV aniversario (Bosch, 2003), at 1097.
Constitution. For instance, the latter mentions the right to an impartial judge, the presumption of innocence and the right to \textit{ne bis idem}.\footnote{Arts II-47, II-48 and II-50, respectively.}


Hopefully all these new instruments can soon be added to the procedural rules now in force in the European Union. At that point a detailed analysis of the procedural criminal law of the EU will be possible.