

‘*Jihadist* lone wolves’: terrorists, murderers or believers? Back to an actor-based criminal law

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FANATICISMS: WHO IS WHO? TOWARDS AN ORWELLIAN SOCIETY

After the *Charlie Hebdo* attack in Paris on 7 January 2015, the then Spanish Prime Minister Mariano Rajoy claimed that ‘totalitarianisms and fanaticisms have never won the battle’.² However, it ought to be remembered – or rather, he ought to be reminded – that such ‘-isms’ have succeeded through the 2015 reforms of the provisions of the Spanish *Código Penal* (‘SPC’) concerning terrorist crimes.³ Acts of (self-)radicalisation or (self-)indoctrination or (self-)training, like consulting *jihadist* websites or moving to areas of armed conflict in which *jihadists* are taking part, are some of the newly criminalised conducts. However, these instances of criminalisation clash with the most basic freedoms recognised in liberal constitutions, such as freedom of thought, conscience and religion, and freedom of speech, which, paradoxically, these provisions aim to protect.

The 2015 reforms of the SPC as regards terrorist offences build on previous measures in 2000, 2003 and 2010,⁴ and all can be regarded as manifestations of a tendency of criminal policy whose characteristic features consist in the prevention of crimes before they are committed, via the incapacitation or sanc-

¹ Translated by Marta Pantaleon Díaz.

² Trans. <http://www.rtve.es/noticias/20150111/rajoy-asegura-paris-totalitarismos-fanatismos-nunca-han-ganado-batalla/1081643.shtml>, last accessed 16 September 2021.

³ See Act 2/2015, 30 March, in particular, art. 575 SPC (Ley Orgánica 2/2015, de 30 de marzo, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, en materia de delitos de terrorismo).

⁴ Acts 7/2000, 22 December; 7/2003, 30 June; and 5/2010, 22 July; after 2015, Act 1/2019, 20 February.

tioning of individuals considered dangerous.⁵ In this way both the enemies and their friends are targets: the enemy's friends are also enemies.⁶ Nevertheless, the 2015 turn of the screw contemplates the punishment of the new threats that, in the legislator's view, demand updates in order to accommodate the phenomenon of individual terrorism, particularly, of displaced terrorist combatants and, most relevantly for the purposes of this chapter, of lone wolves. As is well known, one of the main concerns of the public authorities is the call, through messages and slogans published via the internet to encourage followers of *jihad* ideology carry out attacks. The addressees of such messages are, ultimately, isolated individuals who, 'following their radicalisation and indoctrination', might 'perpetrate attacks against the indicated objectives'.⁷ Hence, the species of '*jihadist* lone wolf'⁸ is added to the always highly debated genus of the 'individual terrorist' or 'isolated terrorist'.⁹ That species of the genus must be neutralised from the moment of access to internet contents which might incite recipients to join a terrorist organisation or possesses documents of a dangerous nature. In other words, the precursor criminal law is applied from the moment anyone might manifest interest in terrorism or terrorism-related beliefs.

This approach raises two new concerns, the explanation and solution to which this chapter is aimed. The first is conceptual: can we speak of 'terrorism' – individual or of any sort – without a prediction of criminal action and a political goal? Is it enough to publicise or endorse the crime of another individual as evidence of sharing the same goal and so becoming part of a terrorist organisation? However, it may be noted that the label 'terrorist' may be used too readily to describe or to handle many attacks perpetrated in Europe by isolated subjects, the *Charlie Hebdo* killings prominently among them. That they are atrocious offences, murders of innocent people, is beyond all doubt. It is not always clear, however, that they are terrorist crimes or crimes which need to be handled as such. These can be crimes that repeatedly and indiscriminately attack the most essential interests in people's lives for a political goal. That an

⁵ Silva Sánchez, J.M., 'El retorno de la inocuización' in Martín, A.N. (ed.), *Homenaje al Dr. Marino Barbero Santos. In Memoriam, vol. I* (Universidad de Castilla-La Mancha, Toledo, 2001) 699.

⁶ Batarrita, A.A., 'El discurso del enemigo y su infiltración en el Derecho Penal' in Cancio Meliá, M. and Gómez-Jara Díez, C. (eds), *Derecho Penal del Enemigo, vol. I* (B de F, Madrid, 2006) 255.

⁷ Preamble to Act 2/2015.

⁸ Compare the five categories of lone wolves described by Jeffrey Simon, *Lone Wolf Terrorism: Understanding the Growing Threat* (Prometheus Books, Buffalo, 2013).

⁹ Cancio Meliá, M., "'Derecho penal" del enemigo y delitos de terrorismo' (2002) 44 *Jueces para la Democracia* 19, 19.

isolated individual, even a *jihadist* ‘wolf’, has such a capacity needs to be analysed more carefully. It is conceivable that not all extremists have the capacity, organisation, or clear motives, to terrorise beyond their immediate victims.

The second concern relates to democratic legitimacy. From a theoretical point of view, liberty and security should not be understood as rival values, but as complementary ones, for a society’s uppermost insecurity stems from unlimited state power. In recent times, it is possible to find parallels between today’s society and, as depicted in the book, *Nineteen Eighty-Four*,¹⁰ the Orwellian society, where information is manipulated and where mass surveillance and political and social repression are prevalent.

Certain lone wolves ready to commit crimes could indeed be punished for carrying out conduct distant from the effective point of attack on a legally protected interest. Yet, such deeds should entail, in the case of ascription of the label ‘terrorism’, a wrong whose symbolic communication of terror or disruption of the general peace (depending on the conception of the wrongdoing that one supports¹¹) was serious enough so as not to punish mere symptoms of dangerousness. Hence, for instance, carrying an explosive vest is conduct that merits a criminal response, even if no more than preparatory acts have been committed – for example, when the carrier of the vest is arrested on her way to the place where she meant to explode the device. Equally, so is the effective training of a person in a terrorist military camp. By contrast, punishment of those who indoctrinate or radicalise themselves by reading *jihadist* propaganda is grounded on the more debatable supposition of a possible subjective dangerousness as the basis for state action which represents an instance of the often discredited status/actor-based criminal law (*Täterstrafrecht*) which goes even beyond the person’s presence in a given situation.¹²

¹⁰ (Secker and Warburg, London, 1949).

¹¹ Silva Sánchez, J.M., ‘Introducción’ in Cancio Meliá, M. and Silva Sánchez, J.M., *Delitos de organización* (B de F, Madrid, 2008) 8–9.

¹² See Preuß, U.K., ‘Vom Tatstrafrecht zum Täterstrafrecht’ (1977) 10 *Kritische Justiz* 310; Kunz, K.L., ‘Strafrechtsmodelle und Gesellschaftsstruktur’ (2010) 42 *Kriminologisches Journal* 9; Spena, A., ‘Iniuria Migrandi: Criminalization of immigrants and the basic principles of the criminal law’ (2014) 8 *Criminal Law and Philosophy* 635; Ambos, K., *National Socialist Criminal Law. Continuity and Radicalization* (Hart, Oxford, 2019); Holiday, Y.S., ‘Refugees and the misuse of the criminal law’ in Šalamon, N.K., *Causes and Consequences of Migrant Criminalization* (Springer, Cham, 2020).

TERRORISM WITHOUT A PREDICTION OF CRIMINAL REITERATION AND A POLITICAL GOAL?

Nowadays, the word ‘terrorism’ is ‘in vogue’ worldwide, which can give rise to confusion of phenomena and inappropriate response.¹³ Nevertheless, the mere commission of any violent criminal act does not amount to a terrorist crime. In the field of terrorism, each specific act not only attacks the individual protected goods or interests against which it is directed but transcends the specific harm. Accordingly, the criminal activity against the person characteristic of this phenomenon must be carried out in a reiterative (continuous) and indiscriminate (random) way. The message of a terrorist attack is that the act performed or an equally destructive one will be committed again, as long as the *status quo* that the attacker aims to modify remains unaltered – hence the importance of continuity or criminal reiteration. Consequently, the specific victim of a terrorist crime not only suffers an attack to her most fundamental interests, in common with a victim of a common crime, but is also instrumentalised.¹⁴ The terrorism victim is affected at a double level.

On the one hand, the message sent by the commission of the act addresses the society as a whole or a group (‘first-level instrumentalisation’) and entails an alteration of the public peace, that is, the transformation of a state of social calm and tranquillity into a situation of collective fear or terror for one’s own life. Hence the relevance of the indiscriminate element, for, when it is present, the specific victim has only a symbolic value, as the carrier of a message with massive potential, implying that harm can befall anyone, especially those who stand in the terrorists’ way or oppose their plans. Notwithstanding that, in statistical terms, there are more possibilities of being killed or injured as a result of other contingencies,¹⁵ the psychological impact of harm is much higher in terrorism.¹⁶ In other words, the feeling of subjective security,¹⁷ is much more affected by this phenomenon although objectively other causes are more dangerous for personal life and integrity; and that is because the *modus operandi*

¹³ For recent tendencies in the US to ascribe the label, ‘domestic terrorist’, see Byman, D., ‘Who is a terrorist, actually? The problem with labeling your least-favorite protest group as “terrorists.”’ *Vox* <https://www.vox.com/identities/21449415/antifa-terrorists-violence-patriot-prayer-black-lives-matter-protests-portland-kenosha>, 22 September 2020, last accessed 16 September 2021.

¹⁴ Ferrajoli, L., ‘La violencia y la política’ in Pérez Mariño, V. (ed.), *Justicia y Delito* (Universidad Internacional Menéndez Pelayo, Santander, 1982) 65–88, 76.

¹⁵ See Mueller, J. and Stewart, M.G., *Terror, Security, and Money* (Oxford University Press, Oxford, 2011).

¹⁶ Reinares, F., *Terrorismo y Antiterrorismo* (Paidós, Buenos Aires, 1998) 39.

¹⁷ Prittitz, C., ‘Guerra en tiempos de paz’ [2004] 14 *Revista Penal* 174, 177.

used, namely, randomness and repetition (which also relates to the magnitude of the harm), has an especially intense impact on people's psyches, particularly in the age of weapons of mass destruction¹⁸ and mass media.¹⁹

On the other hand, the message of the specific act also addresses the government ('second-level instrumentalisation') with the aim to achieve political goals with a message that would not grab its attention if that situation of collective fear did not exist. Given that society demands protection by the state, the government is more vulnerable to terrorist claims the more the population is frightened. Therefore, the creation of generalised terror is at the same time end and means.

Consequently, only criminal activity that instrumentalises people with the ultimate goal of coercing state authorities, that is, members of constituted (or constituting) governments, can truly be defined as 'terrorist'. We can only speak of terrorism when 'instrumentalising violence' attains a double level as aforementioned.

CAN WE SPEAK OF INDIVIDUAL TERRORISM? THE LONE-WOLVES PHENOMENON

As a starting point, terrorism is in reality invariably connected with the existence of an organisation, to which different subjects individually contribute their support and collaboration. It is the organisation that provides 'the means to carry out violence with a minimal degree of success and survival',²⁰ both in terms of the particular crimes and also the necessary background of intimidation.²¹ Consequently, an important collection of authors argues that we cannot strictly speak of 'lone' terrorism, for it is implausible that an isolated subject, without the coverage of an organisation, could have the potential continuously to carry out crimes, spread social terror, and put forward political claims in a stable manner.²² These authors are quite right, for the isolated conduct of an individual does not appear *ex ante* apt to convince the population and the government that it has durability in the field of political violence and that it is fea-

¹⁸ Cole, D. and Lobel, J., *Less Safe, Less Free* (New Press, New York, 2007) 192 ff.

¹⁹ Rodríguez-Magariños, F.G., *La Lucha contra el Terrorismo en la Sociedad de la Información* (Edisofer, Madrid, 2006) 47ff.

²⁰ Jordán, J. (ed.), *Los Orígenes del Terror* (Biblioteca Nueva, Madrid, 2004) 258.

²¹ Batarrita, A.A., 'El discurso del enemigo y su infiltración en el Derecho Penal' in Cancio Meliá, M. and Gómez-Jara Díez, C. (eds), *Derecho Penal del Enemigo, vol. I*. (B de F, Madrid, 2006) 260; Cancio Meliá, M., "'Derecho penal" del enemigo y delitos de terrorismo' (2002) 44 *Jueces para la Democracia* 19, 25.

²² Compare Cancio Meliá, M., *Los Delitos de Terrorismo* (Reus, Madrid, 2010) 86, 157, 259.

sible that it will remain there for a long time (notwithstanding the social alarm that serial killers create, or the social impact of isolated acts of catastrophic consequences such as a school shooting). In other words, the element of criminal continuity and, therefore, the first- and second-level instrumentalisation, is too blurred when a person acts without the coverage of a group. Hence, in terrorism, it is the organisation that has the ability to repeat harmful conducts and thereby amplify their political impacts, notwithstanding that one or more of its members might fall. Consequently, an organised structure, not a lone actor, ultimately provides the element of fungibility that continuous criminal activity requires.

At the same time, from a theoretical point of view, and especially bearing in mind the degree of destruction that certain weapons can currently achieve, it might still be possible to speak of individual terrorism. For example, it is feasible for an isolated individual to attack a non-negligible part of the population with chemical or biological weapons or via cyberspace. In these cases, the harmful potential that the organisation normally lends to terrorism is replaced by the operational and harmful capacity of the means used, which can affect the life and integrity of many people by the performance of one single conduct. These individuals, who exist so far almost entirely in Hollywood scripts, would be true terrorist lone wolves, provided that they pursued a political goal.²³

By contrast, '*jihadist* lone wolves' are, in the majority of cases, intercepted following a criminal act.²⁴ Therefore, can we speak of a prediction of criminal reiteration when the perpetrator of an attack that acts without the coverage of an organisation cannot repeat her conduct? The answer is, quite simply, 'NO'. Consequently, the only possible way that this kind of conduct could be labelled as 'terrorism' would be to consider that, regarded as a whole, it constitutes a functional equivalent of the organisations or groups that exist within the sphere of *jihad*, a sphere in which the internet is used as a general call for the

²³ Beyond *jihadism*, one actor who came close was Theodore Kaczynski, the 'Unabomber', who engaged in a mail bombing campaign, but given that it took from 1978 to 1995 to kill three and wound 23, his terrorising impact was limited and his de-industrial manifesto was far from a lucid political demand: Barnett, B.A., '20 years later: a look back at the unabomber manifesto' (2015) 9.2 *Perspectives on Terrorism* 60. Another example might be David Copeland, convicted of homophobic-inspired bombings in London: *R v Copeland* [2011] EWCA Crim 1711; Wolkind, M. and Sweeney, N., 'R v David Copeland' (2001) 41 *Medicine Science and Law* 185.

²⁴ Examples might include Dzhokhar and Tamerlan Tsarnaev who set off two bombs at the 2013 Boston Marathon, killing three people and wounding hundreds, and then murdered a police officer during the arrest operation when Tamerlan was also killed. Dzhokhar was convicted of murder (*US v Tsarnaev* USCA 1st Circ, 31 July 2020, <http://media.ca1.uscourts.gov/pdf/opinions/16-6001P-01A.pdf>, last accessed 16 September 2021).

holy war and becomes, for this reason, the bonding channel between many young Muslims. This possibility will be considered next.

IN SEARCH OF A FUNCTIONAL EQUIVALENT OF JIHADIST ORGANISATIONS AND GROUPS THAT MIGHT GROUND AN ISOLATED INDIVIDUAL'S PREDICTION OF CRIMINAL REITERATION: MISSION POSSIBLE OR IMPOSSIBLE?

As regards the structure of terrorist organisations and groups, two evolutionary stages can be distinguished in the period comprised between the last quarter of the twentieth century and the beginning of the twenty-first century. From the organisations characterised by a vertical, hierarchical and centralised structure, like ETA or IRA, we have witnessed the rise of increasingly dynamic, horizontal and net-shaped structures. There exist nowadays numerous groups that have progressively adopted the *jihadist* ideology, and which reflect the flexible and decentralised terrorist network model, often claiming connection as a kind of 'franchise' with Al Qa'ida or Islamic State (IS). Therefore, along with organisations with a permanent and stable structure and in which the relationship between their members or the distribution of their functions are governed by notions of hierarchy and discipline, there also now exist many groups of a transitory nature, lacking a vertical chain of command, which share a same goal – political transformation and the ultimate Islamisation.

Nevertheless, a further evolution in the field of international terrorist criminality, characterised by an 'individualisation of the organizational structure', is said to be occurring. This new terrorist network of contacts is individualist, not collective, works through the individual adhesion of isolated subjects to a criminal ideology not a structure, and is shaped through the social networks by means of an anonymous, not direct, recruitment. Therefore, the internet is where the phenomenon of '*jihadist* lone wolves' hatches and develops, stemming from a call to carry out attacks addressed to followers everywhere in the world. Accordingly, the leader of the IS, Abu Muhammad al Adnani, called upon his followers on 20 September 2014 to kill, 'in any manner', citizens from the US, Europe and all the countries supporting the military coalition against them in Iraq and Syria.²⁵ A few days later, an 18-year-old young Australian, Ahmed Numan Haider, was shot dead while attacking two officers

²⁵ Davidson, H., 'Isis instructs followers to kill Australians and other "disbelievers"' *The Guardian* 23 September 2014.

of the Joint Counter-Terrorism Team outside a Melbourne police station.²⁶ The inquest found that intelligence agency interest had been aroused, resulting in the cancellation of his passport, and that he had some sympathetic friends, but his attack was not discussed with others nor encouraged except by the Caliph of IS.

Can this new reality interwoven by individuals disassociated from each other, therefore, be considered a functional equivalent of true terrorist organisations or groups, which might some of their conducts to be counted as terrorist crime? It has already been argued that a hierarchical and vertical structure is not an indispensable element as regards organised criminality. Such structuring can also be horizontal and decentralised. However, an essential characteristic of that phenomenon is that the commission of crimes be, as its name suggests, 'organised'. In short, the following elements must be present: stability over time, compliance with conduct guidelines, mutual agreement between associates, division of tasks, and fungibility of its members. Without these requisites, the requirement of criminal recurrence which can be imputed to all members of the collective cannot exist and we cannot speak of terrorism, organised or individual.

Next, what needs to be determined is whether the current tension between the Islamic and the Western worlds, globalised via the internet, where charismatic leaders spread their messages and slogans, constitutes a 'terrorist collective' on a par with the traditional ones, which can aggravate offences up to the point that they become 'terrorist crimes'. Note that none of the isolated criminal actors need make direct contact with any other member of the aforementioned collective, and that nobody knows the time and place where the new crime will be perpetrated, if at all. Can we nonetheless speak of a stable coordination of tacit relationships, generated by the generic guidelines spread through the internet, which serves as a bonding channel between individuals who do not know each other, and which ultimately determine the fungibility of the 'members' and, hence, the existence of a prediction of criminal reiteration – apt to ground a terrorism-based ~~sanction enhanced?~~ In other words, is the internet the new vessel of the organisation which services: the slogans, broad goals, and guidelines of conduct; and their recipients, anonymous and disassociated, as well as potential new members, who all share a common ideology and are prepared to multiply attacks and thereby share a functional equivalent of the traditional association's mutual agreement? If the answer to this question were affirmative, the attempts perpetrated by 'jihadist lone

²⁶ See Coroners Court of Victoria, *Finding into death with Inquest: Ahmed Numan Haider* (https://www.coronerscourt.vic.gov.au/sites/default/files/2018-12/ahmadnumanhaider_491714.pdf, 2017, last accessed 16 September 2021).

wolves' would in effect merit the label 'terrorist'. However, that, if this is so, they are not so alone.

They do indeed carry out the attack in an individualistic way, without the coverage of an organisation in the traditional sense (so they cannot be convicted of the crime of membership of a criminal organisation or group). Nevertheless, the message and criminal reiteration are conveyed to the extent that they form part of an, albeit vague, organisation chart that transcends the particular crime. A message ~~that~~ can ultimately be imputed to them without violating the principle of liability for one's own acts, as long that the conviction can be reached that an objective prediction of attack reiteration can currently be made, which entails that society lives in a terrified state due to the uncertainty that new acts of that genre may be perpetrated. This outcome would amount to a late modern form of integration with a criminal organisation that would not ground criminal punishment for membership of it – hence the term individual terrorism persists – but would, due to the presence of the element of reiteration, make each individual act committed in this context qualify as a terrorist crime. In this way, it can be argued that an 'isolated' act carried out by a '*jihadist* lone wolf', along with the particular social alarm that its commission entails, communicates prospectively, more so than isolated acts carried out by a serial killer or by a fanatic driven by any other ideology purpose unrelated to the *jihad* because of the lack of any strong motivating belief system.²⁷ Ultimately, the double instrumentalisation characteristic of terrorism is also appreciable in this new form or reiterated and indiscriminate criminality of a collective of subjects that have individualised the concept of organisation, without there being a contradiction between these terms.

THE ADVANCEMENT OF THE PUNITIVE BARRIERS: WHERE IS THE LIMIT?

So far, therefore, this chapter has pursued a labelling question: can the attacks perpetrated by '*jihadist* lone wolves' be described as 'terrorism'? In summary, an affirmative answer can be found in some circumstances without violating

²⁷ This point applies generally to the extreme right-wing attackers whose isolated campaigns produce social disquiet not so much of future repetition through political extremists as of past brutality and the need to control weaponry. See the cases of Anders Breivik (*22 July Commission, Report*, Oslo, <https://www.regjeringen.no/contentassets/bb3dc76229c64735b4f6eb4dbfcdbe8/no/pdfs/nou201220120014000dddpdfs.pdf>, 2012) and Brenton Tarrant (*New Zealand Royal Commission of Inquiry into the Terrorist Attacks on Christchurch Masjidain on 15 March 2019*, Wellington, <https://christchurchattack.royalcommission.nz/the-report/>, 2020, last accessed 16 September 2021).

the principle of act-based criminal law (*Tätstrafrecht*) and without altering the defining commonly understood features of the terrorism phenomenon. However, even if this conclusion is not sustained, it cannot be doubted that these acts count as common murders. Alongside this first question, which will ultimately determine the application of terrorism-based sanction enhancement and of other consequences in the procedural field, the criminalisation or not of these acts *de lege ferenda* is another problem.

The second issue that must be tackled as regards *jihadist* terrorism is the extent to which it is legitimate to push the punitive barriers forward in order to prevent conduct very distant from the effective attack of a legally protected interest. Countries governed by the rule of law cannot usually countenance the punishment of mere thoughts (*cogitationis poenam nemo patitur*) or of acts carried out in stages of the (preparatory) *iter criminis* that not even endanger any interest worthy of protection by the criminal law. Whether these boundaries should remain in the case of terrorism may be considered in the situation where it is found that an individual has started to perform acts that could potentially lead to the commission of an attack. The situation might involve a person who exhibits symptoms of dangerousness through conduct that denotes a violent ideology and indicates the possible lifestyle linked to criminal activity. Is it justifiable to punish the conduct of a person that shows a disposition to commit terrorist crimes through potentially preparatory acts,²⁸ either through self-indoctrination by possessing or consulting materials of a *jihadist* ideology, or through commencement of training? In order to carry out the analysis, two situations must be distinguished according to the way in which the ‘manifestation of dangerousness’ arises: either through conclusive acts, which is the case when a training programme to commit terrorist crimes is commenced; or by accessing websites or possesses materials of a *jihadist* content.

In these situations, article 575 SPC criminalises conduct related to the training and indoctrination of future terrorists, to which it attaches two- to five-year prison sentences. First, it criminalises the conduct of receiving indoctrination or undergoing military or combat training, with the aim of committing any terrorist crime, including moving or settling in a foreign land, even if this country is not controlled by a terrorist group.²⁹ Second, it criminalises the conduct of carrying on any of those activities by oneself (so-called self-training and self-indoctrination), in particular by accessing media services whose content is

²⁸ Pastor Muñoz, N., *Los delitos de posesión y los delitos de estatus* (Atelier, Barcelona, 2005) 55 ff.

²⁹ Since 2019, it is not necessary that the foreign land is controlled by a terrorist group; it is a crime to move to *any* country with such aim (see Act 1/2019, 20 February, art. 21).

aimed at, or apt to, incite recipients to join a terrorist group, and also acquiring or possessing this kind of document.

A case in which the dangerousness of an individual is especially apparent is where the person wants to join a terrorist organisation in the future or to commit the crimes that constitute its goals and is already preparing for doing so. In other words, cases can arise in which the will to become a terrorist is manifested through conclusive acts, whose unequivocal meaning implies the future commission of crimes. Do they deserve to be punished?

As Silva Sánchez points out,³⁰ two relevant theories of crime or wrongdoing can be distinguished. One of them conceives the wrongdoing as the negation of a norm. In this model ‘crime operates at a symbolic, communicative or socio-ethical level’. The other conceives it ‘as the violation of an interest’. According to this model, crime operates ‘at an empirical level’. Neither of these models is, however, practicable as a whole. Almost every crime combines empirical and symbolic aspects. Based on this template, from the standpoint of an eminently empirical conception of the wrongdoing, the punishment of the aforementioned acts is based, not on the act itself, but on the dangerous actor,³¹ given that mere training neither attacks in itself a legally protected interest, nor endangers it. Therefore, from this perspective, the criminal sanction would be situated in the orbit of pre-criminal preventive measures.

Confidence in the re-socialising and preventive potentiality of the criminal law is nowadays in crisis.³² Observers often are disenchanted with the possibilities of re-socialising interventions (positive special prevention) or of the deterrent potentiality of the criminal law (negative general prevention) or of its ability to reaffirm the values of the legal order (positive general prevention). Therefore, punishment remains as an incapacitating measure; because offenders are considered ‘incurable’, they must be kept imprisoned for the longest time possible through ‘the return of incapacitation’.³³ Consequently, punitive

³⁰ Silva Sánchez, J.M., ‘Introducción’ in Cancio Meliá, M. and Silva Sánchez, J.M., *Delitos de organización* (B de F, Madrid, 2008) 7 ff.

³¹ Detractors of the crime of attendance at terrorist training camps claim that it punishes ‘dangerous people’, but the former Minister for Internal Affairs, Wolfgang Schäuble, contended that ‘someone who undergoes planned training in a camp of terror is not there organising his free time: he does it in order to carry out attacks’ (Cancio Meliá, M., *Los Delitos de Terrorismo* (Reus, Madrid, 2010) 237 n. 17.

³² Silva Sánchez, J.M., *La Expansión del Derecho Penal* (2nd ed, Civitas, Madrid, 2001) 145.

³³ Silva Sánchez, J.M., ‘El retorno de la inocuización’ in Martín, A.N. (ed.), *Homenaje al Dr. Marino Barbero Santos. In Memoriam, vol. I* (Universidad de Castilla-La Mancha, Toledo, 2001) 699 ff.

and preventive criminal laws are brought closer to one another.³⁴ One of the weapons in the criminal law of the enemy's punitive arsenal is the criminal sanction understood as a means for the incapacitation of dangerous individuals, that is, the part of punishment grounded on an offender's prediction of future dangerousness.

We never know for sure whether, once the training period or indoctrination periods come to an end, the 'potential terrorist' will back down, or the organisation itself will consider that she is not 'fit' to carry out criminal activity. Each subject must, therefore, have begun to perform specific acts of collaboration or to prepare particular crimes; she must, in other words, have started to put into practice the training tactics learned as an 'aspirant' rather than 'member'.³⁵ Therefore, from the standpoint of the traditional logic of the advancement of the punitive barriers, we would be punishing the preparation of the endangerment of a legally protected interest. This solution is not legitimate from the perspective of a guarantee-based criminal law, for the material harmfulness of those conducts is excessively uncertain. Consequently, the criminalisation of preparations can only be based on the second of the theories of wrongdoing mentioned above, arguing, in particular, from the logic of the wrong inherent to threat-based offences, which resorts to the idea of the protection of security.³⁶ In our field of focus, the communicative aspect of the conduct of undergoing training can be serious enough for its punishment to be warranted. For someone to be found in a training camp fostered by a terrorist organisation is conduct detrimental to the general security of a society. However, in order to be criminalised, the training must show a subjective dangerousness, comparable/equivalent to the objective dangerousness that justifies penal intervention. Therefore, from this perspective, it is only legitimate to punish individuals who are being militarily trained by a terrorist organisation.³⁷ For instance, people arrested in a training camp in South America, Northern Africa or the

³⁴ Pastor Muñoz, N., *Los Delitos de Posesión y los Delitos de Estatus* (Atelier, Barcelona, 2005) 25.

³⁵ García-Pablos de Molina, A., 'Asociaciones ilícitas y terroristas' in Cobo del Rosal, M. (ed.), *Comentarios a la Legislación Penal*, vol.II (Edersa, Madrid, 1983) 109–171, 155.

³⁶ From the perspective proposed by Günther Jakobs, 'Criminalización en el estado previo a la lesión de un bien jurídico' in *Estudios de Derecho Penal* (Civitas, Madrid, 1997) 293–324, 314–315, threat-based offences are conceived as attacks against the legal peace. The wrong inherent in them is only partial, for they violate 'flanking norms whose mission is to guarantee the principal rules' conditions of validity'.

³⁷ It follows that the maximum penalty of life imprisonment for training in the (UK) Terrorism Act 2006, s.6[5][a] is especially illegitimate after being modified by the Criminal Justice and Courts Act 2015. Walker, C., *The Anti-Terrorism Legislation* (3rd ed, Oxford University Press, Oxford, 2014) 213–214).

Middle East, operated by an armed group, in which they are instructed on the use weapons or explosives, or combat tactics. Conversely, the punishment of persons who are learning those tactics by themselves, that is self-training (typically online), or who settle in a foreign land controlled by a terrorist group or organisation is not justified. Punishment of indoctrination-based conduct, like the consultation or possession of *jihadist* propaganda, is equally unwarranted. In these cases, the conduct in question neither objectively endangers any individual legally protected interests, nor constitutes a true social perturbation through the communication of the subjective dangerousness of the actor.³⁸

These excessive criminal interventions represent a manifestation of an actor-based criminal law. This type of law ‘does not intervene on the grounds of an objectively dangerous conduct, but on the grounds of the finding that the actor has a favourable disposition towards crime’,³⁹ which is presumed simply on the basis of ideology. These instances of criminalization sit, therefore, very uncomfortably with the fundamental rationale of a liberal criminal law.

³⁸ Pastor Muñoz, N., *Los Delitos de Posesión y los Delitos de Estatus* (Atelier, Barcelona, 2005) 63.

³⁹ *Ibid.*