

Dealing with Transnational Terrorism

The Concept and Practice of Joint Investigation Teams

Edwin Bakker and Joseph Powderly

Edwin Bakker is director of the Centre for Terrorism & Counterterrorism of Leiden University. Joseph Powderly is Assistant Professor of Public International Law of the Grotius Centre for International Legal Studies at the same university. The authors would like to thank John Ablan, Trainee Researcher at the T.M.C. AsserInstitute for his research assistance.

DOI: 10.1163/187502311796365880

Introduction

Cross-border crime and threats to security are as old as there are borders. In recent decades enormous progress has been made in transnational cooperation to deal with these challenges. This holds true in particular for Europe. European integration, through the European Union (EU) and its predecessors, but also through the Organization for Security and Cooperation in Europe (OSCE), the Council of Europe and various other multilateral agreements, has resulted in much closer and much more direct international law enforcement and judicial cooperation in dealing with cross-border issues. Perhaps one of the closest and most direct examples of such cooperation is the use of joint investigation teams (JITs). These teams represent an important new trend in the development of an effective capacity to investigate and prosecute transnational crimes of all sorts.¹

Since crime often involves actors and locations in multiple states, coordination between the policing authorities of several states is a critical component to a successful crime fighting strategy. This holds true in particular for one type of crime: terrorism. In Europe, almost from its beginning in the days of the Anarchists in the late 1900s, it was known for its international and cross-border dimensions. In those days, national authorities already realised that they needed international cooperation if they were ever going to manage the threat of terrorism. Thanks to the political integration of Europe, JITs provide opportunities unheard of during the period when European States were struggling with the wave of Anarchist terrorism or even the wave of left-wing terrorism in the 1970s and 1980s. One particular recent success story in this respect has been the series of highly successful bilateral JITs instituted by the French and Spanish governments with the aim of quelling Basque separatist violence.²

An important question for the use of JITs in the struggle against terrorism is the legal framework within which they operate. A legal framework must answer questions such as: who has a right to conduct investigations? Which country's law will govern the investigative techniques used? For what use may the information gathered during the course of the joint investigation be put? What role does domestic legislation play in the operations of a JIT? At the heart of these questions lies a tension between the need for expediency and information sharing necessary for effective counter-terrorism and the sovereign rights of a state. JITs must strike a balance between these competing interests that is acceptable to all States involved.³

This article focuses on the issues surrounding the ability of states to create a legal framework for the use of JITs in general and the role of the Council of Europe, the United Nations (UN) and the European Union (EU). The EU and the Council of Europe have created legal instruments to set out such a framework, namely the European Union Convention on Mutual Assistance in Criminal Matters of 2000 and the 2002 Framework Decision on Joint Investigation Teams.⁴ Additionally, the EU has also formulated a number of agreements with the United States (US) for the use of JITs. The issues explored in this paper include the current framework (and its history

1 Yvon Dandurand, Strategies and practical measures to strengthen the capacity of prosecution services in dealing with transnational organized crime, terrorism and corruption, see <http://www.icclr.law.ubc.ca/Publications/Reports/Enhanced%20prosecution%20Qatar%20Summit.pdf>.

2 Kapplinghaus, J. (2006), 'Joint Investigation Teams: Basic Ideas, Relevant Legal Instruments and First Experiences in Europe', 134th International Training Course Visiting Experts' Papers. See, www.unafei.or.jp/english/pdf/RS_No73/No73_07VE_Kapplinghaus_2.pdf

3 Zimmerman, D. (2006), 'The European Union and Post 9/11 Counter-terrorism: A Reappraisal', Studies on Conflict and Terrorism, Vol. 29, No. 2, pp. 123-45, pp. 123-7.

4 European Union, 'European Convention on Mutual Assistance in Criminal Matters'. See, <http://conventions.coe.int/Treaty/en/Treaties/Word/030.doc>; European Union, 'Framework Decision on Joint Investigation Teams'. See, http://europa.eu/legislation_summaries/other/l33172_en.htm.

and background), the issue of a dual legal basis and the duty to disclose, the perceived need for Common Investigation Standards and the role of Europol and Eurojust. The paper closes by asking whether the EU is in fact the right body to create a legal framework for JITS. The unifying research question running throughout the paper asks whether in fact it is realistic, given the inherent reluctance of States to share intelligence material and to relinquish control over certain criminal matters, to speak of an effective multilateral framework (outside of the specific example of the EU) for the investigation and subsequent prosecution of terrorist-related activities. The objective of this paper is not to answer these questions in any categorical sense but rather to attempt to establish the challenges that are likely to be faced in attempting to export this innovative investigative mechanism outside of its current EU confines.

History and background

*United Nations Convention against Transnational Organized Crime*⁵

Some authors have characterised the UN Convention against Transnational Organized Crime as a forerunner to the modern framework for JITS.⁶ Adopted on 12-15 December 2000, the convention calls on States to consider bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. The convention also has a clause calling on all States to ensure that the sovereignty of the State party in whose territory such investigation is taking place is fully respected. This language has been characterised as weak, because it sets out no framework of its own and merely calls on States to consider bilateral or multilateral agreements.⁷

European Union Convention on Mutual Assistance in Criminal Matters of 2000

Prior to the adoption of the EU Convention on Mutual Assistance in Criminal Matters, there was a lack of a specific legal framework for JITS.⁸ In full accordance with Article 34 of the Treaty on the European Union, the convention was adopted on 29 May 2000. Article 13 creates conditions for setting up a JIT and sets out rules for methodology. The convention lists two situations where joint teams may be set up. A joint investigation team may be set up where 1) a Member State's investigation into criminal offences requires difficult and demanding investigations having links with other Member States, or 2) a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated concerted action in the Member State involved.⁹ By agreement between the competent authorities of the Member States that are to be part of the JIT, the JIT must have a defined purpose and a time period for its operation. This time period may be extended by mutual agreement between the parties. Membership will also be specified by the agreement and may include – in addition to law enforcement officers – prosecutors, judges, or other persons.¹⁰ The team will be set up in the Member State where the main portion of the investigation is expected to take place (hereafter the Home State). The leader of the JIT must be a representative of the competent

5 United Nations, 'Convention against Transnational Organized Crime'. Available at: <http://www.unodc.org/unodc/en/treaties/CTOC/index.html>.

6 Plachta, M. (2005), 'Joint Investigation Teams. A New Form of International Cooperation in Criminal Matters', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 13, No. 2, pp. 284-302, pp. 284-5.

7 Ibid, p. 286.

8 Ibid, p. 287.

9 Ibid, p. 288.

10 Ibid.

authority from the Home State, and must act within the limits of his competence under national law. The JIT must carry out its operations in accordance with the law of the Home State. Finally, the Home State must make the necessary organizational arrangements for the JIT to operate.

A JIT member not from the Home State is termed a 'seconded member', and is permitted to be present when investigative measures are taken in the Home State. However, the team leader may, for practical reasons and in accordance with the law of the Home State, deny the seconded member access. The leader may entrust a seconded member with carrying out investigative measures when they have been approved by the competent authorities of the Home State and the seconded State. A seconded member may request his own national authorities to take measures that are required by the team, and that request is treated as though it came from within the seconded country and not from the Home State. The JIT may request additional assistance from another member of the EU or from a third State.¹¹

Any member of a JIT may provide information to the JIT if it is in accordance with its domestic law. Information may be lawfully used by a member of a JIT when it is not otherwise available to the competent authorities of the Member State concerned. Such information may be used for the following purposes: 1) For the purposes for which the team has been set up; 2) Subject to the prior consent of the Member State where the information became available, for detecting, investigating and prosecuting other criminal offences. Such consent may be withheld only in cases where such use would endanger criminal investigations in the Member State concerned or in respect of which that Member State could refuse mutual assistance; 3) For preventing an immediate and serious threat to public security and without prejudice to paragraph 2 if subsequently a criminal investigation is opened; 4) For other purposes to the extent that this is agreed between Member States setting up the team.¹²

Most of the provisions of this instrument were directly reproduced in the subsequent European Union Framework Decision of 2002 on Joint Investigation Teams.

The current framework

In order to avoid the ratification process which is necessary for the European Union Convention on Mutual Assistance in Criminal Matters of 2000 to enter into force, the European Commission decided to propose a Decision for adoption by the European Council.¹³ On 13 June 2002, the Council of the European Union adopted the Framework Decision on Joint Investigation Teams (the Decision). The Decision takes the provisions of Article 13 of the EU Convention listed above and copies them verbatim. The Decision has also added two provisions concerning civil and criminal liability. For criminal responsibility, officials from a Member State other than the Home State are considered officials of the Home State for offences committed by or against them. For civil liability, the Member State of the official shall be liable under the laws of the Member State where the investigation is operating.¹⁴

However, decisions have the disadvantage of not creating direct vertical or horizontal effects.¹⁵ Thus, the

11 Ibid, p. 290.

12 Ibid.

13 A decision has the advantage of being binding on Member States in terms of outcome without the need for ratification.

14 Plachta (2005) pp. 292-4.

15 Rijken, C. (2006), 'Joint Investigation Teams: Principles, Practice, and Problems. Lessons Learnt From the First Efforts to Establish a JIT', Utrecht Law Review, Vol. 2, No. 2, pp. 99-118, p. 101.

Decision itself may not be used as a basis for the establishment and operation of a JIT. Instead, Member State domestic legislation implemented in accordance with the decision must be used.

Issues to explore

Dual legal basis – the need for systemic integration

This dual legal basis (the Convention and the Decision) has led to problems in establishing some JITs. In one instance, a JIT between the United Kingdom and the Netherlands caused some difficulties as the United Kingdom had enacted legislation in compliance with the decision while the Netherlands had implemented the Convention.¹⁶ The Dutch Code stated that a JIT could be set up insofar as the Convention allowed. Since the United Kingdom's legislation corresponded to the Decision, it was – formalistically speaking – not an eligible candidate. Ultimately, however, a district court in the Netherlands held that the Decision was binding on Member States and had a supranational character and that there was a legal basis for the establishment of the JIT.¹⁷ It would appear at this juncture that further action needs to be taken at the domestic level in order to ensure that similar obstacles are avoided in the future. In this respect, it has been suggested that the EU is focusing on 'cooperation and coordination rather than on any form of integration'.¹⁸ However, given the inherent political headaches (most usually pertaining to the maintenance of State sovereignty) arising from any discussion of a common EU criminal code, the integration of cooperative criminal agreements is likely to be a persistent stumbling-block and is certainly worth exploring. That said, there is an argument to be made that such issues, while frustrating in terms of efficiency, can be readily overcome via negotiation amongst the proposed participating states. Additional solace may be offered in the consideration of complementary instruments such as Article 20 to the Second Protocol to the Council of Europe Convention on Mutual Legal Assistance, which specifically mandates the establishment of JITs amongst member states. In this sense the issue of competing and/or dual legal bases for the establishment of JITs is an irritation rather than a genuine obstacle in the EU context. Looking more broadly beyond the EU it is understandable that these issues can be a major issue which realistically will only be addressed through detailed negotiations, as in the case of the establishment of a JIT between an EU member State and the United States.

Duty to disclose

Another issue related to the adequacy of a legal framework for a JIT concerns the duty of disclosure. A duty to disclose refers to the prosecution's obligation to disclose pertinent information regarding a criminal case to the defence prior to trial. For instance, in the United Kingdom the prosecution has the duty to disclose the evidence which is at its disposal to the defence. The prosecution must also disclose any material of relevance that they do not intend to rely on. However, a judge may eliminate this requirement for evidence that he deems would be against the public interest to disclose. The Netherlands, on the other hand, does not have a public interest exception to its duty to disclose. This difference posed problems for a JIT conducted between the two countries until the countries used Europol as an intermediary for sensitive information. This solution prevented the normal disclosure rules from applying.¹⁹ This particular issue has been very much to the fore in the difficulties experienced in the establishment of JITs involving the US and EU member states. Not unsurprisingly disclosure obligations vary greatly between EU States and the US, as do investigative practices

16 Ibid, p. 110.

17 Ibid, p. 110.

18 Monar, J. (2007), 'Common Threat and Common Response? The European Union's Counter-Terrorism Strategy and its Problems', *Government and Opposition*, Vol. 42 No. 3, pp. 292–313, p. 309.

19 Rijken (2006), pp. 113-14.

which may pose significant civil liberties questions relating to privacy and data protection. Add to this the reluctance of states to share certain sensitive information and means by which it was obtained and it is clear that without the requisite trustworthy relationship between states, a workable JIT is unlikely to be established. In many ways this is the crux of the matter, without trust and a willingness to put in place a legal framework which accommodates competing priorities it is extremely unlikely that the JITs model will be exported beyond its current EU context.

Common investigation standards

Some authors have stressed the need for common investigation standards as a necessary condition for the establishment of a JIT. Although this recommendation was made in the context of JITs between members of the EU, the same logic applies to a potential JIT involving States outside of the EU context. This coordination can be characterised as taking place on the domestic or international level. The European Convention on Mutual Assistance regulates some measures; Articles 10 and 11 regulate the interrogation of suspects, witnesses and experts, Article 14 regulates infiltration, and Articles 17-21 regulate intercepting telecommunications.²⁰

This area is one of many places where the tension between expediency and respect for sovereignty makes policy-making difficult. A unified legal framework will create a smoother operating platform; however, it will be difficult to reconcile deeply held legal and cultural rules as to the proper criminal procedure.

The role of Europol

Europol is the EU's most operational agency with respect to supporting the Member States' fight against terrorism.²¹ Its task is to improve the effectiveness of the competent authorities of the Member States and cooperation in an increasing number of areas.²² From an early stage, it was envisioned that Europol would have a large role in police cooperation in the European Union.²³ In the Treaty of Amsterdam, Europol was to be enabled to 'facilitate and support preparation, and foster coordination and execution of specific investigation activities by the competent authorities of the member states, including operations by joint teams which include representatives of Europol in a supporting role'.

Schalken and Pronk point out that Europol plays an important role in the establishment and operation of JITs. They argue that although it lacks this power de jure, Europol fills the gap in police cooperation by taking initiatives and launching investigations and can play a large role in the formation of JITs.²⁴ In this respect it is worth noting that Europol – alongside the Commission – offers significant financial support to States wishing to set up a JIT. The significance of this funding role should not be underestimated and should be recognized as playing an important role in the future success and development of the JITs model.

In addition, an overarching police body, such as Europol, has the potential to offer a lot of added value, such as, for example, with respect to central human resources, organisational hierarchy, signalling the relevance of the creation of a JIT and cultural differences. In this regard, Schalken and Pronk ultimately recommend

20 Schalken, T. & M. Pronk (2002), 'On Joint Investigation Teams, Europol and Supervision of Their Joint Actions', *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 10 No. 1, pp. 77-82), p. 76.

21 Zimmerman (2006), p. 131.

22 Ibid, p. 132.

23 Schalken and Pronk (2002), p. 71.

24 Ibid.

amending the Europol Treaty in order to provide greater detail in their operational and formation powers.²⁵ Authors have also called for increased democratic accountability for the actions of Europol and have suggested that the European Parliament take on a greater role in its supervision.²⁶

The role of Eurojust

Eurojust is a fairly recently (2002) established judicial network.²⁷ The role of Eurojust is to enhance the effectiveness of the competent authorities within the Member States when they are dealing with the investigation and prosecution of serious cross-border and organised crime.²⁸ To that end, the Eurojust Decision 2002 enabled Eurojust to make an official request to the competent authorities in the EU Member States to set up a JIT. The revised Eurojust Decision, published in June 2009, is a major step forward from this basis. It provides for Member States to notify Eurojust of the setting up and results of a JIT, for national members to participate in JITs, to be invited to participate in a JIT if Community funding is provided, and for the Secretariat of the JIT Experts Network to form part of the staff of Eurojust.²⁹ When the revised Eurojust Decision will be fully implemented in all Member States, Eurojust and Europol will become the focus point for JITs in Europe, especially when Eurojust can both help to overcome concrete implementation problems and support JITs either via the Member States' national legislation or via the provisions of the Eurojust Decision.³⁰

EU-US cooperation

On 25 June 2003, the United States and the EU signed an agreement on mutual legal assistance.³¹ This bilateral agreement contains an article concerning JITs. The agreement provides that the parties shall take such measures as may be necessary to enable joint investigation teams to be established and operated in the respective territories of each Member State and the United States.³² Unlike the Decision or the Convention, this agreement does not contain specific rules on the formation and functioning of a JIT. Instead, the various elements and attributes of a JIT are to be agreed by the parties on a case by case basis. This has the advantage of creating flexibility but increases the transaction costs of setting up a JIT.

Some authors have criticised this agreement's lack of provisions on civil or criminal liability. The lack of these provisions is further complicated by the lack of democratic scrutiny or judicial review.³³ Furthermore, there are numerous practical obstacles that relate to the differences in the legal systems and procedures. For instance, since the treaty power of the federal government may not extend to agreements which violate the Constitution, formulating JITs that comport with EU Member States' criminal procedures may be difficult. It is in this area that respect for sovereignty most hampers the efforts to set up a JIT and this fact may explain why current agreements between the US and the EU are on an ad hoc basis without a general legal framework. In addition, EU-US JITs would also lack the benefit of a supranational police force since Interpol is restricted from

25 Ibid, p. 75.

26 Ibid, p. 80.

27 Zimmerman (2006), p. 128.

28 Ibid, p. 132

29 EUROPOL, 'JIT Funding Project'. See, www.eurojust.europa.eu/jit/brochure_jit_funding.pdf

30 Helmborg, M. (2007), 'Eurojust and Joint Investigation Teams: How Eurojust Can Support JITs', ERA-Forum, Vol. 8, No. 2, pp. 245–51.

31 Plachta (2005), p. 294.

32 Ibid, p. 295.

33 Ibid.

dealing with terrorism activities. Without this force, JITS may not be able to overcome some of the procedural difficulties the Dutch and the UK were able to avoid when using Europol. It is not surprising, then, that despite frequent murmurings of the desire to establish a 'pilot' JIT between the US and an EU member state, such an initiative is yet to be successfully negotiated. In this respect we must again return to the issues of trust, shared objectives and an appreciation of the possible added value that is offered by a JIT over that of a conventional bilateral or 'joint venture' investigation which may be more readily established. In addition, if the EU-US initiative is to take root, all parties must have a clear incentive for entering into such a costly venture.

Cooperation in Southeast Europe

An interesting example of joint investigations to deal with transborder crime – including terrorism – is the Regional Center for Combating Trans-Border Crime of the Southeast European Cooperation Initiative (SECI Center). Established in 1999 to deal with transborder crime, it aims to bring together police and customs authorities from its thirteen member countries (including, amongst others, Turkey, Serbia, Moldova and the EU member States Greece, Hungary, Slovenia, Bulgaria and Romania). The Center delivers support to the national customs and law enforcement agencies by offering a trusty environment for information sharing, knowledge development, joint planning and common action in the field of transborder crime. It has initiated regional interdiction operations and joint investigations, involving the competent law enforcement authorities of respective member and observer states, as well as international institutions. The SECI Center also has an Anti-Terrorism Task Force that aims to help identify operational, legislative and structural obstacles in cooperation against crime and terrorism in the region, and to create links and trust among investigators.³⁴ Thus, this regional initiative, including States that are not (yet) members of the EU, could develop into an example of a starting point for JITS across the Eastern and Southern outside borders of the EU.

Moving forward: is the EU the right vehicle for JITS?

The growing role by Europol and Eurojust in the fight against terrorism and the US-EU agreement on mutual legal assistance has evoked criticism about a key role for the EU in this domain – that is still dominated by national (intelligence) agencies and bilateral cooperation based on trust rather than procedures. In fact, there are many efficiency considerations that explain why much cooperation still takes place outside EU structures. Along these lines, some authors have questioned the EU as the correct vehicle for the multilateral fight against terrorism. Doron Zimmerman, for instance, notes the lack of executive power of the EU as well as its intergovernmental – as opposed to supranational – character as the principal reasons for its institutional non-competence in this regard.³⁵ Nonetheless, it is obvious that the EU has the advantage of being able to create uniformity among its Member States within its competencies. To the extent that the EU can force its Member States to adopt criminal investigation policies that comport with its objectives and the need for the establishment of a JIT, it will be a useful vehicle whose future role needs further investigation. That said, the extent to which the EU can spur the integration of something akin to a common criminal procedural code certainly remains to be seen. The potential of the JIT framework to contribute to the effective prosecution of terrorist activity cannot be denied; however, question marks remain as to whether States outside of the EU are prepared to set issues of strict sovereignty to one side in order to fully realise this potential. It is obvious that the trend in this respect continues to be towards bilateral or unilateral initiatives; the question that must be asked is whether a framework can be conceived of in which States would be willing to meaningfully embrace a

34 For more information on the SECI Center, see www.secicenter.org/

35 Plachta (2005), p. 124.

multilateral approach to the investigation and prosecution of terrorist activity, or whether JITS are destined to remain a mechanism particular to the EU.

In February 2011, at an expert meeting organised by the International Centre for Counter-Terrorism in The Hague, these issues were explored in some detail. From the discussion it was obvious that, as it currently stands, the JIT framework is not immediately compatible with counter-terrorism related activities outside of protracted terrorist activities such as that encountered by France and Spain in their long-running struggle with the Basque separatist group ETA. On the one hand, this is a perfect example of highly effective inter-State police cooperation with a common, clearly defined goal. However, on the other hand, there must be an appreciation of the fact that the success of the France- Spain relationship largely lies with the fact that it is the product of thirty years of active engagement and mutual trust. Such a relationship is not possible on an ad hoc short-term basis as would inevitably be necessary in response to the variety of terrorist threats facing States today. That said, it is not suggested that there is no potential for the use of JITS in a counter-terrorism context; rather, that the challenges are greater vis-à-vis 'ordinary' cross-border criminality. The benefits accruing to a JIT are substantial, however, such as increased transparency and a system of checks and balances. Indeed, it is proposed that the potentiality of the JITS model in the context of the global struggle against terrorism is dependent on the following: a strong, trustworthy relationship amongst participating States; a willingness to negotiate a balanced and effective legal framework which clearly defines who will have jurisdiction over what; a sense of shared interests and incentives; and ultimately a clear operational purpose.




























This article was first published with Brill | Nijhoff publishers, and was featured on the Security and Human Rights Monitor (SHRM) website.

Security and Human Rights (formerly Helsinki Monitor) is a journal devoted to issues inspired by the work and principles of the Organization for Security and Cooperation in Europe (OSCE). It looks at the challenge of building security through cooperation across the northern hemisphere, from Vancouver to Vladivostok, as well as how this experience can be applied to other parts of the world. It aims to stimulate thinking on the question of protecting and promoting human rights in a world faced with serious threats to security.

Netherlands Helsinki Committee
Het Nutshuis
Riviermarkt 4
2513 AM The Hague
The Netherlands

© Netherlands Helsinki Committee. All rights reserved.

www.nhc.nl