

## ON TERRORISM AND ANTI-TERRORISM\*

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The terrorism is not a new phenomenon, but its treatment as a subject of International law is more recent. There were many attempts to address terrorism as a matter of legal concern for the international community, beginning with the Geneva Convention for the Prevention and Punishment of Terrorism (drafted by the League of Nations in 1937), followed by the Convention for the Suppression of Unlawful Seizure of Aircraft (December 16, 1970), the International Convention against Taking of Hostages (1979), International Convention for the Suppression of Terrorist Bombings (1997) or International Convention for the Suppression of the Financing of Terrorism (1999). Unfortunately, except the 1979 Convention, the rest of them have never entered into force.

On the other hand, the member states of regional organizations have tried to act in this specific framework. Under the Council of Europe umbrella was adopted the European Convention on the Suppression of Terrorism (January 1997) and the Guidelines of the Committee of Ministers on the Human Rights and the Fight against Terrorism (July 2002). The newest document is the Council of Europe Convention on Prevention of Terrorism, adopted on May 16, 2005 in Warsaw. Within the E.U, the European Parliament issued the Recommendation on the Role of the European Union in Combating Terrorism (September 2001) and the O.S.C.E. has adopted the Decision on Combating Terrorism and the Bucharest Plan of Action for Combating Terrorism (December 2001). The member states of the Organization of African Unity<sup>1</sup> have adopted the Convention on Prevention and Combating of Terrorism (Alger, July 1999) and those members of the Organization of the American States the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (February 1971) and the Inter-American Convention against Terrorism (June 2002).

As we can observe, an important part of those international instrument have been recently adopted, after the terrorist attack occurred on September 11 in New York. This attack suggest that the characteristics of modern terrorism must be re-evaluated since the terrorist groups have now access to financial and technological resources and, consequently, the power to commit mass destruction acts. That is why new directions should be open in international law as a response to modern forms of terrorism but this task is not an easy one for the international community.

There is no consensus on an international legal definition of terrorism. Recent attempts to determine states to agree a common definition of terrorism was during the negotiations for the Statute of International Criminal Court when the proposal was to include terrorism within the jurisdiction *ratione materiae* of the Court. United Nations General Assembly has developed a draft definition of terrorism “criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes which are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature they may be used to justify them”. The European Commission proposal for a Framework Decision (COM (2001)521Final) to combat Terrorism includes a definition of terrorism that cover offences which are intentionally committed by an individual or a group against one or more countries, their institutions or people with the aim of intimidating them and seriously altering or destroying the political, economical or social structures of those countries. This definition seems to intend to extend the terrorism to cover also the demonstrations, street protest etc. since the explanatory report refers to “urban violence”. The

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\* Paper presented in the 29<sup>th</sup> IMISE Conference at the American University of Paris, July 2005.

<sup>1</sup> The organization it is called since July 2002 the African Union.

Council of Ministers of the European Union proposed a broader definition of terrorism that includes actions having the scope of “seriously affecting or destroying the political, economical or social structures of a country or of an international organization”. The European Council Common Position (2001/931/CFSP) on the application of specific measures to combat terrorism try to propose an extensive definition. The “terrorist act” shall mean one of the following intentional acts, which, given the nature or its context may seriously damage a country or an international organization, as defined as an offence under international law where committed with the aims of:

- i. seriously intimidating a population, or
- ii. unduly compelling a government or an international organization to perform or abstain from performing any act, or
- iii. seriously destabilizing the fundamental, political, constitutional, economic or social structures of a country or an international organization:
  - a. attacks upon a person’s life, which may cause death;
  - b. attacks upon the physical integrity of a person;
  - c. kidnapping or hostage taking;
  - d. causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public space or private property, likely to endanger human life or result in major economic loss;
  - e. seizure of aircraft, ships or other means of public or good transports;
  - f. manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of biological and chemical weapons;
  - g. release of dangerous substances or causing fires, explosions or floods the effect of which is to endanger human life;
  - h. interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life;
  - i. threatening to commit any of the acts listed under to a to h;
  - j. directing a terrorist group;
  - k. participating in the activities of a terrorist group, including by supplying information or material resources or by funding its activities in any way, which knowledge of the fact that such participation will contribute to the criminal activities of the group.

In spite of lack of a common definition the states have identified certain violent acts that are considered terrorist acts: taking hostages, the seizure and destruction of civilian aircrafts, attacks against life, physical integrity or liberty of international protected persons, including diplomatic agents, acts of threats of violence destined to spread terror among the civilian population etc. Of course, one could say that states are able to take measures against the violent acts even in the absence of a definition and this is true. Anyway, it is necessary to identify the elements and characteristics of terrorism:

- the profile of perpetrators (states or private individuals, or groups, who may act with direct or indirect support of states, or independently);
- the identity of victims (persons, institutions, property).
- the purposes of those acts (ideological or political in nature);
- the means (use of weapons, the weapons of mass destruction etc).

After September 11 the duty of states to protect the persons living within their jurisdiction from terrorism became a priority. A number of resolutions have been adopted immediately: the Security Council Resolution 1373 (September 28, 2001) under the Chapter VII of the UN Charter, asking the states to take anti-terrorist measures on national level and to cooperate against terrorism

with other states<sup>1</sup>, Resolution 1456 (2003) which invites the states to take measures to combat terrorism but only measures which comply with all their obligations under the international law, especially with international human rights law, refugee law and humanitarian law. When combating terrorism states should have in view the national security protection. Threats to national security could lead to a state of emergency. At the same time, there should be protected the fundamental freedoms during a state of emergency. There is a provision in art. 4 of the International Covenant on Civil and Political Rights (and also in regional instruments as European and Inter-American Convention on Human Rights) that refers to non-derogable rights. These rights are: rights to life, to not be subjected to torture or to cruel, inhuman treatment or punishment, right to not be held in slavery, to not be imprisoned merely on the ground of inability to fulfil a contractual obligation, right to recognition as a person before the law, right to freedom of thought, conscience and religion. In time of public emergency which threatens the life of the nation the states parties may take measures derogating from their obligations under the Covenant except those rights that we have listed. When combating terrorism, human rights are, for sure, threatened and there are some groups who are discriminated on the grounds of origin, socio-economic status (migrants, refugees and asylum seekers). The General Comment nr. 29 of the UN Human Rights Committee is more than welcome to indicate the scope of non-derogable rights and to identify the elements which cannot be subject to lawful derogation.

In the Committee's view, further confirmed by the Statute of International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present constitutes a crime against humanity. The legitimate right to derogate from the Covenant during a state of emergency can never be accepted as justifying such measures.

The anti-terrorist measures which are destined to protect certain human communities are crossing many times the individual rights to life, personal liberty, rights to a fair trial, to judicial protection, to private life, to human dignity.

The most recent example that I have in view is the USA Patriot Act<sup>2</sup>. This act, adopted immediately after September 11 allows law enforcement to use surveillance against more crimes of terror (chemical weapons offences, the use of weapons of mass destruction), allows federal agents to ask a court for an order to obtain business records in national terrorism cases, allows the officials to obtain a search warrant anywhere a terrorist related activity occurred. In this attempt to fight against terrorism the Patriot Act enhances a number of conspiracy penalties (killings in federal facilities, attacking communication systems, sabotage of nuclear facilities, interference with flight crew members). But, if we read some details of the act we can see that it affects some of fundamental rights. The Section 215 of the Act permits the government's access to financial records, travel records, medical records, library records without the knowledge or consent of the suspected person. The government representatives do not need to have a warrant in order to do this activity. The Section 216 allows the authorities to intercept telephones and computers of those suspected for terrorist activities but also of persons under investigation for other crimes.

Section 412 stipulate that any immigrant who innocently supports the activities of a terrorist organization could be deported or indefinitely detained. Can also be detain or deport an immigrant who provides lawful assistance to groups that are not designated as terrorist organizations. We need to add that immigration detainees are not entitled to have a lawyer.

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<sup>1</sup> As a consequence was created the Counter-Terrorism Committee (CTC) having the attribution to monitor the states and to receive reports from states on measures taken.

<sup>2</sup> The full name is Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism.

Another provision regards the aliens who are suspected as terrorists. If the General Attorney certifies that an alien is a terrorist or represents a threat for national security the Immigration and Naturalization Service may detain him without indictment for 7 days before the completion of immigration or criminal charges.

Coming back with the analysis again in Europe we can find similar provisions regarding refugees and asylum seekers. There are legislations which exclude from the asylum seeking process simply on the grounds of their religion, ethnicity, national origin or political affiliation. More than that there are people detained or deported for no other reason than their origin or as a result of revocation of their refugee status. This kind of „fight”<sup>3</sup> against terrorism could seriously affect human rights and the refugees international protection.

The international human rights law generally recognizes some „legal touches” or legal interferences to fundamental rights requested by the public health, public order, social and national security etc. But sometimes the measures taken in the name of security seems to be overestimated in rapport with the scope of prevention against terrorism and this is dangerous because sacrifice human liberty.

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<sup>3</sup> We agree that the term “fight” could create some confusions because it suggests the use of military instruments against an identified territorial objective. See Roberto Toscano, “Le terrorisme international à l’époque de la globalisation”, Bulletin européen, Janvier 2004, nr. 644, p.3.