

FIGHTING TERRORISM: WHAT CAN INTERNATIONAL LAW DO?

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INTRODUCTION

Terrorism is not a new phenomenon. During the last few centuries, humanity has witnessed several patterns of terrorism and the twentieth century added new patterns to terrorism.¹ At the same time, the states of the world, individually as well as within the framework of international organisations, continue with various attempts to counter terrorism.

As far as international law is concerned, an impressive expansion of positive law in the field of anti-terrorist legislation marked the twentieth century.

The main producer of anti-terrorist legislation at the international level is the United Nations. Yet, this activity has not tackled such problems as the ambiguity of the definition of 'terrorism', the difference between a 'terrorist' and a 'freedom fighter' or between a 'terrorist organisation' and a 'national liberation movement', the balance between anti-terrorist policy and human rights, etc.

DEFINING TERRORISM

The problem of the definition of terrorism is of major significance in anti-terrorist policy since it is intimately related to the identification and punishment of terrorist activities and it causes disagreements among states when they have to take common legal measures to counter terrorism. For instance, in the British Prevention of Terrorism Act, s. 20, terrorism is defined as follows: "The use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear." According to US Law 100-204 of 1987, s. 901, "The term terrorist activity means the organizing or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily harm to individuals not taking part in armed hostilities." Additionally, according to US Law 104 302 of 1996, a "federal crime of terrorism" is a crime "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" and to other crimes mentioned in US law, such as unlawful acts against the safety of civil aviation, crimes against internationally protected persons, etc. According to the French Law of 1986, terrorist acts are crimes "en relation avec une entreprise individuelle ou collective ayant pour but de troubler l'ordre public par l'intimidation ou la terreur," i.e. 'terrorism' refers to individual or collective acts which aim at causing social intimidation by terror.

The problem of the definition of terrorism is related to the following facts:

- (i) The notion of terrorism is complicated and terrorist acts may be part of insurgency and subversion,
- (ii) The mass media have contributed to the confusion about the meaning of terrorism by often using the term terrorism in a rather superficial manner, by shifting the political discourse from 'issues' to 'episodes', transforming politics into entertainment and moving from opinion-

making to stimulation through pictures,
(iii) Terrorism is a phenomenon which appears under different guises,²
(iv) States can use the term 'terrorism' arbitrarily in order to be in agreement with their national propaganda and foreign policy goals.

Individual researchers have proposed many definitions of terrorism³ and many working definitions of terrorism⁴ have been used to facilitate the needs of states, national bureaucracies and international organisations. However, there is no definition of terrorism generally approved by an international organisation such as the United Nations or the European Union. The only attempt that has ever taken place to achieve international agreement on the definition of terrorism is the 1937 Convention for the Prevention and Punishment of Terrorism,⁵ signed by Belgium, Bulgaria, Czechoslovakia, France, Greece, Netherlands, Romania, Spain, Turkey, Yugoslavia, Albania, the Argentine Republic, the Dominican Republic, Ecuador, Egypt, Estonia, Norway, Peru and Venezuela. The Convention defined terrorism as "any act intended to cause death or grievous bodily harm or loss of liberty to (a) heads of States, persons exercising the prerogatives of heads of States and their hereditary or designated successors, (b) wives and husbands of the above-mentioned persons, (c) persons charged with public functions or holding public positions when the act is directed against them in their public capacity". Moreover, 'terrorism' covered wilful acts of damaging public property, endangering lives as well as manufacturing machines with a view towards committing such acts anywhere. Yet, the 1937 Convention was never put into practice and, hence, it is not part of positive international law.

The major terrorism conventions drafted within the framework of the UN and ratified by many states are the following:⁶

- Convention on Offences and certain Other Acts Committed on Board Aircraft (Tokyo Convention, 1963): safety of aviation.
- Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention, 1970): applies to aircraft hijackings.
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention, 1971): applies to acts of aviation sabotage, such as bombings aboard aircraft in flight.
- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons (1973): protects senior government officials and diplomats.
- Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention, 1979): combats unlawful taking and use of nuclear material.
- International Convention against the Taking of Hostages (Hostages Convention, 1979).
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (1988): extends the provisions of the Montreal Convention to encompass terrorist acts at airports serving international civil aviation.
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988): applies to terrorist activities on ships.

- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988): applies to terrorist activities on fixed offshore platforms.
- Convention on the Marking of Plastic Explosives for the Purpose of Identification (1991): provides for chemical marking to facilitate detection of plastic explosives, e.g. to combat aircraft sabotage.
- International Convention for the Suppression of Terrorist Bombing (1997): expands the legal framework for international co-operation in the investigation, prosecution and extradition of persons who engage in terrorist bombings.

The main characteristics of these conventions are the following:

1- The internationalisation of terrorist crimes, in the sense that the crimes mentioned in these conventions are international ones. In other words, according to these conventions, there exists a legal duty to deliver up or to bring to court-*aut dedere aut judicare*. The *raison d' être* of the maxim is that an offender should not escape punishment, regardless of whether he is brought to court on the spot or extradited. According to the principle of *aut dedere aut judicare*, it is necessary to ensure the criminal prosecution of every criminal either by the state wherein he has been found or by the state asking for his extradition. Apart from the classical jurisdiction that is provided by national legislation and the conventions signed by the state in whose territory a crime has taken place, jurisdiction is often recognised in case of crimes perpetrated by citizens of the given state in foreign territories and crimes against citizens of the given state outside its territory. Moreover, jurisdiction is often recognised for the prosecution of those responsible for crimes against the national security and national interests of a given state. However, both national legislation and international law rarely⁷ recognise jurisdiction for the prosecution of foreigners whose crimes have been perpetrated abroad against foreign citizens or foreign interests. Finally, it is important to mention that the internationalisation of crimes on the basis of the above mentioned conventions is important because customary international law makes no provisions for the extradition of criminals; extradition is based on positive law (international conventions). Anti-terrorist conventions themselves do not constitute the ultimate foundation of extradition, but they are placed within a broader framework of bilateral and multilateral conventions for extradition signed by states.

2- The expansion of the states' jurisdiction in favour of the state wherein a crime has been perpetrated,⁸ the state of which a criminal is a citizen⁹ and the state of which a criminal with no citizenship is a permanent resident.¹⁰

3- All these conventions require contracting states to punish the crimes that the conventions mention by introducing appropriate national legislation.

4- All these conventions require contracting states to assist each other in connection with criminal proceedings brought under a given convention or protocol.

On the other hand, the above-mentioned anti-terrorist conventions are characterised by two weaknesses. First, they do not provide a definition of terrorism. Second, even though those supporting 'automatic' extradition in case of the crimes mentioned in the conventions (i.e. terrorist crimes) argue that terrorist crimes should be clearly differentiated from political offences, this was not achieved except in case of the 1997 International Convention for the Suppression of Terrorist Bombing.

TERRORISM AND HUMAN RIGHTS

One may characterise the criminal activity of terrorists in several ways. However, terrorists do violate the human rights of their victims, i.e. terrorism per se constitutes a violation of human rights.¹¹ If we see terrorism as a violation of human rights, then international law should protect states from the terrorist activity of insurgents and other criminals by putting emphasis on the condemnation of the means used by terrorists in order to achieve their goals, no matter what those goals are. For instance, in Turkey, PKK insurgents killed 4,630 civilian Turks during the period 1984-1988, and this constitutes a blatant violation of the human rights of non-combatant citizens, irrespective of the PKK's goals.

Moreover, by accepting that terrorism is a violation of human rights, international organisations that, among other things, aim at the protection of human rights, e.g. the UN and NATO, can actively contribute to the fight against terrorism. In other words, the means by which any political, social or economic goal is pursued must be subjected to international regulations. The pursuit of any goal by violence directed against non-combatant people or by creating a public danger or a state of terror must be clearly condemned by international law.

TERRORISM AND MOVEMENTS OF NATIONAL LIBERATION

Movements of national liberation have often been related to terrorism, and, to a large extent, this connection is because the meaning of terrorism remains blurred. For instance, until Israel and the PLO signed the 1993 interim peace accord, PLO fighters were terrorists for Israel and freedom fighters for the Arab nations. Similar controversies about the nature of particular organisations are associated with the action of the IRA in Northern Ireland, ETA in Spain and the PKK in Turkey, etc.

The identification of the difference between terrorism and movements of national liberation as well as the clarification of the right of national self-determination are intimately related to the conduct of an effective anti-terrorist struggle and the maintenance of international order in general.

Most importantly, as far as the principle of national self-determination is concerned, the conduct of foreign policy based on abstract principles deprives policy-makers of the ability to distinguish among individual cases. In other words, the uncritical espousal of the principle of national self-determination, without any geopolitical considerations, courts failure, as demonstrated in the most dramatic way by the failure of Wilsonianism in the 1930s.¹²

From the viewpoint of international law, a state does not constitute an international-legal entity unless it is recognised as such.¹³ The 'natural' society of states assumes a 'legal' nature through the mutual recognition of states. A state entering the natural society of states only because of its natural entity must be recognised by the other states to become a member of the 'legal' society of states. Hence, no rule of international law can oblige a sovereign state that is already a subject of international law to recognise another state as a member of the legal society of states. The criteria with respect to which a state recognises another one are primarily a matter of foreign policy. A state, as a natural entity, can exist only if it has a people, a territory and a self-existent legal order. However, a state should be recognised as a legal entity because of broader geopolitical considerations. For instance, is such a state politically, economically and militarily viable? Is it going to destabilise critical balances of power? These are some of the questions that policy-makers have to answer before deciding to recognise a state. In general, international political questions related to the issue of national

self-determination should be tackled on a case by case basis as components of geo-strategic equations.

Although the recognition of a state is ultimately a political question, the characterisation of an activity or an organisation as terrorist is not necessarily a political question. For, terrorism does not refer to the goals of an activity or an organisation but to the means by which those goals are pursued. Thus, an organisation may or may not be characterised as a movement of national liberation on the basis of its goals, but terrorism is something that refers to the means it uses in order to achieve its goals-namely, the existence of non-combatant casualties and the creation of social intimidation or terror.

TERRORISM AND POLITICAL OFFENCE

There is a conceptual relationship between 'terrorism' and 'political offence' since most often political motives govern terrorist activities. Hence, given that many bilateral and multilateral international conventions exclude political offences from the list of crimes that justify extradition, several terrorist activities could become unpunishable if certain states decided to characterise them as political offences and terrorists as political offenders.

The right of political asylum was originally an expression of sympathy on behalf of liberal states toward similarly minded people who fight in other states for liberal values. The French Revolution played a crucial role in this. Article 120 of the French Constitution of 1793 offered political asylum. Additionally, the scholarly works of well-known experts in international law, such as Louis Renault, Guizot and Kluit, opposed the extradition of political offenders.

In general, there are two main reasons that can justify the non-extradition of political offenders: (a) the relativity of the concept of political offence and (b) the lack of trust in the impartial administration of justice in a state requiring the extradition of an offender. However, no political end can justify the use of violence-at least when it leads to non-combatant casualties-and the creation of a state of terror. Assassination as a means to a political end always has the character of a detestable crime against the most valuable of human possessions, life.

CONCLUSIONS

International approval of a common definition of terrorism could substantially facilitate the anti-terrorist struggle. Terrorism should be differentiated from war crimes or crimes against humanity and from common murder. The essence of war crimes is numbers afflicted, whereas, with the exception of relatively few incidents, the numbers of people killed in terrorist activities are often small. Also, terrorist activities differ from common murder in their psychological impact since terrorists aim at creating a climate of fear in which they expect to realise their goals.

A functional definition of terrorism should include the following elements:

- (i) The existence of non-combatant casualties or the indiscriminate use of violence,
- (ii) The purpose is to create a public danger or a state of terror,
- (iii) The ultimate goal is to influence an audience and serve ideological, social, philosophical or other ends,

(iv) Those actively committing the criminal offences are non-state or state-sponsored groups or agents.

The states of the world should comply with the principle *aut dedere aut judicare*, so that terrorists would have no opportunity to remain unpunished for their crimes and crime would not be vindicated as a means to any political end. In fact, according to the Declaration on Measures to Eliminate International Terrorism adopted by the UN General Assembly in Resolution 49/60 of 9 December 1994: "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 are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them." The establishment of a permanent International Criminal Court of Justice could play a very important role in the anti-terrorist struggle. It would apply the law of the state within whose territories the unlawful action has taken place and it would be optional, i.e. states would be able to use it instead of their national courts, and, if for one reason or another, they do not wish or they cannot¹⁴ extradite a person accused of terrorism. Additionally, it would be well to bring terrorist crimes before an international criminal court instead of a national court, thereby avoiding political tension between states.

A general anti-terrorist convention would not eliminate the problems related to terrorism, no matter how successful it may be. The legal solution is never likely to eliminate terrorism, which by its very nature disdains the rules of the international game. The most energetic response to terrorism is to strike back hard.¹⁵ However, at least at the legal level, a general anti-terrorist convention could help the international community get rid of a bunch of destructive conceptual controversies and no terrorist activity could remain unpunishable.

1 See: Department of State, 'Patterns of Global Terrorism', 1995, in *Terrorism-Documents of International and Local Control*, H.S. Levie, 1996; W. Laqueur, 'Post-modern Terrorism', *Foreign Affairs*, Vol. 75, No. 5, September-October 1996, pp. 24-36.

2 One variant of terrorism is organisational terrorism. Mostly small, tightly knit and politically homogeneous, such groups are incapable of developing popular support for their radical positions and hence resort to terrorism to gain influence. The 17 November group in Greece is a characteristic case in point. Another variant of terrorism is conducted within the context of insurgencies. The PKK in Turkey is a characteristic case in point. In addition to ethnic separatist insurgent activity, the PKK conducts terror (by directing violence against non-combatants) to demonstrate that the Turkish government cannot protect its people. A third variant is state-sponsored terrorism. For more details, see N. K. Laos, 'Information Warfare and Low Intensity Operations', *Perceptions*, Vol. IV, No. 2, June-August 1999, pp. 174-195.

3 For instance, Cherif Bassiouni ('A Policy-Oriented Inquiry into Different Forms and Manifestations of International Terrorism', in *Legal Responses to International Terrorism-US Procedural Aspects*, 1988, p. xxiii) defines terrorism as "an ideologically motivated strategy of internationally proscribed violence designed to inspire terror within a particular segment of a given society in order to achieve a power-outcome or to propagandize a claim or grievance irrespective of whether its perpetrators are acting for and on behalf of themselves or on behalf of a state." According to D. Spinellis ('Terrorism', *Revue Hellenique de Droit International*, 1994, pp. 445 - 462), "Terrorism is the causing of terror to individuals or to groups of them or to the community at large, by committing serious violent crimes against certain individuals or indiscriminately against innocent citizens and with certain ends in view, especially ones of ideological, philosophical of socio-political character."

4 For instance, according to the US Defense Department, terrorism is defined as an "unlawful use or threatened use of force by a revolutionary organization against individuals or property with the intention of coercing or intimidating governments or societies, often for political or ideological purposes." However, according to the US State Department, terrorism is "Premeditated, politically motivated violence perpetrated against non-combatant targets by sub-national groups or clandestine state agents." Source: Louis Rene Beres, 'The Meaning of

Terrorism-Jurisprudential and Definitional Clarifications', *Vanderbilt Journal of Transnational Law* 28, 1995.

5 Before 1936, the legal framework for the prevention and punishment of terrorism was mainly restricted to the national level. Examples include a Hungarian law of 1921 providing "for the more active defence of the State and the society", a Bulgarian law for the defence of the state, a Yugoslav law of 1921 for the security and order of the state, a Romanian law of 1924 for the punishment of public-order offences and the Soviet penal code. However, an intergovernmental conference to repress terrorism opened in the League of Nations Palace on 1 November 1937, under the presidency of Count Henry Carton de Wiart of Belgium, elaborated the draft Convention for the Prevention and Punishment of Terrorism and another one that provided the necessary machinery by establishing the first international criminal court.

6 See A. Cassese, 'The International Community's 'Legal' Response to Terrorism', *International and Comparative Law Quarterly* 38, 1989.

7 Piracy is the only striking exception.

8 See, for instance, the 1971 Montreal Convention.

9 See, for instance, the 1979 Hostages Convention.

10 See for instance the 1997 International Convention for the Suppression of Terrorist Bombing.

11 See S. D. Bailey, 'The UN Security Council and Terrorism', *International Relations*, XI, 1993.

12 See H. Kissinger, *Diplomacy*, Simon & Schuster, New York, 1994.

13 Many experts in international law have analysed this argument, such as Bluntschli, Jellinek, Triepel, Liszt, Meringhac, Wheaton, Anzilotti, Cavaglieri, Perassi, Oppenheim, Strupp, etc.

14 In 1887, the Swiss authorities sought to extradite a Mr Wilson, a British national in Britain, to stand trial and be punished for a crime committed in Switzerland. The Queen's Bench Division found in Article 3 of the 1874 Extradition Treaty between Switzerland and the UK, "No Swiss shall be delivered up by Switzerland to the United Kingdom and no subject of the United Kingdom shall be delivered up by the Government thereof to Switzerland." Mr Wilson was non-extraditable. Moreover, punished in England was impossible since no English court had jurisdiction to try Wilson for an offence committed abroad. Thus, he escaped punishment altogether.

15 For instance, in April 1986, the United States launched raids on Libya in retaliation for terrorism and, in October 1986, the United Kingdom led its European partners in taking limited diplomatic measures against Syria because of its complicity in an attempt to destroy an El Al aeroplane in flight.