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INTERNATIONAL LEGAL ASPECTS OF DEALING WITH THE CONTEMPORARY TERRORISM THREATS

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Abstract

Recent challenges in international security posed by two terrorist organizations, Al Qaeda and ISIS, have highlighted an urgent domestic and foreign policy challenge. Terrorism has been, for more than a decade, top headline in the world media, and the cost of terrorist activities is expressed in numerous human lives and enormous material damage. Yet to date, international organizations and governments have not been successful in the attempt to find a common definition or uniform approach. Up to now, the approaches towards terrorist activities differ from case to case. There is no single legal regime to deal with terrorist activities, and the legal regime is what gives the answer and the framework for the counterterrorist activities of the security forces, in order to be able to deal with the threat. This paper will attempt to answer at least some of the dilemmas.

Key words: terrorism; law; extraterritoriality; applicability

INTRODUCTION

Terrorism has been trending topic at the world's media for more than a decade. Although as a tactic of warfare it follows society more or less during its development for centuries, terrorism daily gains new dimensions and manifestations, and still is lacking consensus over the conceptual definition as a serious threat to national and international security. During the last few centuries, humanity has witnessed several patterns of terrorism and the twentieth century added new patterns to terrorism (Schmid 2011). There are numerous conventions that define certain manifestations of terrorism, addressing the way states should deal with the threats of terrorism, but not a single, comprehensive document.

State practice differs and in absence of comprehensive legal regime, applicable law should be defined on case by case analysis.

INTERNATIONAL NORMATIVE ACTIVITY APPROACHING TERRORISM

Many regional and international bodies have addressed different forms of terrorism since the early 1970. However, more intensive activity in the field has been produced during the post-Cold War period and especially after the 9/11 attacks.

Post-Cold War period brought new actors to the international legal scene: old enemies became partners and old dogs were supposed to learn new tricks. A great stated dissolution occurred and the right of self-determination got different meaning (Frckovski 2005). Such situation was urging for different legal solutions, so different forms of terrorism were approached through different legal mechanisms, such as:

- Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on December 14, 1973;
- International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17, 1979;
- International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15, 1997;
- International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on December 9, 1999;
- International Convention for the Suppression of Acts of Nuclear Terrorism New York, adopted by the General Assembly of the United Nations on April 13, 2005;
- Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on September 14, 1963 (deposited with the Secretary General of the International Civil Aviation Organization);
- Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on December 16, 1970 (deposited with the governments of Russia, Great Britain and the United States);
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on September 23, 1971 (deposited with the governments of Russia, Great Britain and the United States);
- Convention on the Physical Protection of Nuclear Material, signed in Vienna on March 3, 1980 (deposited with the Director General of the International Atomic Energy Agency);
- Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving of International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24, 1988 (deposited with the Governments of Russian Federation, United Kingdom and the United States and the Secretary General of the International Civil Aviation organization);
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988 (deposited with the Secretary General of the International Maritime Organization);

- Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on March 10, 1988 (deposited with the Secretary General of the International Maritime Organization);
- Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on March 10, 1988 (deposited with the Secretary General of the International Maritime Organization);
- The Arab Convention on the Suppression of Terrorism, signed at a meeting held at the General Secretariat of the League of Arab States in Cairo on April 22, 1998 (deposited with the Secretary General of the League of Arab States);
- Convention of the Organization of the Islamic Conference on Combating International Terrorism of July 1, 1999 (deposited with the Secretary General of the Organization of the Islamic Conference);
- European Convention on the Suppression of Terrorism, Strasbourg, on 27 January 1977 (deposited with the Secretary General of the Council of Europe;
- Convention on prevention and punishment of terrorist acts, taking into account the form of crimes against persons and related extortion that are of international importance, signed in Washington on February 2, 1971 (deposited with the Secretary General of the Organization of American States);
- Convention on Preventing and Combating Terrorism, adopted in Algiers on 14 July 1999 (deposited with the General Secretariat of the Organization of African Unity);
- Regional Convention on Suppression of Terrorism, signed at Kathmandu on 4 November 1987 (deposited with the Secretary General of the Association of South Asia Regional Cooperation);
- The cooperation agreement between the member states of the Commonwealth of Independent States in Combating Terrorism, done at Minsk on 4 June 1999 (deposited with the Secretariat of the Commonwealth of Independent States).

Although all of the above mentioned documents address different aspects and specific acts of terrorism, they rarely address potential effective mechanisms in practice. Implementation is probably even bigger problem rather than precise normative work. Forms of manifestation of terrorist acts also change on daily basis, so some legal instruments have overcome already until the ratification process ends.

UN Security Council normative activity in the field

When Talibans attacked New York Twin Towers, it was the first time for the United Nations to recall upon the UN Charter for common action against a terrorist attack. Many resolutions followed, such as:

- 1267 relating to Al Qaeda;
- 1333- addressing the Taliban regime;
- 1368- condemning the 9/11 attacks;
- 1390 -frizzing funds of the Taliban regime;
- 1373-prevention and suppression of terrorist financing and forming a committee;
- 1456 – counterterrorism, IHL and IHRL;

• 1526 -measures against al Qaeda;
• 1540 -proliferation of weapons of mass destruction;
• 1624- addressing support for terrorism;
• 1735-sanctions for Al Qaeda and the Taliban regime;
• 1822 -threats to world peace and security from acts of terrorism (Security Council Resolutions Pertaining to Terrorism | UN Counter-Terrorism Committee 2017).

The phenomenon of terrorism is probably one of the most changeable, but also one of the most persistent companions of the society over the last few centuries. During the last 50 years, rapid changes occurred in the means of conducting and final objectives to be reached. Certainly, the most dramatic change were the 9/11 attacks on the Twin Towers in New York in 2001. More interesting is that after those attacks, NATO activated article 5 of the Washington Treaty (Spokesman: US Asks for NATO Aid 2017). This was the first time in the history of the Alliance that article 5 was activated in a way that enables acting against none state actor, meaning that the terrorist attacks have been considered as armed attack- in the way UN Charter considers it.

There is neither a comprehensive United Nations treaty on terrorism nor an official definition of the term "terrorism" for the time being. However, the Member States of the United Nations are in the process of drafting a comprehensive convention on international terrorism which would ultimately provide such a generic international definition of the crime of "terrorism" and complement the existing legal framework of international antiterrorism instruments (UNODC 2009).

STATE PRACTICE

Checking state practice and the way states deal with terrorist activity has shown that the approach and strategy also differs a lot, depending on the context in which the activity took place or it was planned to be carried out. From that aspect, state's approach to terrorism can be considered as dealing with:

1. Criminal act,
2. Internal armed conflict,
3. International armed conflict (equivalent of war) (Majoran 2017).

The way terrorist activity has been approached, defines the type of counter-terrorist operation and the law that will be applicable. The way states approach terrorism is important for regulation of the use of deadly force and the legal regime that is applicable. Applicability of the legal regime is defined by the facts on the ground and certain operational circumstances. This means that the use of deadly force will be governed by human rights law or the law of armed conflict, or by parallel regimes in certain circumstances (usually occupation or peace operations).

The challenges

The first challenge for the European states engaged in peace operations that included also dealing with terrorist attacks in Afghanistan and Iraq was the extraterritorial applicability of the European Convention of Human Rights and Fundamental Freedoms.

The extraterritorial applicability of human rights was also confirmed by Human Rights Committee. Additional challenge when it comes to use of drones are the issues of sovereignty. Besides that, targeting doctrine can hardly be justified if the globe is considered as battlefield. It simply goes beyond the human rights standards that were so hard to be achieved even nowadays, such as due process of law on a personal level, and the idea of independent, sovereign states on national level, as well as the idea of collective security and the UN as a global peace keeper.

The use of deadly force for dealing with non state actors and individuals inspired by global ideas, such was Breivik in Norway, or the global jihad of the Taliban, is a grey zone for the international law. Many experts have agreed that was is needed are rules that would deal with the use of force against non state actors, as strong and clear as those for dealing with state actors.

What can be given as an input while clear framework is lacking, is combating terrorism in context that would put counterterrorist operations under the blanket of the legal regime that is applicable in general: human rights law or law of armed conflict. Speaking about applicability of human rights law, two international documents are the most important: The International Covenant on Civil and Political Rights: (International Covenant On Civil And Political Rights 1966) and the European Convention of Human Rights and Fundamental Freedoms (European Convention On Human Rights: Collected Texts 1988). Framework that provides access must be based on legal grounds, from which arises the methodology of the counterterrorist operation, and the overall response to the removal of the threat and consequences.

APPLICABLE LEGAL REGIME FOR COUNTERTERRORIST OPERATIONS

International humanitarian law vs. the Law of armed conflict

The law of armed conflict (LOAC) and the international humanitarian law (IHL) are usually referred as synonyms. However, in the author's view, although both terms are pretty often used to refer to the same, term "law of armed conflict" is considered to cover a broader spectrum. Law of armed conflict refers to both *ius ad bellum* and the *ius in bello*, meaning that it addresses both the *law of war* and *law in war*, while the international humanitarian law affects the *ius in bello* aspect only. For the purpose of this chapter, usage of the term "international humanitarian law" is more appropriate due to the fact that what matters here is *protection* as a concept. The focus of international humanitarian law is put on the civilians and persons that do take (more) direct participation in hostilities, as well as civilian objects and infrastructure. Law of armed conflict is a bit wider concept- it includes the protection that has been discussed above (referred here as international humanitarian law or *ius in bello*, consisted by "the Geneva law" that protects and the so called "Hague Law" that addresses the means and methods of warfare - that has the idea to limit the acts in war) but it also includes the so called "right to go to war". The "right to go to war" is a bit obsolete definition or a concept- nowadays it affects the right of the states to use force and it is ruled by the United Nations Charter.

The usage of the terms "international humanitarian law" and "international law of armed conflict " as synonyms is not wrong- however author finds preferable the usage defined by the separation of the *ius ad bellum* and *ius in bello* concept. LOAC is organized

around the assumption that parties to an armed conflict are "combatants," meaning that they are members of a state military acting in the name of that state. Norms of conduct are unclear with regard to non-state actors, and there are few consistent legal principles to provide guidance. The absence of a clear alternative to traditional law of war principles, coupled with the need for a strong defensive response to the threat of terrorism, has a deleterious effect on the maintenance of rule of law values in the current climate, and may also hinder efforts to carry out such a defensive response effectively.

International humanitarian law vs. International human rights law

Although *protection* is important for both international humanitarian law and the international human rights law, it is defined and implemented differently in each of the context. This is mainly because those two legal regimes are applicable to the different factual situation: international human rights law applies at peace time, directly or transposed into the national legal system, depending on the way the national constitution defines it. International humanitarian law is applicable in case of war or its equivalent- de facto occupation. Things get complicated in post-conflict societies, when there is not an effective control over the territory. Those situations are pretty commonly combined with international presence – peacekeeping or peace enforcement missions. In such cases, peacemakers are also obliged with the mandate provided by their mission, and for the most cases peacekeepers are obliged predominantly by the rules of international human rights law.

Use of force allowance

There is a general forbiddance for use of force in the relations between states in accordance with the United Nations Charter:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations (UN 1945).

However, there are two exceptions: restoration or preserving of world peace (action by the Security Council) and individual or collective self-defense (actions that has to be reported to the Security Council of the United Nations):

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security (UN 1945).

Use of force for dealing with violent non state actors (armed groups) and individuals is not regulated by the Charter of the United Nations. Experts have agreed that what is necessary are rules that would adress with the use of force against non state actors, as strong and clear as those for dealing with state actors. In some cases, armed groups can receive the status of a subject of international law, but this goes mostly for liberation movements, after satisfying the preconditions required by international law. This is not the case with terrorist groups.

There is a broad international debate if a third case that allows us of force is possible- and this is the self -determination of the peoples treated by the International Covenant on civil and political rights. However, the view that is predominant is the one that goes *a contrario* and it is justified by the fact that the process of decolonization is completed, thus the goal and intention of the creators of the covenant are fulfilled, so the self-determination processes should be considered only internal- as internal self determination within the frame of the existing state.

Additional challenge - the extraterritorial application of human rights treaties

The first challenge for the European states engaged in peace operations that included also dealing with terrorist attacks in Afghanistan and Iraq was the extraterritorial applicability of the European Convention of Human Rights and Fundamental Freedoms. The extraterritorial applicability of human rights was also confirmed by Human Rights Committee. Extraterritorial applicability of human rights means that state officials are also obliged with the internationally recognized human rights standards (to be more concrete, with the human rights instruments that are signed and ratified by the state they represent). There is not a consensus among state practice, but at least in theory, this concern is also to be taken into consideration. There is pretty wide consensus of the academic community and human rights bodies that extraterritorial applicability of human rights is acceptable and justified. The European Court of Human Rights is having an extensive practice in this field.

Two regimes as modus operandi: proportionality and necessity in different context

In a situation of de facto occupation (this also includes some of the peacekeeping or peace enforcement missions), applicability of the module for operating depends upon the effective control over the territory (Doswald-Beck 2006). If there is effective control over the territory (or at least for those parts that are under such control), the law enforcement module is the appropriate one. This means that officers operate as police forces. This module is based on the international human rights law and criminal law. It considers necessity, proportionality, and obligation to arrest rather than shoot whenever it's possible. If the criteria for effective control over the territory is lacking, the applicable model for operating is based on the international humanitarian law and the officers' act as soldiers in combat. Both regimes require necessity and proportionality, but defined differently: law enforcement model measures necessity and proportionality in accordance with the protection of the right to life, and the second module measures necessity and proportionality in conjunction with the military advantage that could be possibly gained.

ADDITIONAL LEGAL INTERSECTIONS

Countering contemporary terrorist threats is closed with different legal branches such as international criminal law, human rights law and refugee law. It goes far behind national security systems and the classical notion of what security means. All legal aspects must be taken into consideration since inappropriate precedent can lead to greater mess and insecurity. International criminal law as such might be also a legal way out, but the implementation will be probably slower rather than the ongoing threats. The characterization of acts of terrorism as international crimes entails a different set of considerations (Paulussen 2012) and would result in a number of important consequences, not least the possible entitlement of all states to exercise universal jurisdiction (Macedo 2001) over alleged offenders, regardless of any treaty basis, under customary international law (Bianchi and Naqvi 2011).

CONCLUSION

Framework that provides access must be based on legal grounds, from which arises the methodology of the counterterrorist operation, and the overall response to the removal of the threat and consequences.

An additional indicator that might be symptomatic is the answer of the question: who conducts counter-operation- whether it is the police, the military or some special units, and the model upon they operate.

A third factor is the bearer of terrorist activity: their motives, circumstances in which the act and the goal they want to achieve (the attack on al Qaeda on the United States are treated differently from cases in Russia, Paris, Northern Ireland, the attack in Norway or attacks in Afghanistan during the withdrawal of coalition forces.

Particularly complex is the derivation of counter terrorist operations by coalition forces that have different national mandates. Often these security forces are under the so called “national restrictions” (national caveats) (Defense. Gov News Article: National Caveats among Key Topics at NATO Meeting 2017) that are hard to be recondiled under the flag of the mission.

The position of the International Committee of the Red Cross is that existing humanitarian law should be aplikable whenever possible based on case by case analysis, or in the case of dealing with terrorism in the context of armed conflict, as it was in the case of Afghanistan.

In accordance with the Resolution 1456 of the Security Council of the United Nations from 2003, states must ensure that any measure taken to combat terrorism must comply with their obligations under international law, particularly international human rights law, refugee law and humanitarian law. This opinion was confirmed by the General Assembly in resolution 65/221 and in several occasion (UNODC 2009). Approaching terrorism threats and counter terrorist operations, legally speaking, should be always done on case by case analysis. There is no one solution to fit it all. However, rule of law and legal procedures, must be ensured in order the counterterrorist battle not to be converter in another form of threatening universal human rights values. 

REFERENCES

1. Arend, Anthony Clark and Robert J Beck. 2015. *International Law And The Use Of Force*. 1st ed. London: Routledge
2. Bianchi, Andrea and Yasmin Naqvi. 2011. *International Humanitarian Law And Terrorism*. 1st ed. Oxford: Hart.
3. Defense.Gov News Article: 'National Caveats' Among Key Topics At NATO Meeting". 2017. *Archive.Defense.Gov*. http://archive.defense.gov/news/newsarticle.aspx?id=25938.
4. Doswald-Beck, Louise. 2006. "The Right To Life In Armed Conflict: Does International Humanitarian Law Provide All The Answers?". *International Review Of The Red Cross* 88 (864): 881. doi:10.1017/s1816383107000823.
5. European Convention On Human Rights: Collected Texts. 1988. *Human Rights Quarterly* 10 (4): 562. doi:10.2307/761924.
6. Frckovski, Ljubomir. 2005. *International Human Rights Law*. 1st ed. Skopje: Magor.
7. International Covenant On Civil And Political Rights. 2017. *Ohchr.Org*. http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx.
8. Macedo, Stephen. 2001. *The Princeton Principles On Universal Jurisdiction*. 1st ed. Princeton, N.J.: Program in Law and Public Affairs, Princeton University.
9. Majoran, Andrew, 2017. "The Illusion Of War: Is Terrorism A Criminal Act Or An Act Of War? - Mackenzie Institute". *Mackenzie Institute*. http://mackenzieinstitute.com/illusion-war-terrorism-criminal-act-act-war/.
10. Paulussen, Christophe. 2012. *Impunity For International Terrorists? Key Legal Questions And Practical Considerations*. Hague: The International Centre for Counter-Terrorism (ICCT) – The Hague.
11. Schmid, Alex P. 2011. *The Routledge Handbook of Terrorism Research* 2011, New York
12. Spokesman: US Asks for NATO Aid, Article 5 Activated. 2017. "Spokesman: US Asks For NATO Aid, Article 5 Activated". *Al Bawaba*. http://www.albawaba.com/news/spokesman-us-asks-nato-aid-article-5-activated.
13. UNODC,. 2009. *Frequently Asked Questions On International Law Aspects Of Countering Terrorism*. Vienna.
14. UN Charter 1945
15. Security Council Resolutions Pertaining To Terrorism | UN Counter-Terrorism Committee. 2017. *Un.Org*. http://www.un.org/en/sc/ctc/resources/res-sc.html.