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The Protection of Fundamental Human Rights in the context of the Global Fight against Terrorism

Abstract: Terrorism poses a serious threat in the world today. Although it does not affect all countries to the same extent, the international community must cooperate to develop measures to effectively eradicate this common enemy. Despite the increasing number of international treaties aimed at regulating the fight against terrorism and terrorism-related acts, terrorism continues to thrive around the world, and as a result, has a significant impact on human rights. This article examines some anti-terrorist measures at the universal level and aims to determine to what extent they may infringe upon fundamental human rights. This article also highlights the importance of fundamental human rights and the risk of them being violated in the global fight against terrorism. There is no doubt that terrorism has devastating consequences on the exercise of human rights, including the right to live, the right to liberty and the physical integrity of victims as well as the individuals suspected of committing terrorist acts. The research was conducted using primarily the dogmatic method, followed by an analysis of international legal instruments. The analysis proved that the measures taken internationally in response to terrorism-related attacks may not only violate fundamental human rights but also undermine the rule of law and hinder the protection of some basic human rights. It is important,

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therefore, that States find a right balance between fulfilling their two obligations: ensuring security of their citizens and fighting terrorism.
Keywords: terrorism, crime, threat, impact, fundamental rights, international law.

Introduction

This article examines some anti-terrorist measures used internationally and aims to determine the extent to which they may violate fundamental human rights. It also highlights the importance of fundamental human rights and the risk of them being violated in the global fight against terrorism. For a long time the questions of terrorism and human rights have been at the center of both domestic and international laws. Terrorism, particularly in the contemporary international context, is usually approached from highly ideological and political perspectives, which are often emotional or even manipulative.[2] The formula of "One man's terrorist is another man's freedom fighter" is a pathetic expression of this approach. Terrorism is a serious challenge which individual States and the international community must tackle.[3] It poses a threat not only to national order and security, but also to the standards by which democratic societies operate. The threat of terrorism is particularly visible in the context of the ongoing globalization processes and the ties between Member States of international organizations and alliances. What is even more dangerous is the fact that different terrorist groups, regardless of their political orientation, conduct transnational activities which include training of terrorist organizations and the provision of mutual cross-border services.

2 James M. Lutz, and Brenda J. Lutz, *Terrorism: Origins and Evolution*. New York, 2005, 22.

3 See Christopher Greenwood, "International law and the 'war against terrorism'", *International Affairs* 78, no. 2. 2002: 301–317; Eric A. Heinze, "The evolution of international law in light of the 'global War on Terror'", *Review of International Studies* 37, no. 3. 2011: 1069–1094; Marcin Lech, *Ochrona prawna społeczności międzynarodowej wobec zagrożenia terroryzmem*. Gdańsk, 2014; Thomas R. Mockaitis, *The New Terrorism: Myths and Reality*. Stanford, 2008, 20; Johan D. van der Vyver, "The ISIS Crisis and the Development of International Humanitarian Law", *Emory International Law Review* 30, no. 4. 2016: 535.

Terrorism or terrorism-related attacks have become a part of today's world, and nowadays no State can responsibly claim that it is not a potential terrorist target. This also means that every State seeking to ensure national security must be prepared for actions related to fighting against this threat. It must be borne in mind that a terrorist threat may be rooted internally, within a state, or may come from outside. Terrorist groups seek to acquire advanced weapons, including biological, chemical and even nuclear weapons, and from a psychological point of view their action is more spectacular than that of the use of conventional weapons. The unpredictability of terrorist attacks, their violence, intensity and impact mean that fighting terrorism has become a common interest of the entire international community, and today, as never before, it is of the utmost importance that all nations internationally are genuinely willing to cooperate in the fight against terrorism. The United Nations Global Counter-Terrorism Strategy adopted on 8 September 2006 by 192 Member States was certainly a good step in this direction. Some countries face a much more serious and very real threat of terrorism, and the measures adopted by these nations to counteract terrorism often violate human rights or undermine the principles of international law and the rule of law in general. In countries where the terrorist threat is not so imminent, the main measures that are being implemented usually aim to restrict public freedoms and suppress political and social opposition. However, even those are not always in compliance with international standards. And yet, international law and the case law of human rights courts constitute an invaluable source of appropriate measures relevant to different circumstances, and the conditions for their implementation to counteract terrorist acts within the framework of the rule of law.[4] However, there is still a problem with their proper application. This is partly because although the international community has repeatedly condemned "terrorism," there is no consensus on

4 See Anna Oehmichen, *Terrorism and Anti-Terror Legislations: The Terrorised Legislator?: A comparison of Counter-Terror Legislation and Its Implication on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany and France*. Antwerp, Oxford, Portland, 2009, 51.

the very definition of this offense.[5] For many decades, States, lawyers and the legal community have tried, albeit with no success, to arrive at a definition of terrorism that would be legally acceptable according to the characteristics assigned to it by international law. Over a hundred definitions of the term have so far been developed.

The Definition of the notion of terrorism: from the 1937 Geneva Treaty on Terrorism to the Rome Statute of the International Criminal Court and the Ad Hoc Tribunals

The 1937 Geneva Treaty on Terrorism of the League of Nations was the first occasion when a definition of the word terrorism[6] was proposed. There were major difficulties with its formulation, and the text of the Convention opted to include a general definition of the crime of terrorism with a restrictive enumeration of acts qualified as terrorism. Thus, the Treaty of Geneva defined terrorism as "criminal acts directed against a State, the purpose or nature of which is to provoke terror in specific personalities, groups of people or in the

5 Despite the pressing need for a universally accepted definition of terrorism, and the significant impact that this would have on current and future anti-terrorism efforts, the term has become politically and emotionally loaded and consequently, there is no universal agreement on what it entails.

6 According to Article 1 of the Convention, terrorism is "criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public". Terrorism is commonly understood to refer to acts of violence that target civilians in the pursuit of political or ideological aims. In legal terms, although the international community has yet to adopt a comprehensive definition of terrorism, existing declarations, resolutions and universal sectoral treaties relating to specific aspects of it define certain acts and core elements. In 1994, the General Assembly's Declaration on Measures to Eliminate International Terrorism, set out in its Resolution 49/60, stated that terrorism includes: 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 and that such acts are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them. Charles L. Ruby, "The Definition of Terrorism", *Analyses of Social Issues and Public Policy* 2, no. 1. 2002: 9–14.

public." Articles 2 and 3 of the Treaty criminalized specific acts or modes of participation, or even complicity, in terrorist acts.

The problem of terrorism was addressed again in the 1990s during the preparatory work for the Rome Statute of the International Criminal Court.[7] The International Law Commission proposed to include in its jurisdiction also certain acts of terrorism that had already been criminalized by different treaties. Those acts were to be listed in an annex to the Rome Statute. The ILC proposal characterized these acts as "crimes of international concern which are of exceptional gravity." Among them, were acts of unlawful seizure of aircraft defined by the 1970 Hague Convention, and crimes defined by the 1971 Montreal Convention.

The Preparatory Committee, in its 1998 draft, proposed an article entitled "Crimes of terrorism" which established two categories of crimes of terrorism (acts of violence likely to cause terror, and the use of certain weapons to commit indiscriminate acts of violence) and made references to other Conventions regarding other terrorist acts already incriminated.[8] However, neither of these two proposals was retained in the Rome Statute.[9]

It should be recalled, as stated in Article 5 of the Rome Statute, that "the jurisdiction of the Court is limited to the most serious crimes affecting

7 Mahnoush H. Arsanjani, "The Rome Statute of the International Criminal Court", *American Journal of International Law* 93, no. 1. 1999: 22.

8 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN General Assembly, 50th Session, Supplement No.22, A/50/22, 1995; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume 1, (Proceedings of the Preparatory Committee During March-April and August 1996) UN General. Assembly, 51st Session, Supplement No.22, A/51/22,1996; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act (UN Document A/Conf.183/2/Add.1, 1998).

9 Rome Statute of the International Criminal Court, Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex 1, Res E, UN Doc A/CONF.183/10 (1998). 117 The jurisdiction of the ICC is 'complementary' to national criminal jurisdictions (Rome Statute, opened for signature 17 July 1998, 2187 UNTS 90, Preamble (entered into force 1 July 2002)) in the sense that a case can only be brought before the ICC if a state with jurisdiction is unwilling or genuinely unable to investigate or prosecute the case (Rome Statute, opened for signature 17 July 1998, 2187 UNTS 90, art 17 (entered into force 1 July 2002)).

the international community as a whole." Interestingly, The Statute of the Ad Hoc International Criminal Tribunal for the former Yugoslavia did not include in the list of crimes within its jurisdiction, terrorism or terrorist acts. However, the Statute of the Ad Hoc International Criminal Tribunal for Rwanda, in its Article 4 "Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II" included in the list of crimes, subject to the jurisdiction of this ad hoc tribunal and without giving any definition, "acts of terrorism."[10]

Terrorism as a Threat to Fundamental Human Rights

The international community has taken a relatively long time to establish the link between terrorism and human rights. It was not until the Vienna World Conference on Human Rights in 1993 that this link was established.[11] It had not been established earlier because of deep ideological differences which marked the attitude of the Member States with regard to the practical and political consequences which flowed from it. Terrorism is a term that has a strong political connotation, so it seemed very difficult to define it and therefore to make a possible link with fundamental rights.[12] If it is still very difficult to define the concept of terrorism, it is mainly because certain States adopt a maximalist conception of terrorism, while others opt for a minimalist conception. Another reason is that the natural definition of terrorism is not the subject of a clear and precise consensus. Indeed, to this day we do not know

10 Leonard Weinberg, Ami Pedahzur, and Sivan Hirsch-Hoefler, „The Challenges of Conceptualizing Terrorism", *Terrorism and Political Violence* 16, no. 4. 2004: 780; UN Document A/C.6/56/WG.1/CRP.5/Add.5 (Definition of Terrorism).

11 The World Conference on Human Rights, held in Vienna from 14 to 25 June 1993, resulted in the adoption of the Vienna Declaration and Program of Action (document A/CONF. 157/23, of June 25, 1993) by 171 States see Kevin Boyle, "Stock-Taking on Human Rights: The World Conference on Human Rights, Vienna 1993" in *Politics and Human Rights*, ed. D. Beetham. Oxford, Cambridge, 1995, 79.

12 See Aida Huerta-Barrientosa, and Pablo Padilla Longoria, "Understanding the Interrelationship Between Global Terrorist Attacks and the Citizen's Wellbeing: The Complexity of Terrorism", *Sociology Study* 6, no. 5. 2016: 283–292.

precisely whether terrorism is merely an act of an armed group or whether it may also be an act of a State.

When terrorist actions have been carried out, sponsored, manipulated and encouraged by a State, the term "State terrorism" is sometimes used to describe aggressions openly committed by a State against a particular group. The expression "State terrorism" was coined by the Soviet Union during the Cold War. It was also used to designate a strategy of repression of far-left insurrectionary movements, put in place by the regimes of South America in the 1970s. It was a question of denouncing practices which consisted in massive employment of the secret services to carry out actions of assassination and torture. This expression is used today to designate acts of terrorism sponsored or supported by a foreign State. The notion of State terrorism has been, and continues to be, a source of contention between States. Moreover, the term itself had earlier been an obstacle to linking terrorism with the violation of human rights.

Indeed, if a link had been established between terrorism and the violation of human rights, this would have meant that all entities which had committed terrorist acts also violated human rights. This assertion poses no problems when it comes to qualifying an armed group like the Al-Qaeda network as terrorists. But what happens when a State sponsors a terrorist attack? States are not yet willing to be held responsible for the violation of human rights as a result of the perpetration of a terrorist act. This was vividly illustrated in the case concerning the Military and Paramilitary Activities in Nicaragua when the question whether the behavior of the United States constituted State terrorism could have been asked.[13] Indeed, as it was proved later, the Contras who led a guerrilla war in Nicaragua and who were responsible for killing many civilians, had been trained, financed and armed by the United States. However, although it could have done so, the International Court of Justice did not deliberate the actual meaning of State terrorism because it was not the subject of the

13 ICJ, 27 June 1986 (available on the ICJ website http://www.icj-cij.org).

matter in question, and did not take up the opportunity to rule on State terrorism, thus offering a contribution to the clarification of this notion.

As a matter of fact, the concept of State terrorism was the very reason why the draft Convention on international terrorism proposed by India was not adopted. Another concern was the scope of its application, and in particular the contents of Article 1(2) and Article 18(2). It was pointed out that Article 18(2) excluded the application of the proposed Convention to Armed Forces defined in Article 1(2) of the same draft Convention as the Armed Forces of a State.

Despite these concerns, some States supported India's proposal. Others wanted to modify the content of the two challenged Articles by narrowing the scope of the Convention's application to only those activities of the armed forces which fell within the framework of their official functions. Moreover, in order to avoid any confusion with State terrorism practiced by certain States, the exercise of the latter must always be in conformity with international law, especially in times of armed conflicts.[14]

For a long time, the United Nations held to the traditional point of view of international law according to which human rights apply only to the relationships between States and their citizens. However, because the concept of State terrorism was not accepted, the link between terrorism and human rights had not been established. This traditional approach to international law has a significant impact on the nature and content of the link between terrorism and human rights.

It obviously brings into play the question of the scope of the application of human rights, in particular with regard to the perpetrators of terrorism and the situations in which acts of terrorism may be considered as violations of human rights. It was not until the Vienna World Conference on Human Rights that, in

14 François Voeffray, "Le Conseil De Sécurité De L'onu :Gouvernement Mondial, Législateur Ou Juge ? Quelques Réflexions Sur Les Dangers De Dérives" in *Promoting Justice, Human Rights and Conflict Resolution Through International Law/La Promotion de la Justice, des Droits de L'Homme et du Réglement des Conflits par le Droit International: Liber Amicorum Lucius Caflisch*, ed. M. G. Kohen. Leiden, Boston, 2007: 1205.

the course of the Declaration and Program of Action adopted at that Conference, the link between terrorism and human rights was clearly established.

The wording was as follows: "Acts, methods and practices of terrorism in whatever form and in all their manifestations and their links, in certain countries, with drug trafficking, aim at the annihilation of human rights, fundamental freedoms and democracy, threaten the territorial integrity and security of States and destabilize legitimately constituted governments."[15] Since the adoption of the Vienna Declaration and Program of Action, the UN General Assembly, on the recommendation of the Committee on Social, Humanitarian and Cultural Affairs, has been adopting specific resolutions on "human rights and terrorism."[16]

The resolutions on human rights and terrorism not only reveal an international awareness of the impact of terrorism on human rights but they also point to a certain evolution in the attitude of the UN General Assembly towards acts of terrorism committed by entities other than States.[17] There is no longer any doubt that terrorist acts and methods undermine not only the rights of victims but they also threaten the constitutional order and democratic society. In some cases, acting as a catalyst of wider conflicts, they also undermine international peace and order.[18] Consequently, there is clearly an indirect perception of the existence of a link between terrorism and human rights.

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15 A/CONF. 157/ 23 (25 june 1993), Partie 1, para. 17.

16 See the following General Assembly resolutions: A/RES/48/122, on 20/12/1993; A/RES/49/185, on 23/12/1994; A/RES/50/186, dated 22/12/1995; A/RES/52/133, dated 12/12/1997; A/RES/54/164, on 17/12/1999 and A/RES/56/160, on 19/12/2001.

17 In the report of the Special Rapporteur in the Field of Cultural Rights, presented to the General Assembly (A/HRC/34/56) on 16 January 2017, the subjects of fundamentalism, extremism and cultural rights were widely explored, especially in relation to the freedom of artistic expression and attacks against artists, attacks against intellectuals and cultural rights defenders, women's cultural rights, attacks against others based on a perceived or assumed "difference" in faith or culture, as well as the attacks against educational institutions personnel and students.

18 Alain Plantey, "Le terrorisme contre les droits de l'homme", *Revue du droit public et de la science politique en France et à l'étranger*, no. 1. 1985: 5–13.

An indirect link may also be seen when a State reacts to terrorism by adopting a policy and practices which go beyond the limits of what is admitted in international law. Such practices or measures result in human rights violations, such as extrajudicial executions, torture, unfair trials. These unlawful repressive measures undermine not only the rights of terrorists, but also of innocent civilians. Terrorism has always been a threat to democracies, and its "values" are a negation of democracy. Before the attacks of September 11, 2001,[19] a broad consensus existed within States on the pre-eminence of the democratic model and on the imperative need to respect human rights, whatever the circumstances. After the attacks, something changed.[20] Indeed, more and more voices are being raised to question the democratic model, and they believe that the rules of the democratic game must be changed.

The Impact of Terrorist Acts on Fundamental Human Rights

Human rights are universal values and legal guarantees that protect individuals and groups from acts and omissions primarily committed by state agents who in their acting infringe the fundamental freedoms, rights and dignity of human beings.[21]

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19 Enrique Lagos, and Timothy D. Rudy, "Preventing, Punishing, and Eliminating Terrorism in the Western Hemisphere: A Post-9/11 Inter-American Treaty", *Fordham International Law Journal* 26, no. 6. 2002: 1624.

20 On 28 September 2001, the UN Security Council adopted Resolution 1373 under Chapter VII of the UN Charter, calling upon States to implement more effective counter-terrorism measures at the national level and to increase international co-operation in the struggle against terrorism.

21 International human rights law is reflected in a number of core international human rights treaties and in customary international law. These treaties include in particular the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. Other core universal human rights treaties are the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol; the Convention on the

Ensuring the full range of human rights implies respecting, protecting and fulfilling civil, cultural, economic, political and social rights, as well as the right to development. Human rights are universal, which means that they inherently belong to all human beings and are interdependent and indivisible.[22] Terrorism targets the destruction of human rights, democracy and the rule of law. It attacks the values that are at the heart of the United Nations Charter and other international instruments: respect for human rights; the rule of law; the rules governing armed conflict and the protection of civilians; tolerance among peoples and nations; and the peaceful resolution of conflicts. Terrorism has a direct impact on the exercise of a number of human rights, in particular, the right to life, liberty and physical integrity. Terrorist acts can destabilize governments, weaken civil society, undermine peace and security, threaten social and economic development, and have a particularly detrimental effect on certain groups (minorities), all of which directly affect the exercise of fundamental human rights.

The destructive effects of terrorism on human rights and security have been recognized at the highest level of the United Nations, notably by the Security Council, the General Assembly, the former Commission on Human Rights and the new Human Rights Council. Member States of the United Nations emphasized that terrorism threatens the dignity and safety of human beings everywhere, endangers or takes innocent lives, creates a climate that prevents populations from being free from fear, compromises fundamental freedoms and aims at the destruction of human rights.

Rights of the Child and its two Optional Protocols; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The most recent are the International Convention for the Protection of All Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities and its Optional Protocol, which were all adopted in December 2006.

22 The Universal Declaration on Human Rights (UDHR) acknowledges in article 19 that "everyone has the right to freedom of opinion and expression". The right to freedom of speech and the right of the press have the dialectal relationship with other rights. The UNESCO Convention (1945) points out the objective to "encourage freedom of exchange of opinions and intellect." Indeed, artistic and cultural expression is one of the categories of freedom of expression protected by many conventions.

International and regional human rights law clearly establishes that States have, under their jurisdiction, both the right and the duty to protect individuals from terrorist attacks. This stems from the general obligation of States to protect individuals who are subject to their jurisdiction against any infringement of the exercise of their human rights. More specifically, this obligation is part of the obligations of States to ensure the respect for the right to life and the right to security of its citizens.

The principle of legality in the global Fight against Terrorism

The principle of legality in matters of crimes and misdemeanors — *nullum crimen sine lege, nulla poena* — is universally recognized by human rights treaties.[23] This principle means that acts qualified by law as criminal offences must be defined strictly and unequivocally or unambiguously.

The principle *nullum crimen sine lege, nulla poena* also means that criminal law, national or international, cannot be applied retroactively.[24] The principle also has as corollaries the principle of restrictive interpretation of criminal law and the prohibition of analogy.

Thus, legal definitions that are vague, imprecise or make it possible to criminalize acts that are legitimate and/or lawful under international law, are

23 The legality principle of crimes and punishments is derived from the Latin phrase "nullum crimen, nulla poena sine lege". Thus, no act whether immoral or against public interest or public order is considered a crime, if it was not specified by law before. As a result, the criminal judge cannot construe the individuals' acts as crimes and assign punishment, even if he proves that it is worthy and useful in respect of the social interests; see Beth Van Schaack, "Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals", *Georgetown Law Journal* 97. 2008: 119; Darryl Robinson, "The Identity Crisis of International Criminal Law", *Leiden Journal of International Law* 21. 2008: 925.

24 See Jakub Kociubiński, "Zasada nullum crimen, nulla poena sine lege i jej ograniczenia w orzecznictwie Europejskiego Trybunału Praw Człowieka", *Nowa Kodyfikacja Prawa Karnego* 28. 2012: 269; Andrzej Zoll, "Zasada określoności czynu zabronionego pod groźbą kary w orzecznictwie Trybunału Konstytucyjnego" in *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego*, ed. M. Zubik. Warszawa, 2006, 526–527.

perceived as contrary to international human rights law and failing to meet the "general conditions prescribed by international law."

Unfortunately, in the fight against international terrorism or terrorism *per se*, national legislations frequently resort to vague, ambiguous, imprecise definitions, which then often enable criminalization of legitimate forms of exercise of fundamental freedoms, peaceful political or social opposition and lawful acts. The principle of legality in matters of crimes and misdemeanors — *nullum crimen sine lege* — has long been universally recognized. This principle applies both to national standards and to the offences referred to in international criminal law treaties. The principle *nullum crimen sine lege* is also recognized by human rights treaties and the Rome Statute of the International Criminal Court, which considers it as one of the general principles of criminal law.

The principle of legality means that the definitions of criminal offences, or incriminations, must be precise and devoid of any equivocation and ambiguity. As the United Nations International Law Commission pointed out, "Criminal law sets standards of conduct that individuals must observe." The principle also has, as a corollary, the principle of restrictive interpretation of criminal law and the prohibition of an analogy. Thus, for example, Paragraph 2 of Article 22 of the Rome Statute prescribes that "the definition of a crime is to be strictly interpreted and cannot be extended by analogy." It should also be emphasized that it is this principle of legality that was the basis for the elaboration of the elements of crimes provided for in the Rome Statute. In this order of ideas, in application of the principle of legality, vague, ambiguous or imprecise incriminations cannot be admitted. In the absence of a consensus on a general definition of international terrorism, both at United Nations and regional levels, the approach has therefore been to criminalize specific acts of terrorism.[25] Thus, the approach is "sectoral" and in this context terrorism is a "multifaceted offence."

25 See, for instance, UN General Assembly, "Declaration on Measures to Eliminate International Terrorism", Doc. A/RES/49/60, 1994, para. 1; and UN Security Council resolutions 1373 (2001), para. 3, and 1566 (2004), para. 3.

Fighting Terrorism and Respect for the Rule of Law

In the repression of terrorist acts, the action of the State cannot escape certain basic principles, of criminal law and international law in particular, despite the odious and especially serious nature of certain terrorist acts.[26] As the UN General Assembly reaffirmed in its 1999 Resolution on Human Rights and Terrorism, "all measures aimed at countering terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards."[27] Thus, with regard to the administration of justice and the fight against terrorism, every State must respect the stipulated criteria.

As a general criterion, any counter-terrorism measure must be framed in strict compliance with the rule of law and international human rights obligations. The declaration of a state of emergency and the use of emergency powers to ward off terrorist acts must be done within the framework prescribed by international law.[28] The use of emergency powers must be strictly limited to the temporary needs of the situation and comply with the recognized principles of legality, proportionality and necessity. The authorities must provide for measures to safeguard human rights. No derogation may be made to intangible rights or modifications that would alter the independence and impartiality of the judicial system and the principle of effective separation of public powers.

26 See United Nations, General Assembly, 2006, A/RES60/288; United Nations, Security Council, 2004, S/2004/616, para. 6; United Nations, General Assembly, Human Rights Council, 2016, A/HRC/34/30, para. 56; Furthermore, United Nations organs and entities, including the United Nations General Assembly and Security Council, regularly emphasize the importance of adhering not only to international human rights law, but also to international humanitarian law and international refugee law UNSC Resolution 1373 (2001).

27 Twelve Conventions have been drafted at the UN level to deal with terrorism; recent ones are the Convention for the Suppression of Terrorist Bombings (1997), the Convention for the Suppression of Financing Terrorism (1999) and the International Convention for the Suppression of Acts of Nuclear Terrorism (2005). These Conventions and others establish that States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts. Practically all forms of terrorism are covered by these Conventions, in addition to the Geneva Conventions and the Rome Statute of the ICC.

28 Petros Stangos, and Georgios Gryllos, "Le droit communautaire à l'épreuve des réalités du droit international: leçons tirées de la jurisprudence récente relevant de la lutte contre le terrorisme international", *Cahiers de droit européen* 42, no. 3–4. 2006: 466.

At all times and in all circumstances, the fundamental rights and freedoms recognized as intangible, both by treaties and by customary international law, must be maintained and ensured. They include, among others, the prohibition of torture and ill-treatment; thus, for example, all measures such as "physical pressure" must be prohibited as well as the prohibition of discrimination based solely on race, colour, sex, language, political opinion, religion or social membership. It extends further to the prohibition of arbitrary deprivation of life, the prohibition of arbitrary deprivation of liberty; as well as unacknowledged and secret detentions. It also covers the principle of legality of crime and penalty which must apply imperatively, and the right to a judicial remedy to challenge the legality of any measure of deprivation of liberty (*Habeas Corpus*), the right to an independent and impartial court or tribunal, the presumption of innocence, judicial guarantees and the effective existence of a judicial remedy against any violation of human rights. Definitions of criminal offences must be precise and strict, and under no circumstances may vague, ambiguous or imprecise incriminations or criminalization of acts that are legitimate or lawful under international human rights law or international humanitarian law be permitted. The retroactive application of criminal law should also be prohibited. Courts with proper jurisdiction to punish terrorist acts must be independent, impartial and competent. Under no circumstances should the alleged perpetrators of such acts be tried by non-judicial bodies (such as commissions of the executive power with "judicial" functions). Moreover ordinary citizens cannot be tried by military courts.

The criminal procedure must ensure the legal guarantees of every person subject to it. No one may be sentenced for a crime without a due trial conducted by an independent and impartial court ensuring elementary judicial guarantees. These guarantees include: (i) the presumption of innocence until proven guilty, and to be treated as such, (ii) the right to be informed, as soon as possible, in detail in a language that the accused can understand, of the nature and grounds of the accusation, (iii) the right to appoint a lawyer of his or

her choice, and to have the time and facilities necessary to prepare the defense, (iv) the right to be judged within a reasonable time, be present at the trial, and to examine or cause to be examined the witnesses for the prosecution as well as to obtain the presence and examination of the witnesses for the defense under the same conditions as the witnesses for the prosecution. Further rights include the right to not be forced to testify against oneself or confess guilt, and the right to legal recourse to a higher court in the event of conviction. The *Non bis in idem* principle (or the "*non bis in idem" rule*) is a classic principle of criminal procedure, already known in Roman law, according to which no one can be criminally prosecuted or punished (a second time) for the same offence. This expression therefore designates the authority of *res judicata* in criminal matters, which prohibits any new prosecution against the same person for the same facts. This rule, which prohibits double criminality, addresses the need to protect the individual freedoms of the person prosecuted.

Persons deprived of their liberty must be kept in official places of detention and the register of detainees must be available to their lawyers and families for inspection. Solitary confinement must be prohibited. In all circumstances, persons deprived of liberty must have the right to exercise a Habeas Corpus remedy (*Habeas corpus*, more precisely *Habeas corpus ad subjiciendum et recipiendum*), which is a legal concept setting out a fundamental freedom according to which no one may be imprisoned without due judgment, through an illegal practice of arbitrariness which allows anyone to be arrested without a valid reason.

Under this principle, every person arrested has the right to know the reason for the arrest and on what charges it has been made. At the same time, the arrested must be informed about the right to be silent and the right to ask for a lawyer. Any measure of deprivation of liberty must be taken under judicial supervision, even in the case of administrative detention. Criminal investigations must also be put under judicial supervision. Judicial police powers should neither be granted to military bodies nor be placed under the control of

the army. Any expulsion, extradition or *refoulement* procedure must comply with the guarantees provided for in international human rights law, in particular the right to an effective remedy, and they must conform to the principle of *non-refoulement*. All measures taken during the investigations as well as those affecting the right to respect for private life, home and correspondence, such as searches and interception of correspondence or telephone tapping, must be legal and conducted under judicial control.[29]

Conclusions

There is no doubt that under international law every State has the right and duty to fight and suppress criminal acts which, by their nature, objectives or means employed for their commission, are deemed or qualified as terrorist acts. The international community must also equip itself with the necessary instruments and means to combat this scourge. Nevertheless, the fact remains that States must do so within the framework of the rule of law, respect for the principles of international law and the provisions of international human rights law and international humanitarian law.

In the repression of terrorist acts, the action of States cannot evade certain basic principles of criminal law and international law. The heinous and particularly severe nature of certain terrorist acts cannot serve as a pretext for a State not to respect its international obligations in terms of human rights, and more rightly, when the intangible rights of human beings are at stake.

In their efforts to fight terrorism, States must respect certain limits: they are obliged to respect human rights and international law in general. The legal bases to which they must adhere in this context originate from customary international law, conventional international law as well as international treaties for the protection of human rights, refugee law and international humanitarian

29 M. Cherif Bassiouni, "Legal Control of International Terrorism: A Policy-Oriented Assessment", *Harvard International Law Journal* 43, no. 1. 2001: 83.

law. The basic rules governing the use of force are enshrined in the UN Charter. It is only under these conditions that an effective and coordinated fight can be waged against terrorism without replacing terrorist acts with state terrorism.

The promotion and protection of human rights for all and the rule of law are essential to all components of the Strategy in order to recognize that effective counter-terrorism measures and the promotion of human rights are not conflicting, but complementary and mutually reinforcing goals.

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