Definition of terrorism and international cooperation in criminal matters: contributions of the United Nations and regional implementation in Europe

By

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Excellencies, dear colleagues and friends,

Speaking about definition of terrorism is one of the favorites topics of jurists who always complain about the lack of definition of terrorism, blaming the 6th Committee of the General Assembly of the United Nations of not having been able to find a comprehensive definition of the phenomenon.

Actually, we face here both a total misunderstanding of what is international criminal law and a real confusion between humanitarian law, human rights law and international criminal law per se. Indeed, during the war's time, the crime of terrorism exists since it was mentioned in the Geneva Conventions but without any definition of it. However, as it is explained by the ICRC, "*HL specifically mentions and in fact prohibits " measures of terrorism " and " acts of terrorism".* The Fourth Geneva Convention states that *" Collective penalties and likewise all measures of intimidation or of terrorism are prohibited",* while Additional Protocol II ( ) prohibits *" acts of terrorism against persons not or no longer taking part in hostilities. The main aim is to emphasize that neither individuals, nor the civilian population may be subject to collective punishments, which, among other things, obviously induce a state of terror".*

Both Additional Protocols to the Geneva Conventions also prohibit acts aimed at spreading terror among the civilian population. *" The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited " (AP I and AP II, (2))…It is important to bear in mind that….these provisions outlaw attacks that specifically aim to terrorize civilians, for example campaigns of shelling or sniping of civilians in urban areas".* In addition, the ICRC also clearly stresses that " *Even if IHL does not apply to such acts they are still subject to law. Irrespective of the motives of their perpetrators, terrorist acts committed outside of armed conflict should be addressed by means of domestic or international law enforcement, but not by application of the laws of war*[2] *».*

Most of the measures taken by states to prevent or suppress terrorist acts do not amount to armed conflict. Measures such as intelligence gathering, police and judicial cooperation, extradition, criminal sanctions, financial investigations, the freezing of assets or diplomatic

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[2] https://www.icrc.org/en/doc/resources/documents/faq/terrorism-faq-050504.htm

and economic pressure on states accused of aiding suspected terrorists are not commonly considered acts of war".

Still, everybody is lamenting about that terrible situation on the lack of definition with a certain degree of hypocrisy since nobody wants to look at the immense possibilities on international cooperation in criminal matters provided by the current United Nations 19 international sectorial instruments against terrorism and/or Security Council binding resolutions against terrorism or even policy documents adopted by the General Assembly and following up to the UN Counter terrorism Strategy. That situation might be very comfortable for many States which to keep their total independence in terms of Counter terrorism policies. Thus, on one side, and without true explanation and even under circumstances in which it should be, States do not international humanitarian law to terrorists and on the other side they pretend not to follow principles of international criminal law since they have not a general definition of terrorism.

Actually, the 19 international instruments together with the General Assembly and Security Council should be considered as eal body of international criminal law on counter-terrorism issues, from a legal and judicial perspective which allows, at the same time to respect human rights and the rule of law.

The first question which has to be brought to our attention is to know if we need a comprehensive definition of terrorism. The immediate answer is to say "yes, of course!". Nevertheless, we should not forget that, while terrorism is a criminal phenomenon according to Security Council or the General Assembly resolutions, we should bear in mind that complying with the principle of legality requires to criminalize a specific criminal act rather than a criminological concept. Let me explain that, in my opinion of an honorary judge at the Criminal Chamber of the French Judicial Supreme Court (Cour de Cassation), compliance with the principle of legality requires a precise definition of the act of terrorism for which an individual may be indicted. That is the only way to comply with human rights in the procedural context since using the UN international instruments implies to respect the UN Covenant on civil and political rights. If we accept that both cover a broad range of offences'definitions and a precise description of the elements of those offences. This element should be acceptable from the Human Rights or Humanitarian lawyers while at the same time, they would like to have a comprehensive definition of terrorism in order to protect more individual rights.

Few other elements should also be underlined in that respect. When I performed the functions of the Chief of Legal section of the Centre for International Crime Prevention at the UN Vienna at the time of the negotiations of the United Nations Convention against Transnational Organized Crime (the Palermo Convention) and my UNODC colleagues had also to face similar difficulties in the negotiations of the UN Convention against Corruption (the Merida Convention). How did we resolve those issues? Since we were mainly among international criminal law specialists of transnational crimes (corruption, organized crime for example), we did not take the international public law approach of willing to embrace all types crimes in a definition in order to have a more robust international regime. We knew very well that it would have been impossible for transnational organized crime which would have covered all types of crimes! We decided with the negotiators to define the most significant acts which are committed by organized criminal groups. Of course, in another definition, we also characterized what is an organized criminal group and finally, we also defined separately the transnational element. Thus, we included obviously all the necessary concepts but in different places and separately. The same appears even more clearly in the UN Convention against corruption which includes a series of offences but not a comprehensive offence.

Why, in such a situation, those two conventions are not criticized? Actually, it is probable that corruption and transnational organized crime offences are more distant from international public criminal law and humanitarian law since none of those offences is mentioned in the Geneva Conventions, contrary to the terrorist ones.

Still, it should be underlined that the principle of legality is well respected in all the sectorial conventions and protocols against terrorism. It should also be recalled that the sectorial conventions against terrorism cover almost all acts of terrorism. So, from a criminal law point of view, there is no need to have a comprehensive definition of terrorism.

Why in such a situation UN member States and many organizations still request to have a comprehensive definition of terrorism: on one hand, it is possible that more discussions are needed on the principle of legality, acts of terrorism and terrorism but from a strict legal point of view, we could say that, nowadays, at the UN level, terrorism can be defined as acts of terrorism as criminalized in the 19 sectorial conventions. Yet, it may be of an interest for certain actors and countries to deny or not even to mention the international sectorial instruments against terrorism since it may be a good reason not to criminalize their terrorist crimes in accordance with those instruments and to keep in their criminal code lose definition of terrorism which allow countries to embrace in those definitions acts which have a broader spectrum. Still, it should be kept in mind that the great majority of those international sectorial instruments enjoy a very high level of ratifications which imply that national laws should be in compliance with those instruments and thus be a solid foundation for international cooperation in criminal matters in full compliance with rule of law, international human rights and humanitarian law.

Another topic has always been brought to the attention of the international community: that is the issue of state terrorism: in spite of that position which has been propoted by international lawyers and Member States, we should always keep in mind that behaviors of States and States' officials are always reprehensible under International Humanitarian Law and it is not in the interest of either a state or an individual to diminish the level of responsibility and accountability of those types of crimes in placing the responsibility of those states or individuals at the level of counter terrorism legislation while they should face their International Humanitarian Law.

Also, we should keep in mind that acts of terrorism were solemnly condemned by the UN General Assembly since the Declaration against terrorism of 9 December 1994 (A/RES/49/60) and then repeated in the most famous policy document against terrorism of the United Nations, the UN Counter-Terrorism Strategy adopted by the UNGA on 8 September 2006 (A/RES/60/288):

Of course, the Strategy took the necessary precautions to respect the rights of the people in saying in its preambular paragraphs that "*at the 2005 World Summit Outcome world leaders rededicated themselves to support all efforts to uphold the sovereign equality of all States, respect their territorial integrity and political independence, to refrain in our international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations, to uphold resolution of disputes by peaceful means and in conformity with the principles of justice and international law, the right to self-determination of peoples which remain under colonial domination or foreign occupation, non-interference in the internal affairs of States, respect for human rights and fundamental freedoms, respect for the equal rights of all without distinction as to race, sex, language or religion,*

international cooperation in solving international problems of an economic, social, cultural or humanitarian character and the fulfilment in good faith of the obligations assumed in accordance with the Charter",

But having said that, Members States reiterated "*that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism".*

And also reaffirmed *"that terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group".*

Those elements were repeatedly restated both in the various UN conventions and protocols as well as in Security Council, especially resolution 1373 the largest and one of the first UN Security Council Resolutions against terrorism without referring to any geographical situation while adopted under Chapter VII which provides the Council and Members States to establish sanctions including military ones for any violation of those resolutions. General Assembly resolutions against international terrorism should not be forgotten either, including the one which adopted the UN Counter Terrorism Strategy as well as the other ones which adopted the sectorial conventions. It means that those acts of terrorism described and criminalized in the sectorial conventions should be taken seriously into consideration as definitions of acts of terrorism and thus be incorporated in the national legislation.

In such a legal situation, we should first underline the fact that a legal definition of an act of terrorism exists more specifically in the International Convention for the suppression of Terrorism Bombings to which 170 UN Member States are Parties. This number of Parties provides to that Convention a character almost universal. We should, of course stress the fact that in its preamble, it is said that " *the activities of military forces of States are governed by rules of international law outside the framework of this Convention and that the exclusion of certain actions from the coverage of this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws"*.

However, in its operative para 2 the Convention states that:

"*Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:*

(a) With the intent to cause death or serious bodily injury; or

(b) With the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss"[3].

[3] A/RES/52/164

-As far as the International Convention for the suppression of the financing of terrorism[4] is concerned, the definition set for in article 2 reads as follows:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act[5].

Not even mentioning the Convention on Nuclear Terrorism which also follows the same wording.

Those definitions are very clear and may be considered as close to the interpretation of the offences included in the Geneva conventions since for the last ones, we need a specific offence with a specific intentional element well described in the Geneva conventions themselves and which, actually, is reasonably comparable to the one of the sectorial ones.

Finally, we should also mention the UN Security Council Resolutions as bodies of law for countering terrorism, quoting only two of them which are essential for establishing new elements of an international criminal law framework. For example, we can find a definition of the criminal concept of Foreign Terrorist Fighters in UN Security Council Resolution 2178. However, in such cases, we should still keep in mind that there is a need to translate into the national legislation the provisions contained in the SC Resolution. Actually, whatever the legal system is, there is a ,need for incorporation since the UN Security Council Resolutions are not self-implementable even if there are adopted under the Chapter VII of the Charter of the United Nations which provide them with the necessary sanctions if Member States of the United Nations do not implement them. At the end, incorporation of those provisions is as indispensable as the ones of the Conventions and protocols.

All those elements should be part of the debate here and in the future in order to clarify what has been done concerning the definition of terrorism and acts of terrorism at the UN level. In order to protect peace and security at the worldwide level and at the same time protect human rights and humanitarian law, it is far from right to say that we have no elements of definition at least of acts of terrorism at the international level. Why the international community is doing so? Does it mean that doors are open to any type of definition at the national level and allow countries to go far beyond what is foreseen at the international level and thus allow more definitions of terrorism which will not comply with the international standards. In addition, it would hamper dramatically international cooperation in criminal matters and, in doing so, depriving victims of terrorism to get the just and necessary compensation.

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[4] Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999

[5] https://www.qwant.com/?client=qwant-safari&q=un%20convention%20against%20financing%20of%20terrorism

However, another element of the international legal framework against terrorism is also extremely important. This element is the regional dimension of the legal work. Since we are in Europe, allow me to mention four main organizations which have worked on that issue. In terms of international cooperation, the Shanghai Cooperation Organization as well as the CIS Organization have already made a solid body of work based on the UN legal instruments. But, at the legal level, the Council of Europe should be cited with a full regional convention for the prevention of terrorism. What should even more be mention about the Council of Europe is the complementarity between the UN and the Council on one specific topic. Just right after the adoption of the UN Security Council Resolution 2178 of September 2014 on the Foreign Terrorist Fighters, my former Office touched based with the Secretary General of the Council to explore possibilities of implementing immediately that resolution at the international cooperation in criminal matters level. Just a year after the adoption of that resolution, an addition protocol was adopted by the Council and opened to signature to trigger that cooperation against the Foreign Terrorist Fighters and being an implementing mechanism for that Security Council Resolution.

Also, we should forget to mention the new European Union Warrant of Arrest which was adopted few times after 9/11 as well as the adoption of the key UN Security Council resolution 1373 which was also enforced in the EU while also respecting human rights.

Many other references could be mentioned at the regional level, such as the conventions of the League of Arab States or of the African Union.

Unfortunately, each time there is a new terrorist attack, national legislators adopt broader and broader definitions of terrorism which do not correspond anymore to that international legal framework and at the end be an impediment to international cooperation in criminal matters. Indeed, countries should refrain themselves to go away from the international instruments since their authorities may not be able to comply with the principle of dual criminality which is an essential element of inter prosecution and judiciary cooperation. As a key principle in that area of cooperation, judges have the obligation to look carefully into the definition of crimes whenever a request for international cooperation is submitted to them. Without a clear compliance between the definition of the crimes for which the request in international cooperation is submitted, many times the request will be rejected. Of course, the authorities may always accept to provide cooperation based on the principle of reciprocity for which UN Security Council Resolution 2322 has adopted a special provision under which the principle of reciprocity should be combined with the implementation of Human Rights and Humanitarian Law Principles. Still, it is a much more difficult exercise.

But we should do even more. Do we need a comprehensive definition of terrorism? If the UN member States cannot or do not wish, for many reasons to agree on it, we should look into the matter of international customary law. Actually, the immense professor Antonio Cassese, at the time he presided the Chamber of Appeal of the Special Tribunal for Lebanon which is still in charge of the judgement of the assassination of Rafik Hariri, at that time Prime Minister of Lebanon, elaborated an opinion juris in that direction with both sources and practice. Actually, all those elements already quoted in the previous paras provide solid foundations for the opinion juris' sources in addition to the ones quoted by Antonio Cassese. In the decision of the Special Tribunal on Lebanon, position of establishing terrorism as an offence under the customary law

was adopted; for that purpose, the Tribunal, on one hand, examined the quantity of sources which could established terrorism as an offence and on the other hand stressed the strong will of States to establish terrorism as an international offence.

For that, it defined terrorism as being first recognized as an offence by more than 33 states at the time of that decision. However, nowadays, it is much more, and it was clear from the work I did at the time I was the Chief of the Terrorism Prevnetion Branch at the UNODC Vienna and even more during my time 2013-2017) as the Executive Director of the Counter-Terrorism Committee of the Security Council. We were in charge of assessing if the legal definition of terrorist acts in all the countries visited (more than 110) were in compliance with the international legal instruments against terrorism and also to the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime which supported strongly the UN Member States in making their legislation in accordance with the international counter terrorism instruments. I should testified that all visited Member States agreed to have in their legislation in accordance with the international legal instruments and, thus, applied by their criminal courts, the various definitions of acts of terrorism as defined in the sectorial instruments. I have never seen a single Member State being against incorporating in its legislation definitions contained in the various sectorial conventions as soon as those conventions were ratified or when the Member State had adhered to that international instrument. Actually, in many countries whatever there are of the monist or the dualist system vis a vis the international instruments, a criminal law is required to enforce a criminal legal instrument. Hence, almost all the countries which have ratified those instruments have enacted new laws for enforcing those conventions and protocols. It means that not only the opinion juris is about the international instruments themselves but practically on national legislations which constitute the famous concrete practice necessary to establish customary law and as a consequence of that situation, many judicial authorites have already taken legal sentences in that respect.

Thus, since it is quite clear that, according to United Nations Security Council Resolution 1373, all terrorists have to be brought to justice and that this resolution makes clear reference to the international instruments against terrorism to cover all acts of terrorism, it could be accepted, even more than with any argument of the Special Tribunal on Lebanon, that terrorism may be considered as a breach to International Customary Law. Going into that direction, relies also as states before, on the encapsulation of the various acts of terrorism in national legislation and that, as also demonstrated, that in all those states, reference is made to those conventions and protocols, either directly or through provisions of their national laws which contain such elements.

Of course, it is our duty to continue to provide justice in accordance with those elements and at the same time, in full compliance with the international principles and especially the Charter of the United Nations and the International Covenant on Civil and Political Rights[6].

The organizations I represent here today stand ready to work with all of you and, more specifically the ICRC and the Special Tribunal of Lebanon to eventually advance that discussion in order for the international community to make significant progress in that direction.

[6] https://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

In conclusion, let me first thank our organizers not only for the excellent organization of that meeting but also toils and political rights have allowed this stimulating debate about terrorism and international law.

In that respect, I should underline again that one of the key-responses to terrorism is to bring terrorism to justice as stated in resolution 1373. This is, actually, the only way to avoid impunity to terrorists and provide victims of terrorism the necessary attention while respecting the rule of law, human rights and humanitarian law. Our dear and regretted Antonio Cassese was absolutely right about that goal.

Thank you for your kind attention,