

CONSIDERATIONS REGARDING THE INTERNATIONAL COURT AGAINST TERRORISM

Prof.dr. Mihai FLOROIU

"Dunărea de Jos" University of Galați / Cross-Border Institute for International Studies and Criminal Justice, mihai.floroiu@ugal.ro

Prof.dr. Florin TUDOR

"Dunărea de Jos" University of Galați / Cross-Border Institute for International Studies and Criminal Justice, florin.tudor@ugal.ro

Abstract

The 2015 terrorist attacks in Paris and Brussels, caused by exponents of a new type of terrorist movement, have brought to the attention of the international community the need to be aware of the fact that terrorism has no borders and that only by concerted action of the entire international community may try to stop the phenomenon that ideologically and religiously recalls the Middle Ages and the expansion of the Ottoman Empire. Hence, two EU States decided to propose the creation of a specialized court of justice aiming at bringing terrorists to justice, thus reducing the risk of further perpetrating such actions. This paper will try to focus on the idea of such a court, as well as on the feasibility of an endeavor of this kind.

Keywords: *Public law, international law, criminal justice, international jurisdictions*

I - The original idea of a specialized court against terrorism

The terrorist phenomenon, which has gained momentum in recent years, reveals a difficult observation, namely that the criminal repression of terrorism is hardly amenable to international jurisdiction, the need to repress this crime contrasts well with the lack of international criminal jurisdiction with general jurisdiction over terrorism, apart from the modest contribution of international criminal tribunals to the repression of certain terrorist acts as a meager point of relief.

The approach of the notion of terrorism and the concern of the international society for the framing of this extremely volatile phenomenon, with other valences at the beginning of the 20th Century, was in the attention of the League of Nations, based on a Romanian proposal, as early as 1926, through a project of the Romanian internationalist, Vespasian C. Pella¹.

¹ <http://gallica.bnf.fr/ark:/12148/bpt6k54484124/f226.item.r=pella>, pag 205-242

Thus, although the Romanian proposal aimed to consider the possibility of drafting a convention for the universal criminalization of terrorism, unfortunately the initiative was not appropriated at that time by the League of Nations, which needed more than a decade to adopt two conventions, in 1937, respectively the Convention on the Prevention and Punishment of Terrorism², which defined the terrorist offense and whereby States undertook to criminalize acts of terrorism and the Convention on the Establishment of an International Criminal Court setting up the mechanism for punishing the facts provided for in the First Convention³.

However, due to the international context and the delicate position of the League of Nations in the late 30s, which made possible the outbreak of World War II, projects the two conventions could not be continued, despite their signing the well of 20 States.

With the relaunching international cooperation at universal level, through the creation of the United Nations, as a *de facto* continuation of the League of Nations, within the change of paradigm of the concept of terrorism and the resurgence of attacks of terrorist nature with implications for international politics, in 1972, following the terrorist attack on Israeli athletes at the Olympic Games in Munich, the United States presented to the General Assembly of the United Nations a draft of convention aiming to prevent and punish acts of international terrorism, targeting acts such as murder, serious bodily injuries or the abduction of persons if these acts were of an international dimension and were intended to prejudice the interests of a State or an international organization or to obtain concessions from them, without however defining what terrorism really meant⁴.

We consider that this lack in the US proposal of 1972 was due to the fact that the draft Code of Crimes against the Peace and Security of Mankind⁵, finalized by the International Law Commission in the second decade of the 1950s, defines one of these offenses as "*the undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State*"⁶.

Subsequently, with the intensification of the terrorist activities, in the context of a lack of cohesion of the international community regarding the approach of this phenomenon, in the first project of the status of the future international criminal court were also provided terrorist activities, thus confirming the will of the states

² Official Journal of the League of Nations, volume 19, page 21-35 in English and French on alternate pages (document C.546.M.383.937.V), available as facsimile at <https://www.wdl.org/en/item/11579/>

³ These agreements resulted from a three-year work of a working committee created under the aegis of the League of Nations, whose mission was to draft international conventions aimed at repressing conspiracy or murder committed for a political and terrorist purpose" in the context the assassination by terrorists in Marseilles in 1934 of the French Foreign Minister and the King of Yugoslavia

⁴ <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=2210&context=gjicl>

⁵ http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_3_1954.pdf

⁶ Art.2 pt.6 of the Draft Code

and of the international society to join in the struggle against this new enemy. Thus, we can list two categories of terrorist activities as follows :

- *“Undertaking, organizing, sponsoring, ordering, facilitating, financing, encouraging or tolerating acts of violence against another State directed at persons or property and of such a nature as to create terror, fear or insecurity in the minds of public figures, groups of persons, the general public or populations, for whatever considerations and purposes of a political, philosophical, ideological, racial, ethnic, religious or such other nature that may be invoked to justify them;*

- *The use of firearms, weapons, explosives and dangerous substances when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups or persons or populations or serious damage to property”⁷.*

Considering that the Final Act of the Rome Statute Conference of the International Criminal Court notes the absence of a generally accepted definition of terrorism, recommending, as a consequence, the inclusion of the terrorist offense in the jurisdiction of the ICC, for a future review, a series of UN General Assembly resolutions have been issued which set up an Ad Hoc Committee⁸ to develop a comprehensive international convention on international terrorism in a coherent legal system for the legal framing of international terrorism.

In this context, following the terrorist events of 2015, the Foreign Ministers of Romania and Spain at that time proposed, within the EU Foreign Affairs Council⁹, the idea of setting up an International Criminal Court against terrorism (CIT), a criminal international criminal organization in order to discourage acts of terrorism and to punish those who commit such acts wherever they may be committed¹⁰.

However, the creation of such a jurisdiction will not be a panacea either, since the Court may have serious difficulties in judging international acts of terrorism committed in the territory of states that are not part of its Statute or by nationals of these states, as it is possible to happened in present days in the case of the International Criminal Court.

II. How would the Court look like?

Compared to the initial criminal jurisdictions, created ad-hoc for specific cases and circumstances, starting with the courts from Nuremberg and Tokyo, the International Court against Terrorism should be more similar to the International Criminal Court, as permanent jurisdiction, established by a specific international treaty and belonging to the United Nations system.

This vocation of permanence has evident advantages. Thus, the existence of such a Jurisdiction will contribute to try all terrorist offences perpetrated under its

⁷ http://www.mae.ro/node/34522#_ftnref3

⁸ UN Resolution 51/210 - <http://www.un.org/documents/ga/res/51/a51r210.htm>

⁹ http://www.consilium.europa.eu/media/23364/outcome-of-the-council-meeting_fac_150209_fr.pdf

¹⁰ <https://www.ejiltalk.org/the-establishment-of-a-special-court-against-terrorism/>

jurisdiction, thus potentially no terrorist crime will remain unpunished, which could be deterrent at the time of committing other similar acts. In addition, the existence of a permanent court is more just and equitable than the creation of *ad hoc* tribunals, since these originate in response to a political decision of the Security Council and, if there is no will to create them, certain international terrorist crimes could remain unpunished.

At the same time, another specificity of such a Court would be its subsidiary characteristic, as States should have priority to investigate and prosecute the crimes of terror, which could only afterwards be submitted to the jurisdiction of the Court, which will also be complementary with the existing International Criminal Court¹¹. This fact differentiates it from the international tribunals for the former Yugoslavia and for Rwanda which, while not denying the jurisdiction of other national courts, have preference over the jurisdictions of all other states (Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and Article 8 of the Statute of the International Criminal Tribunal for Rwanda).

Generally speaking, the International Court against Terrorism would have the following specificities, drawn from the previous international tribunals:

- **international jurisdiction**, created by an international agreement, with specific Statute, according to procedures of Public International Law. In the case of the courts for the former Yugoslavia and for Rwanda, their creation was based on a decision of the Security Council of the United Nations Organization. In the case of the International Criminal Court, its Statute was approved at the Diplomatic Conference of Plenipotentiaries of the United Nations held in Rome in 1998, which could also be the case for the new desired jurisdiction, which could also come into existence based on an agreement between the European Union, United Nations and NATO, as those structures are militating for an increased complementarity;
- **jurisdiction that judges individuals**, despite the fact that terrorism is used lately also as a State policy¹². In this sense, at the beginning, the court should only have jurisdiction to hear cases in which the individuals are responsible for the acts of terror, as the responsibility of States is still to be codified by the United Nations;
- **tribunal competent to determine the criminal liability** of the persons' subject to its jurisdiction, imposing the respective custodial sentences, taking into account the seriousness of the terrorist crime and the personal situation of the accused people, with the possibility, in the future, considering also aspects on State sovereignty, to determine in which cases the origin of the terrorist acts was a State one;
- **independent court**, not subordinated to the States, organs or assemblies that decided its creation or approved its Statute;

¹¹ <http://www.contributors.ro/editorial/%C2%AB-dreptul-de-a-nu-ne-teme-%C2%BB-%C8%99i-curtea-internationala-impotriva-terorismului>

¹² <http://www.terrorism-research.com/state/>

- **collegiate jurisdiction**, since it should be made up of several magistrates (11 to 15), coming from different regions and legal systems of the world.

We believe that the international community must adopt a clear and firm line on the need to carry out counter-terrorism activities in full respect of the protection afforded to everyone by international law, including international humanitarian law and international human rights law. Thus, in the context of the future reform of the United Nations, and in line with the latest developments concerning, in particular, the Agenda for Sustainable Development 2030, it would be useful to review the way in which the United Nations regulates this phenomenon of counter-terrorism, so that it becomes more effective and allows the full implementation of the preamble of the United Nations Charter, which, more than 70 years ago, assumed a global mission to fight for peace and respect for human rights in the whole of the international society.

REFERENCES

[1] Compte rendu de la XXIIIe conférence tenue à Washington du 1er au 7 octobre et à Ottawa le 13 octobre 1925 / publié par le Bureau interparlementaire 1926

[2] Official Journal of the League of Nations, volume 19, page 21-35 (Document C.546.M.383.937.V)

[3] UN Draft Code of Crimes against the Peace and Security of Mankind of 1954

[4] UN Resolution 51/210

[5] TERRORISM: THE PROPOSED UNITED STATES DRAFT CONVENTION of 1972