The Individual Threatened by the Fight Against Terrorism?

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I. Introduction: Terrorism

The 11th of September 2001 has become the hallmark of death and destruction that strike unexpectedly like thunder. Within minutes, thousands of human beings lost their lives in two cities which symbolized more than any others the power of the United States. A feeling of absolute protection against outside enemies collapsed together with the fall of the twin towers in New York. It is no great wonder that after this traumatic experience the United States declared a "war on terrorism". In any war, however, an enemy is needed. Terrorism is in the first place no more than a word. It needs to take concrete shape in order to become a real enemy who can be combated. In the wake of the 11th of September, it soon turned out that Islamic fundamentalists had perpetrated the crimes in New York and Washington. This fact has deeply impressed the minds of political leaders. Terrorism is widely held to consist of attacks of persons of Islamic faith against the secular – and industrialized – North of our common globe. This simplistic equation does not always prove to be helpful. Terrorism is a much more complex phenomenon.

In the United Nations General Assembly, terrorism became a topic on the agenda in 1972. Just the title of this topic amply demonstrates how divided at that time the member States of the World Organization were and what high amount of sympathy they had for the so-called struggle for colonial liberation. Textually, it read as follows:[1]

> "Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes".

Without any diplomatic reservation, the fourth operative paragraph of the resolution adopted under that heading denounced activities of State terrorism:

> "Condemns the continuation of repressive and terrorist acts by colonial, racist and alien régimes in denying peoples their legitimate right to self-determination and independence and other human rights and fundamental freedoms".

There is certainly a link between situations of misery and despair and acts of violence directed against innocent human lives. But to portray terrorism as an automatic consequence of the existence

[1] See resolution 3034 (XXVII), 18 December 1972.

of ”colonial, racist and alien régimes” was certainly a big mistake. Western States, consequently, never supported the adoption of the resolutions passed under that item.

It stands to reason that the new States of the Third World could not maintain their predominantly negative assessment of the exercise of sovereign power and the predominantly positive assessment of movements challenging that power after the majority of them had acceded to independence and now had also to face up to charges that they had exceeded the legitimate bounds of the exercise of State authority. In some places, secessionist movements sprang up which also invoked the right to resort to violent means. First, changes came about in slow steps. The objectionable title was kept until 1989, before it was replaced by the neutral words ”Measures to eliminate international terrorism”. A great leap forward was made in 1994 when the General Assembly adopted the ”Declaration on Measures to Eliminate International Terrorism” in which the States Members of the United Nations

> “solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States”.[2]

It was particularly significant that this Declaration renounces any ideological justification of terrorism by stating (operative para. 3):

> “Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them”.

This definition has been kept and reconfirmed in more recent years. It provides important clues as to what is meant by terrorism, in particular if read in conjunction with the words employed by the International Convention for the Suppression of the Financing of Terrorism. This Convention, quite obviously, had to specify in greater detail how terrorism is to be understood since the financing of a given human activity as such could hardly be deemed to constitute an offence punishable under criminal laws. The relevant provision (Article 2 (1) (b)) reads:

> ”Any … 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”.

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[2] Declaration on Measures to Eliminate International Terrorism, adopted by resolution 49/60 of the UN-General Assembly, 9 December 1994, operative § 1.

If one takes the different elements together, a fairly complete picture emerges. Terrorism is then characterized by four essential features:

- It is a criminal act of considerable gravity. Essentially, such acts are directed against the life and the physical integriy of human beings.
- The act purports to intimidate a population and to create a general state of terror.
- The aim is a political one. Governments are put under pressure to act in a specific way. Thereby, terrorism distinguishes itself from ordinary crime.
- Ideological justifications are rejected.

Since in any event according to this conclusion terrorist acts are criminal acts, punishable under the criminal codes of any nation, one might ask why so much ”fuss” is made of terrorism? Should not just the ordinary law apply? It is at this point that the difficulties begin. Terrorism hangs like a threatening cloud over societies. Normal patterns of police prevention and investigation become useless. Usually, crime has very simple root causes, in particular money, jealousy or hatred in personal relationships. Terrorism, by contrast, has ideological motivations which can unite thousands of people which have no personal contact whatsoever with their potential victims. As we know from the preparations for the first anniversary of the 11th of September, a terrorist attack may occur anywhere any time against persons or objects which have only one thing in common, namely that they belong to the targeted society. Therefore, the objective, as it seems, must be to establish preventive mechanisms. Nothing seems more plausible than to combat terrorism before it can disclose its ugly head, before any offences actually affecting its targets have been perpetrated. In other words, conspiracies must be detected, perilous ideas must be identified, their authors being registered as dangerous persons, generally societal life must be put under a network of surveillance. This is the irrebuttable logic of effective fight against terrorism: measures must be taken *ex ante*, before actual damage has occurred.

In Turkey, penal law has been employed many times to repress opinions which harshly criticized the Government. In the case of *Ceylan*, a judgment handed down on 8 July 1999, the applicant had been sentenced to 20 months in prison for a statement which denounced ”state terrorism” and ”genocide” against the Kurdish people. Not without reason, Ceylan said *inter alia*:

> ”The political authorities and the forces of monopolistic capital use a few vague concepts to enable every action to be presented as a terrorist offence and every organisation as a terrorist group.”

The Court, on the other hand, recalled first its general position that freedom of expression constitutes one of the essential foundations of a democratic society and that it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb, these being the demands of pluralism, tolerance and broadmindedness without which there could be no democratic society. Taking into account the fact that the applicant was writing in his capacity as a trade-union leader, a player on the Turkish political scene, and that the article in question, despite its virulence, did not encourage

the use of violence or armed resistance or insurrection, it found the conviction disproportionate in the circumstances and therefore not ”necessary in a democratic society”.

Even worse is the recent case of *Bayrak v. Turkey*, which ended with a friendly settlement (3 September 2002). Here, a Kurdish writer had been convicted and sentenced because he had written and published a number of books promoting Kurdish identity. This is what the press release published by the Court had to say about the facts:

> For publishing a book entitled “Kurdish Popular Songs” (*Kürt halk türküleri*), Mr Bayrak was sentenced on 17 November 1995 to one year’s imprisonment and a fine of 100 million Turkish liras (TRL). On the same date, for publishing “Contemporary Kurdish Poetry” (*Çagdas kürt destanlari*), the applicant was fined TRL 50 million and the six months’ imprisonment to which he had originally been sentenced was commuted to a fine of TRL 900,000. Lastly, in a judgment of 3 June 1996, the Court of Cassation upheld the applicant’s sentence of one year’s imprisonment and a fine of TRL 100 million for publishing “The Kurds and their democratic and national struggle” (*Kürtler ve ulusal demokratik mücadeleleri*).

The case was struck out of the Court’s list following a friendly settlement under the terms of which the applicant is to receive 11,000 euros for damage and for his costs and expenses. In addition, the Turkish Government made the following declaration: “The judgments against Turkey rendered by the Court in cases concerning prosecutions under Article 312 of the Criminal Code or the provisions of the Prevention of Terrorism Act clearly show that Turkish law and practice must as a matter of urgency be brought into conformity with the requirements of Article 10 of the Convention. That is further evidenced by the interference complained of in the instant case.”

These two cases chosen at random illustrate the dangers inherent in placing the fight against so-called terrorism above all other values. Fortunately, Turkey seems to have understood that it has travelled along a wrong route and that, as a member of the Council of Europe and a party to the European Convention on Human Rights, it cannot continue to strike at peaceful and therefore legitimate ethnic aspirations simply because one day such aspirations might lead to criminal acts in a quest for self-determination for the Kurdish people.

At the same time, the Kurdish background demonstrates that there can indeed be something which one may rightly call ”State terrorism”. If a State strikes blindly (back?) against presumed terrorists and their environment, accepting that together with the suspects other civilians lose their lives, it uses the same tactics as the terrorists themselves. In this perspective, many actions carried out by the Israeli military in the occupied Palestinian territories would also have to be scrutinized very carefully. Normally, States see themselves as guardians of human rights. However, by ordering the systematic commission of war crimes and crimes against humanity they themselves deserve the same blame as those targeted by them. In such instances, there is little hope that the judicial system of the State concerned will conduct effective investigations and punish the responsible agents. Nowhere have excesses committed by security forces been adequately punished.

In a spiral of violence and counter-violence the commands of law tend to be overlooked and forgotten.

It is precisely the lack of agreement on how State terrorism could be defined which until now has prevented the elaboration of a general convention against terrorism in the fora of the Unitd Nations. Obviously, such a convention would be useless if it did not, at the same time, take into account terrorist acts undertaken by State authorities. A convention focusing exclusively on terrorist offences committed by private individuals would be blind on one eye.

II. The Two Functions of the State

Concerning human rights, the State has two functions. Traditionally, constitutions impose on the three branches of government the duty to respect, to comply with, to abide by the fundamental rights listed in the constitution itself or in a special act. A classic example of this concept is provided by the First Amendment to the U.S. Constitution, which establishes:

> ”Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

Essentially, this was the doctrine of the 19th century. The State had to ensure certain basic foundations of peaceful life. It had to organize external defence, it had to establish a police force, it had to care for a workable judicial system and it was incumbent upon it to build up a decent system of public education. All the rest, however, was left to individuals themselves and to society as a collective body. It was not the task of the State to ensure to everyone comfortable conditions of personal existence.

There is no need to give lessons on how this classic liberal position eroded progressively during the 20th century. Many milestones can be referred to in this regard, the Soviet revolution in Russia as well as the Weimar Constitution of 1919 which sought to introduce comprehensive responsibility of the State in many fields of societal interaction, or the Irish Constitution of 1937. In any event, it has now become commonplace that the State is not only obligated to refrain from interfering with individual rights, but that it also has a duty actively to protect the rights held by its citizens (and of cause anyone else under its jurisdiction). Reference may be made to the German Basic Law, which starts out with the well-known proposition (Article 1 (1)):

> ”Human dignity shall be inviolable. To respect and protect it shall be the duty of all State authority”,

or to the International Covenant on Civil and Political Rights, which provides (Article 2 (1)):

> ”Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant …”

To respect and to ensure are placed at the same level. This has likewise become the philosophy of the European Court of Human Rights and of constitutional courts at least in Europe. The concepts prevailing on the national and on the international plane have found a perfect consensus.

On the one hand, the doctrine of protection can be called effective progress. It is trivial to note that human beings can be threatened not only by the State, but also by other members of society surrounding them. Indeed, the doctrine of protection can be traced back to the philosophical foundations of the State. Everyone knows that according to Thomas Hobbes the institution of the State was necessary to avert ”*bellum omnium contra omnes*”. This justification has lost nothing of its original well-foundedness. In spite of many centuries of modern civilization since Hobbes wrote down his ideas, human beings have not become fundamentally different, better in a moral sense.

To conceive of the public order functions of the State in terms of promotion and protection of human rights tends to blur essential distinctions, though. During the 19th century, notwithstanding the prevailing liberal philosophy, nobody had of course overlooked the essential functions which are discharged by the police for the maintenance of public order and thereby in the service of effective enjoyment of fundamental rights. But I venture to say that generally the opinion was held that despite its public welfare mandate the State had to respect the boundaries traced by the constitutional rights of the citizen. Fundamental rights took precedence, in any event at a dogmatic level, certainly not always in practice. Now, with the doctrine of protection, the fundamental rights of the citizen and the powers of the State to interfere with these rights in the fulfilment of its mandate find themselves on a level of parity.

III. Restrictions of Human Rights

This new conceptual approach may have significant consequences for the way in which limitations on human rights are assessed. When legislative bodies make use of the restriction clauses which are appended, for instance, to the fundamental rights under the Basic Law, it does not so much interfere with the substance of these rights, but it protects other rights of the same importance. It is of course trivial to note that human rights need to be coordinated with the same rights of other persons and of the collective needs of society at large. But when the different interests are balanced, it does matter whether the conflicts to be resolved are conceived of in terms of individual freedom

v. State interference or whether this becomes a game on a playing field where all the pawns are human rights. To the extent that one takes into account distant and remote dangers, measures to fight terrorism and which may entail deep-going cuts into the substance of rights become measures for the protection of human life. Has not the attack on the twin towers in New York proven that negligence in operating an intelligence network may cause the deaths of thousands of persons? Thus, even traditional human rights, which seemed to be more resilient against State interference than economic and social rights, may turn from hard law into soft law which is contingent upon changing historical and political circumstances.

An interesting example in this regard is the judgment of the (German) Federal Constitutional Court of 14 July 1999.[3] It concerned the Fight Against Crime Act of 1994,[4] which provides that telephone communications with foreign countries may be intercepted and that the data of persons involved in allegedly suspicious communications may be registered. One of the purposes permitting such interception and registering was the prevention of terrorist attacks. In attempting to assess the lawfulness of the interference with the freedom of telecommunication of a number of journalists who had each filed a constitutional complaint, the Constitutional Court referred to the dangers resulting from illegal arms transactions, drug trafficking, money laundering and terrorist attacks, stating that these these threats have a considerable weight in that they affect foreign policy and security policy interests of Germany.[5] Although the Court stated in great detail that the data thus collected may not be used for any other purpose and that a system of control must be established, it is stunning how little attention was given to the balancing test itself. According to the method employed by the Court, any danger which jeopardizes the security of the nation might lead to the curtailment of fundamental rights. The balancing test has no true constitutional support. It becomes a free-wheeling exercise. Unfortunately, the formula ”necessary in a democratic society”, which provides a useful parameter for the assessment by the Strasbourg Court of Human Rights in similar instances, is conspicuously lacking in the Basic Law. Nor has the concept of ”clear and present danger” made its way into the case law of the Court.

IV. The Measures Taken in Germany

Immediately after the 11th of September 2001, Germany took a number of measures, in political jargon called ”security package I and II”. The first package encompassed three determinations which had already been in the pipe-line for a considerable amount of time. First, it became possible to ban so-called religious associations. Until that time, such associations had enjoyed the privilege

[3] Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 100, p. 313.
[4] Verbrechensbekämpfungsgesetz, 28 October 1994, Bundesgesetzblatt 1994 I, p. 3186.
[5] Loc. cit., p. 382: ”Die Gefahren, die ihre Quelle durchweg im Ausland haben und mit Hilfe der Befugnisse erkannt werden sollen, sind von hohem Gewicht”.

of not being subject to the general regime governing associations. Second, according to a policy decision by the European Union a new article was inserted into the Penal Code according to which participation in a criminal association having its seat abroad and not in Germany became a punishable offence. Third, a determination was made that personnel in airports, having access to security areas, must undergo specific checks. All of this does not raise any major objections.

However, in the month of December 2001 the second security package was adopted by the legislative bodies.[6] It is a complex statute covering not less than 34 pages, hard to understand even for a lawyer who is used to reading legal texts. Many of the measures provided for therein are innocuous from a human rights viewpoint. I shall therefore confine myself to commenting on a few only of the specific amendments or innovations.

On the one hand, the new Law provides for the inclusion in identity documents like passports and identity cards of biometrical data regarding the fingers, the hands or the face of a person. Public authorities are not obligated to reveal which one of the different body parts is taken as evidence for identification. Hence, a passport holder does not know whether, in addition to his/her photo, his/her passport contains elements defining his physical appearance. This planned regime – it will have to be detailed by a law of implementation - has aroused a storm of protests. In my view, this opposition is simply exaggerated. No one can have a legitimate interest in not being recognizable. Fears have also been voiced that such biometrical data may permit immigration control services to establish a personal profile of everyone using the new IDs. But such fears appear to be unfounded. Already now the majority of IDs can be read by machines. The inclusion of biometrical data does not change this state of affairs in any significant respect.

It is a different thing altogether to establish a system of surveillance which permits to control the activities of everyone. In that regard the most intriguing of the new rules are those which authorize the the Federal Intelligence Office (Bundesnachrichtendienst) to request from banks and other financial institutions information about money transfers and money deposits ”if there exist factual clues indicating serious dangers for foreign policy and security policy interests of the Federal Republic of Germany” (Article 3).[7] Likewise, the Federal Intelligence Office may request from telecommunication enterprises all relevant information about services rendered. The Law specifies that such requests may be made only ”in individual cases” (”im Einzelfall”), but of course proceedings may be initiated in hundreds and thousands of individual cases at the same time. One must also emphasize that the Law has refrained from establishing a requirement to the effect that substantiated reasons point to the commission of a criminal offence. What we are confronted with is prevention pure and simple.

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[6] Gesetz zur Bekämpfung des internationalen Terrorismus (Terrorismusbekämpfungsgesetz), 9 January 2002, Bundesgesetzblatt 2002 I, p. 361.

[7] “Soweit ... tatsächliche Anhaltspunkte für schwerwiegende Gefahren für die außen- und sicherheitspolitischen Belange der Bundesrepublik Deutschland vorliegen”.

A third method of preventive investigation consists of search by screening or computer-assisted profiling and search (”Rasterfahndung”). Central authorities establish profiles of suspects – according to age, sex, religious faith, residence etc. – and then request other agencies to look in their registers for persons meeting the selected criteria if they themselves do not have access to the relevant registers. Obviously, in the aftermath of the 11th of September 2001 young male persons of Islamic faith fell into this category. Thus again, the fight against terrorism is a fight against abstract dangers which implicates many persons who are perfectly law-abiding citizens.

It stand to reasons that in the three situations just described the targeted persons are not informed about the measures taken against them. Since prevention is nosing around vague suspicions, it must remain confidential. Otherwise, it could not reach its objectives. This means that the victims, if one may say so, have no remedies at their disposal to assert their rights of privacy which might be infringed. Germany has established a complex system of parliamentary control in lieu of judicial control. But nobody really knows how effective this system is. In any event, it is clear that if intrusion into personal data is permitted on a broad scale, subsidiary systems of monitoring and review must be established. Even so, one cannot fail to note that the individual is completely in the hands of State authorities which decide in an autonomous fashion on right or wrong. One needs a high degree of confidence in the virtues of democracy to accept this system.

There is one group of persons which can definitely be called the victims of the 11th of September, namely aliens. In almost all countries, the regime governing the entry and sojourn of foreigners has been tightened. In principle, this is the consequence of the lack of a guaranteed right of sojourn in the territory of other countries. In Germany, a heated debate centers now on the question of whether an alien should be subject to expulsion as soon as there is some ground of suspicion against him to be involved in terrorist planning. But how does one define the threshold of suspicion that would have to be reached? Would it be sufficient that somebody belongs to a group of persons or an organization which is generally considered to constitute a danger for public security? In the United Kingdom, the Anti-Terrorism, Crime and Security Act 2001 has defined a terrorist as a person who has links with an international terrorist group (section 21 (2) (c)). However, in order to reign in any possible overzealous action by police authorities, the Act specifies at the same time that to have links means to support or assist the group (section 21 (4)) – which, I presume, would have to be proven by substantiated evidence.

V. The Fight against Terrorism in Other Countries

Other countries have taken much more drastic steps to fight terrorism. More stringent measures can be envisaged on the procedural level. Furthermore, new sanctions may be introduced or existing sanctions may be intensified.

Germany has refrained from introducing any changes in its Code of Criminal Procedure. Indeed, the rule of law should be upheld in criminal proceedings without any reservation or derogation. One may recall, in this connection, the interrogation methods used by the British police in its fight against terrorism in Northern Ireland. They all were intended to disorient the persons under arrest by ”sensory deprivation” and consisted of wall-standing, forcing the detainees to remain for periods of some hours in a ”stress position”, hooding, subjecting to noise, deprivation of sleep and deprivation of food and drink.[8] When this became public, the Republic of Ireland lodged an inter-State complaint against the United Kingdom in which, eventually, the only relevant question was whether these techniques amounted to torture or constituted ”no more” than inhuman and degrading treatment. The final outcome of the proceeding, i.e. that the gravity of such treatment did not deserve a qualification as torture, was greeted almost as a victory in the United Kingdom but was a clear indication by the Court that even terrorists may not be denied a fair trial. Indeed, it is hard to see why alleged terrorists should not be dealt with according to the same standards that are applicable to murderers and robbers.

Legislative bodies should not try to modify the legal position to the detriment of alleged terrorists. The presumption of innocence is an incontrovertible sign demonstrating whether a State abides by the rule of law or does not.

No long words need to be lost on the denial of procedural rights to those who are under detention at the American military basis of Guantánamo. The treatment of these persons is not worthy of a nation which proclaims being an advocate of the rule of law. The U.S. Constitution may be defective if it withholds any protection from prisoners being held by American authorities outside the U.S. territory proper. We will definitively know this only after the Supreme Court has ruled on the issue. But it is quite clear already at this stage that the United States is breaching the obligations incumbent upon it both under the Hague Convention No. 3 of 1949 relative to the Treatment of Prisoners of War and the International Covenant on Civil and Political Rights. Obviously, the American declaration, made at the time of ratification, that the Covenant is not applicable internally in the United States has had a disastrous effect, leading some U.S. authorities to believe that it is deprived of any binding effect. As it appears, to date a hearing has been granted only to the one prisoner who has American nationality, all the others being held without any actual charges for an undetermined period of time. I have seen no official statement justifying the establishment of a system of administrative detention, which in the past was known mainly from communist or other dictatorial countries.

[8] See judgment of the European Court of Human Rights of 18 January 1978, Series A, Vol. 25, p. 41.

As far as penalties are concerned, the formal establishment of administrative detention would indeed constitute a new form of sanction, while currently with regard to the prisoners at the Guantánamo base it must still be considered as a denial of procedural rights. Is it unfair to mention in this context that a well-known U.S. lawyer has suggested that in case of a suicide bombing the relatives of the perpetrator should be executed? This proposal has met with vivid criticism. It does not reflect the position of the U.S. Government or of Congress. And yet it demonstrates the degree of disarray of public mood in a country which has never suffered the brunt of armed conflict on its soil. This augurs badly for challenges to the American might which may lie ahead in the future.

VI. Conclusion

It is deeply worrying that as a result of the terrorist attacks of the recent past the trust in the virtues and necessity of a just policy is rapidly fading. Instead of seeking to discover their own shortcomings, nations rush to cure symptoms. Of course, measures must be taken against terrorists. Vigilance must be stepped up. But all this activism should not detract from the basic necessity of self-inspection. Every nation should at the same time analyze its own conduct and ask itself searchingly whether it has made mistakes which have given and give rise to frustration, hatred and despair. Not even by openly dealing with such root causes of terrorism can terrorism be effectively eliminated, however. There will always be fanatics, desperados, who think that all the evils of the world can be blamed on a specific country and that therefore this country needs to be punished. But the fanatics will remain an infinite minority if the perception grows that all the countries of the globe are seriously committed to world-wide welfare goals without any distinction as to race, colour or religion. Under such circumstances, too, a coalition against terrorism will have solid foundations.