

INTERNATIONAL COUNTER-TERRORISM LAW: AN OVERVIEW

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- THE CONUNDRUM/DILEMMA OF THE LEGAL DEFINITION OF (THE CRIME OF) INTERNATIONAL TERRORISM

The decolonization legacy (aphorism 'one man's terrorist is another man's freedom fighter')

UNGA Res 3034(1972)!!! Title: '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'. [in the aftermath of **attacks during the Olympic Games in 1972**]

UNGA retained this title until **1991** when it changed it as follows:
'Measures to Eliminate International Terrorism' (UNGA Res 46/51)

UNGA turning point is however **1994 'Declaration on Measures to Eliminate International Terrorism'** (UNGA Res 49/60 Annex).

UNGA condemned '**all** acts, methods and practices of terrorism... wherever and **by whomever committed**' and added '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 circumstance unjustifiable**, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them' (Section I(3))

'by whomever committed' includes so-called '**State terrorism**' caused by law-enforcement agents as well as so-called '**freedom fighters**' affiliated with '**national liberation movements**' and participating in '**wars of national liberation**'

But the decolonization legacy is not vanishing, is persistent: cf **African Union Convention on the Prevention and Combating of Terrorism**, 1999 (in force 2002, 36 Parties). Convention states the following regarding the definition of terrorism; in line with the **general policy of African countries**, it excludes from the scope of the definition of terrorism 'the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces' (Art. 3).

International Convention for the Suppression of the Financing of Terrorism (UNGA Res 54/109), 9 December 1999

A two-fold definition (Art 2(1)):

(i) renvoi clause: terrorism/terrorist acts are all those that are prohibited by the existing treaties on terrorism (eg, hijacking of aircraft)

(ii) an abstract definition: ‘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’.

- **physical violence against human beings is required**; violence against objects/property does not fulfil this definition, but compare Draft Comprehensive Convention on International Terrorism which – similarly to many domestic definitions – does include

‘serious damage to public or private property, a place of public use, a State or government facility, a public transportation system, or an infrastructure facility or the environment, or damage to property, places, facilities, or systems... resulting or likely to result in major economic loss’.

- **intimidation/fear/terror is not necessarily an element of the definition**; it’s not required when the purpose is to compel a State or IO to do something;

- **political, religious, or ideological motivation on the part of the terrorists not required** (as well as a collective action on the part of a group of persons not required) unlike, eg, UK and Canada, but similarly to the EU (see EU Council Framework Decision of 13 June 2002 on Combating Terrorism)

- **exclusion of/carve-out for lawful acts of warfare against belligerents!!!**

Draft Comprehensive Convention on International Terrorism (DCCIT): too restrictive or too far-reaching?

- Long-standing project undertaken by UNGA since 1996 on the basis of a draft by India (by way of an ad-hoc Committee and then a WG) and yet to be completed/*impasse*

Major Stumbling block: treatment of National Liberation Movements (NLM) and State Terrorism (ST), ie, acts of violence carried out by the official Armed/Military Forces (AF) of States: should they be excluded/exempted?

In relation to ST/acts of AF, the formula proposed envisaged the exclusion from the scope of application of the Convention of:

'activities undertaken by the military forces of a State **in the exercise of their official duties, inasmuch as they are governed by other rules of international law**' (similar to Art. 19(2) of 1997 International Convention for the Suppression of Terrorist Bombings)

- This broad formula entails exclusion of ST both in times of war (when they are governed by IHL) **and in times of peace** (when they are governed by IHRL)!!!

- Note that however DCCIT includes terrorism against objects/property (see supra)

- DCCIT also criminalizes attempted offences and forms of participation in the crime, in particular **any form of contribution**, without being more specific: too broad? Also persons participating in violent demonstrations/uprisings?

- OBLIGATIONS TO FIGHT TERRORISM UNDER UNIVERSAL TREATY LAW ('universal' duly used since the number of Parties is invariably **around 150 States**; note here the **impact of 9/11 Attacks** on Twin Towers: eg, in 2 months only, ie, 11 Sept-16 Nov 2001 76 States signed and 10 ratified the 1999 Financing Convention)

- inability to agree on the definition means that int treaty law approach to terrorism has always been so far 'sectoral', devoted to specific acts, aspects, areas, manifestations of terrorism

- early exception was the 1937 League of Nations Convention for the Prevention and Punishment of **Terrorism (reaction to the assassinations of the Yugoslavian King and France's Foreign Minister by separatists in mid-30s) = never came into force due to lack of ratifications)**

- Since the **1963 Tokyo Convention on Offences and Certain Other Acts committed on Board Aircraft** was adopted, a **total of 12 treaties** supplemented by a number of **protocols have been negotiated (11 adopted + DCCIT)** under the aegis of the UN, permitting the criminalization of the most uncontroversial acts of int terrorism

- **General Scheme** is largely the same:

obligation to domestically criminalize a specific act or specific acts of terrorism (ie, to make them criminal offences under national law and to provide for penalties)

+ *aut dedere aut judicare* obligation, either extradite or prosecute persons responsible for such act/acts (ie, the perpetrators)

+ mutual cooperation between SP in the application of the treaties (esp vis-à-vis prosecutions, requests for judicial assistance etc)

1. Tokyo Convention on Offences and Certain Other Acts committed on Board Aircraft, 1963 (in force 1969)
2. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (in force 1971)
3. Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971 (in force 1973)
 - + Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the 1971 Montreal Convention, 1988 (in force 1989)
4. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, 1973 (in force 1977) (terrorism convention *lato sensu*)
5. International Convention against the Taking of Hostages, 1979 (in force 1983) [1979 hostage taking at US embassy in Tehran]
6. Convention on the Physical Protection of Nuclear Material, 1980 (in force 1987) ('Nuclear Materials Convention')
7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (in force 1992) ('Maritime Safety Convention') [maritime terrorism/safety and the Achille Lauro affair (1985)]
 - + Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf to the Maritime Safety Convention, 1988 (in force 1992)
 - + Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (in force 2010)
 - + Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, 2005 (in force 2010)
8. Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991 (in force 1998) [1988 Pan Am Flight 103 bombing, Lockerbie affair] ('Plastic Explosives Convention')

9. International Convention for the Suppression of Terrorist Bombings, 1997 (in force 2001) [1996 bombing attack on US military personnel in Saudi Arabia plus Other bombings between 1995 and 1996 in Tokyo, Tel Aviv, and Manchester] ('Bombings Convention')

Milestone in international counter-terrorism treaty-making, because it broadens and strengthens international law enforcement with regard to one of the main instruments of international terrorism.

10. International Convention for the Suppression of the Financing of Terrorism, 1999 (in force 2002) ('Financing Convention')

Terrorist financing as 'directly or indirectly, unlawfully and wilfully, provid[ing] or collect[ing] funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part', to carry out an offence described in any one of the existing counter-terrorist treaties or to carry out terrorism as distinctly defined under the Convention

11. International Convention for the Suppression of Acts of Nuclear Terrorism, 2005 (in force 2007) ('Nuclear Terrorism Convention')

- REGIONAL MEASURES

Council of Europe: **European Convention on the Suppression of Terrorism, 1977** (in force 1978) + CoE **European Convention on the Prevention of Terrorism, 2005** (in force 2007): focus on criminal offences constituted by certain acts in the preparatory stages of terrorist offences, eg, public incitement, recruitment, training etc + the hot potato of '**extraordinary renditions**', see esp '2006 Dick Marty Report': 'Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States' [12 June 2006], finding 14 CoE Members involved in such practice, including Italy [**Abu Omar case**])

European Union: **2002 Framework Decision on Combating Terrorism as amended in 2008**

+ **Listing Measures/Targeted Sanctions**: (i) EU implements **UNSC sanctions resolutions**: starting from Council Regulation (EC) No 2580/2001 of 27 December 2001 on Osama Bin Laden, Al Qaeda, the Taliban and their accomplices, the EU lists individuals

and entities (including suspected terrorists) which are targeted with a variety of sanctions by the UNSC: milestone judgment in **Kadi 2005-2008** +

(ii) **the EU has autonomous sanctions lists** formed upon investigations and information by the MS (see Common position 2001/931/CFSP of 27 December 2001); **they include (or have included) many controversial cases of suspected entities: IRA, ETA, Palestinian Islamic Jihad, and the People's Mojahedin Organization of Iran (PMOI):** PMOI has however been delisted after a 2008 CJEU Judgment, Case T-256/07 **People's Mojahedin Organization of Iran v Council [Judgment of 23 October 2008]**, finding a violation of fundamental rights

- OBLIGATIONS TO FIGHT TERRORISM UNDER CUSTOMARY INTERNATIONAL LAW

- **Customary prohibition of State-sponsored terrorism**

as reflected in **UNGA Friendly Relations Declaration (1970)** (Res 2625 (XXV)): '[e]very State has the duty to refrain from organizing, instigating, assisting or participating in **acts of civil strife or terrorist acts in another State** or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force'.

'[N]o State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State'.

- **Aut dedere aut judicare** persons suspected of/charged with terrorism: present in all of the counter-terrorism treaties (eg, Art 10 Financing Convention, Arts 8-9 Bombings Convention)

- UNITED NATIONS AS THE MAIN GLOBAL INSTITUTIONAL ACTOR

- Involved since the 1970s, yet through non-binding acts until the 2000s (UNGA Res)

- Sept 11, 2001 as the turning point giving rise to sustained action by the UNSC under its enforcement powers as provided for in Ch VII Charter

(i) UNGA, SG etc

- **2005 World Summit on Counter-Terrorism** (call for a UN Strategy)

- **SG Kofi Annan's Report 'Uniting against Terrorism: Recommendations for a Global Counter-Terrorism Strategy'** (2 May 2006)

- **2006 UN Global Counter-terrorism Strategy** (adopted by means of UNGA Res 60/288) with an annexed plan of action: a common platform for UN actions bringing together the

efforts of the many UN programmes, offices, departments, and agencies, including the counter-terrorism related bodies of the Security Council (addressing issues such as the use of Internet by terrorists, bioterrorism, needs of victims, money laundering, etc, 'while respecting human rights and upholding the rule of law')

(ii) UNSC

- **International Terrorism as Threat to International Peace and Security under Art. 39 UN Charter**

- **1988 Pan Am Flight 103 bombing (Lockerbie affair)** spurred action, see **UN sanctions against Libya under Art 41 Ch**, Res 748 (1992) and following: Libya's **failure 'to demonstrate by concrete actions its renunciation to terrorism** and in particular its continued failure to respond fully and effectively to the requests in Resolution 731(1992) **constitute a threat to international peace and security'**.

- same in later cases, eg, with regard to the Taliban regime in Afghanistan and its support to Al Qaeda (UNSC Res 1267 [1999]; 1333 [2000]; and 1363 [2001])

- and **'any act of international terrorism' as such**, with no reference to specific situations, **as a 'threat to international peace and security'** (UNSC Res 1373 [2001]; 1535 [2004]; 1566 [2004]; 1617 [2005]; and 1624 [2005])

- the SC started to legislate with respect to international terrorism, not only a law-enforcer but also a law-maker!!! See esp **Res 1373 [2001]**, basically transforming the regime of the 1999 Financing Convention (only ratified by 4 States at the time) into a Security Council resolution thus making it binding on all Member States of the UN! Note absence of protests, ie, acquiescence, by UN Members; Res 1373 also establishes as a key-supervisory body the UN Counter-Terrorism Committee (CTC)

- **enforcement/military actions against terrorism** (not only peace-keeping, but also peace-enforcement, ie the UN security missions established are 'authorized to take all necessary measures in order to fulfil their mandate', which implies the use of force if necessary);

- the first case of establishment of such missions principally in order to fight against terrorism was **NATO-led International Security Assistance Force (ISAF) in Afghanistan** (UNSC Res 1386 (2001))

- **UN Sanctions regime/system against terrorists and their supporters**

from sanctions against terrorist States (eg, Libya) to targeted/smart sanctions against listed individual terrorists; the historical 'Afghan' precedent of UNSC 1267 (1999) against

persons and entities 'associated with' the Taliban, Osama bin Laden, and the Al Qaeda network; three main types of sanctions: assets-freeze, travel bans, and arms embargoes; black-lists administered by a UNSC Sanctions Committee (eg, '1267 Committee'), **UNSC Res 1904 (2009)** established an **ombudsperson** for individual de-listing complaints; listing request to come from a UN Member which 'provide[s] a detailed statement of case in support of the proposed listing that forms the basis or justification for the listing in accordance with the relevant resolutions';

targeted sanctions and HRs: right to property/right to effective judicial protection engaged by reason, eg, of (original) inability of targeted individuals to seek their de-listing (only their home State originally); situation changed with **SC Res 1730 (2006)**, which set up a so-called **Focal Point**. Focal Point was charged with the treatment of de-listing requests **(i) by individuals, groups, and entities**. This task has now been taken over by the **Office of the Ombudsperson** + Distinct de-listing procedure triggered by **(ii) Member States** and created by SC Res 1904 (2009);

SC Res 1904 (2009) as a reaction to the **CJEU Kadi judgment of 2008**, finding that Reg (EC) No 881/2002, which was one of the instruments transposing the individual sanctions regime established by SC Res 1267 (1999) into the EU legal order, was not in conformity with EU fundamental rights.

- **JUS AD BELLUM ISSUES: SELF-DEFENCE AGAINST TERRORIST ATTACKS**

Art 51 UN Charter: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs **against a Member of the United Nations**, until the Security Council has taken measures necessary to maintain international peace and security. [...]'

- Only an armed attack against a State **by another State**? And not by non-State actors, such as non-State armed opposition groups (AOGs) or terrorist groups/networks?

ICJ seemed to accept the first/conservative option in **2004 Israeli Wall Advisory Opinion (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory)**, unlike position of several countries such as Turkey, Israel, and United States, and IOs such as esp NATO and OAS:

'Article 51 of the Charter thus recognizes **[but where exactly?]** the existence of an inherent right of self-defence in the case of armed attack **by one State** against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State' (para 139)

'The Court also notes that **Israel exercises control in the Occupied Palestinian Territory** and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. The situation is thus different from that contemplated by **Security Council resolutions 1368 (2001) and 1373 (2001)**, and therefore **Israel could not in any event invoke those resolutions** in support of its claim to be exercising a right of self-defence.

Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case' (ibid)

Israel had taken the view that: "the construction of the Barrier is consistent with Article 51 of the Charter of the United Nations, its inherent right to self-defence and **Security Council resolutions 1368 (2001) and 1373 (2001)**". More specifically, Israel's Permanent Representative to the United Nations asserted in the General Assembly on 20 October 2003 that "the fence is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the Charter"; the **Security Council resolutions** referred to, he continued, "**have clearly recognized the right of States to use force in self-defence against terrorist attacks**", and therefore surely recognize the right to use **non-forcible** measures to that end' (para 138)

Cf SC **Res 1368 and 1373** adopted in the aftermath of 9/11 to justify strikes on Afghanistan by the US

Res 1368 (12 Sept 2001): 'The Security Council,

Reaffirming the principles and purposes of the Charter of the United Nations,

Determined to combat by all means threats to international peace and security caused by terrorist acts,

Recognizing the inherent right of individual or collective self-defence in accordance with the Charter,

1. Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and **regards such acts, like any act of international terrorism, as a threat to international peace and security'** [...]

and of **Operation Enduring Freedom** in Afghanistan (US, UK, Afghanistan coalition), which was meant to root out terrorism, was justified on the basis of self-defence

- Further problem: measures of self-defence **only against the entity launching the 'armed attack'**, ie, the terrorists themselves, as it would be natural/logical? (Consider Afghan example: strikes against Taliban-controlled areas, not against Al Qaeda);

unworkable standard in terrorist cases, given the volatility of terrorist groups, much more sensible to target States sponsoring terrorism, harbouring terrorists, training terrorists etc; a requirement that the territorial State concerned with the attack in self-defence is 'unwilling or unable to combat the terrorist activities on its territory' as a balance between fight against terrorism and sovereignty?

- Further problem: the attack/measures in self-defence must be taken immediately after the attack and be necessarily temporary (a temporary and proportionate reaction to an attack) or can they rather be of a prolonged nature); Can 'permanent self-defence' be accepted? Probably not under the text and purpose of Art 51, thus better to act against terrorism on the basis of previous authorization to use force or other measures by the SC;

- Final problem: **anticipatory/preventive** self-defence lawful? Wide doctrinal divide

- IHL & IHRL (SELECTED ISSUES)

- The **Guantanamo 'legal black hole'**: indefinite detention for Al Qaeda suspects without the guarantees of fair trial on the ground that they are 'unlawful enemy combatants' to whom IHL protections under 'Geneva law' are not owed (unlike to POWs and civilians)

- A US unilateral interpretation of IHL which creates a third unknown category of persons implicated in armed conflict: for US, Guantanamo detainees cannot be lawful combatants entitled to POWs status because terrorists are not entitled to take part in hostilities (and this is OK), but at the same time they cannot either be considered as civilians because they in fact take part in hostilities, a position forcefully rejected by the ICRC and a host of lawyers for which GC IV does apply to civilians unlawfully participating in hostilities (cf Art. 51 (3) AP I, according to which civilians enjoy the specific protection owed to them 'unless **and for such time as** they take a direct part in hostilities')

- The **hot potato of Targeted Killings** understood as the intentional, premeditated, and deliberate use of lethal force, by States or their agents acting under the colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator' (very controversial compatibility with the right to life) (see Alston Report 2010, suggesting requirements for their legality, such as need to increase transparency and to observe proportionality)