

COUNTERING TERRORISM: NEW INTERNATIONAL CRIMINAL LAW PERSPECTIVES

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I. BACKGROUND

In 1994 the United Nations General Assembly established that terrorism was “criminal and unjustifiable, wherever and by whomever committed”... “what ever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them”.¹ By defining terrorism as a crime rather than as an international security issue, the General Assembly has chosen a *criminal law approach* rather than a war model of fighting terrorism.² While the General Assembly categorized international terrorism in 1994 in terms of a criminal justice model as a serious crime, the United Nations Security Council categorized it, on 12 September 2001, in resolution 1368, “like any act of international terrorism, as a threat to international peace and security”, thereby applying a security rather than a crime model to such acts. It is widely accepted that a number of countries are strongly supporting the Security Council approach while other members of the international community feel more comfortable with the General Assembly method. Nevertheless, as we will see, with the passage of its resolutions 1267 (1999), 1373 (2001), 1624 (2004) and several others, the United Nations Security Council (UNSC or just SC) has put unprecedented obligations on Member States to implement its decisions through their national criminal justice systems. Taking into account that UNSC resolutions are usually not written by international criminal law specialists, it leaves States under a heavy burden of finding their own ways to live up to their commitments under the UN Charter. We, at the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime, stand readily to *provide assistance to countries, upon request, for ratifying and implementing the universal legal instruments against terrorism, strengthening their national legislative base for complying with their international obligations on developing a robust international legal regime against terrorism* (please refer to the Appendix). It is widely accepted that a working international legal regime against terrorism will help us to bring terrorists to justice and prevent future possible attacks. Therefore, more and more accent is put not on punishing terrorists for the acts already committed (although it does remain an extremely important function of a criminal justice system) but rather on preventing new attacks from happening.

II. NEW APPROACH

In one of the TPB working papers it is explained that “‘Proactive law enforcement’ is a phrase used to convey a contrast with ‘reactive law enforcement’. The proper grammatical usage may simply be “active” or “activist”, but the adjective “proactive” has become accepted in both popular and criminological writing. Proactive law enforcement emphasizes preventing and interrupting crime, rather than reacting to crimes already committed, and its novelty is often overstated. Public safety authorities have always attempted both to prevent crime and to solve offences already committed, although the two functions have sometimes been inefficiently separated and characterized by a lack of communication. Nevertheless, the label “proactive” is now used for almost every initiative to reduce crime, having been expanded far beyond its original reference to police patrolling (emphasis added)”³

Terrorism is one of the gravest crimes. Therefore, it would be logical to conclude that a great deal of attention should be paid to preventing possible terrorist attacks. Referring to the above-mentioned paper a successful proactive criminal justice approach to terrorism prevention would need ‘*a strategy to permit intervention against terrorist planning and preparations before they mature into action*. The goal is to

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¹ Declaration on Measures to Eliminate International Terrorism. General Assembly resolution 49/60 of 9 December 1999. Annex; repr. in United Nations. International Instruments related to the Prevention and Suppression of International Terrorism. New York, UN Office of Legal Affairs, 2001, p. 233.

² M. J. Peterson. Using the General Assembly. In: J. Boulden & Th. G. Weiss, op .cit., p. 183.

³ Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments. Terrorism Prevention Branch Technical Assistance Working Paper. P.2.

proactively integrate substantive and procedural mechanisms to reduce the incidence and severity of terrorist violence and to *do so within the strict constraints and protections of the civilian criminal justice system and the rule of law*⁴ (emphasis added).

Thus, countering terrorism through penal prevention would mean *criminalizing acts that are committed BEFORE any terrorist acts take place*. And indeed in recent years, the international community has moved in this direction. Most importantly there were efforts made to criminalize recruitment, training, supplying weapons to, support, financing, conspiracy, incitement, and glorification of terrorism.

Thus UNSC resolution 1373 (2001) “*Decides that all States shall: (a) Prevent and suppress the financing of terrorist acts; Decides also that all States shall: (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists; (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;...*”. Ideally these provisions of the Resolution should be incorporated into criminal codes of the countries in order to insure that they become separate criminal offences punishable under national laws.

The UNSC in its Resolution 1624(2005) further expanded this list of offences to incitement when it decided to “*Calls upon all States to adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:*

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;
- (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.”⁵

III. CHALLENGES TO NATIONAL CRIMINAL JUSTICE SYSTEMS

As we all have read and heard in recent years, this trend to outlaw the preparatory and supporting acts committed before or even regardless of whether actual terrorist attacks take place have attracted a lot of criticism from human rights activists. The concern is that new legislation is contradictory to the human rights standards and obligations under international human rights norms.

On the one hand, these concerns are very understandable in the countries with weak criminal justice systems where there is a certain risk that these offences will be used for political reasons.

On the other hand, the argument that these new proposed offences are contradictory to the international legal human rights norms is not correct.

Let us go back to the cornerstone of international human rights law – the International Covenant on Civil and Political Rights (ICCPR). Article 6 of the Covenant, from which no derogation is permitted, provides that:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

As the TPB working paper quoted above explains this provision:

To the average person, protecting the right to life means preventing its loss, not punishing those responsible for a successful or attempted deprivation. Protection by law thus demands

⁴ Ibid.

⁵ UNSC resolution 1624 (2005). P.3. par 1.

*legal measures to **interrupt and interdict preparations for terrorist violence**, not merely the identification and punishment of the perpetrators after a fatal event. (emphasis added).⁶*

We can therefore conclude that all the recent criminal justice initiatives to criminalize the conduct that facilitates the possibility of commission of terrorist acts, regardless of whether or not actual attacks take place, *are not only in full compliance with but are aimed at safeguarding a fundamental human right - the right to life!*

IV. NEW INTERNATIONAL CRIMINAL JUSTICE POLICY

With its recent move to criminalize conduct facilitating the commission of terrorist attacks and imposing legal obligations on the UN Member States to strengthen their criminal justice systems to be better equipped to prevent the terrorist attacks from happening, the Security Council moved into *domaine reserve* of sovereign States - their criminal justice system and policy. It has done so on the basis of the United Nations Charter-document that all countries have to agree to when they are becoming a member of the United Nations.

The following Articles of the Charter will help us to better understand the authority of the Security Council in these matters.

Article 24

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

V. CONCLUDING REMARKS

The UN is often criticized for its action (or more accurately lack of action) on terrorism. “Lack of the definition” of terrorism, not addressing its “root causes”, “victims” and other issues are often cited by the critics to highlight UN impotence in dealing with this gravest manifestation of crime. But the critics often fail to acknowledge that these accusations do not reflect the reality adequately and present only a one-sided picture of the problem.

The UN effectively addresses various issues related to the fight against terrorism through its different departments and agencies. For example, on the “root causes of terrorism front” the UNDP deals with poverty and UNHCHR deals with the issues of human rights. UNODC supports countries in their efforts to promote the rule of law. And finally, the International Criminal Court, although it does not deal with terrorism directly does have a victims’ fund that could be applicable to the victims of taking hostages which is under its jurisdiction according to the Statute. And most importantly, although a comprehensive definition of terrorism would be extremely useful, *the international legal regime against terrorism exists and if allowed to work properly (especially with regard to the provisions of international cooperation in criminal matters) could contribute greatly to the work of the nations of the world on the counter-terrorism front.*

⁶ Preventing Terrorist Acts: A Criminal Justice Strategy Integrating Rule of Law Standards in Implementation of United Nations Anti-Terrorism Instruments. Terrorism Prevention Branch Technical Assistance Working Paper. P.1.

APPENDIX

Number of Member States, which are Parties to the Twelve Universal Anti-Terrorism Conventions and Protocols.

	Mid-2000	November 2006
1. Tokyo Convention (1963)	169	182
2. Hague Convention (1970)	171	183
3. Montreal Convention (1971)	174	184
4. Int. Protected Persons Convention (1973)	102	163
5. Hostage Convention (1979)	89	156
6. Nuclear Material Convention (1980)	64	120
6a. Amendment to the Nuclear Material Convention (2005)	—	6
7. Airports Protocol (1988)	99	160
8. Maritime Navigation Convention (1988)	39	141
8a. Protocol to the Maritime Convention (2005)	n/a	0
9. Fixed Platform Protocol (1988)	35	130
9a. Protocol to the Fixed Platform Protocol (2005)	n/a	0
10. Plastic Explosives Convention (1991)	56	129
11. Terrorist Bombing Convention (1997)	8	150
12. Terrorist Financing Convention (1999)	0	154
13. Nuclear Terrorism Convention (2005)	n/a	8

Source: Data from UN Office of Legal Affairs; updates by Terrorism Prevention Branch (20/05/2005).