

LEGAL POLICY AT THE INTERSECTION OF HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM: WHAT SHOULD BE CONSIDERED?

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Abstract

The fight against terrorism is one of the policies necessary for a contemporary society. The spread of democracy and the demise of authoritarian regimes bring about new enemies to liberty and democracy – terrorism. The rule of law is one of substantive touchstones of modern constitutions guarantees, thus the fight with terrorism requires legal regulation as well.

Legal policy in the fight against terrorism should consider two vital principles: the protection of society and the reduction and prevention of terrorist behavior, as well as respect for human rights and the rule of law. In the light of these principles, the legal definition of terrorism is important, because labeling any conduct as terrorism raises a much more important question about the types of activity that should be controlled as well as the methods to be used for such control. This article address the fundamental balance between human rights and the fight against terrorism and argues that special provisions should not be made for terrorism in the laws regarding the investigation and prosecution of terrorism, but special consideration for the punishment of terrorists is appropriate.

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Özet

Çağdaş toplumların önemli sorunlarından birisi de terrörle savaştır. Bu tehdit bir çok devlette aktüeldir. Demokrasinin yayılması ve otoriter rejimlerin giderek azalması, terrörizm gibi özgürlüğün yeni düşmanını ortaya çıkarmıştır. Hukuk devleti ilkesi çağdaş toplumların vazgeçilmez unsurlardan birisi olduğuna göre, terrörizmle mücadelede bu ilke yine mutlaka gözetilmelidir.

Terrörizmle mücadelede iki önemli prensip gözönünde tutulmalıdır: bunlardan biri toplumun korunması ve terrörist eylemlerin azaltılması, diğeri ise hukuk devleti ilkesinin ve insan haklarına saygı gösterilmesidir. Bu prensipler ışığında, terrorizmin tanımı da çok önemlidir, çünkü bir davranışın terrörist eylem olarak nitelendirilmesi kendisiyle beraber hangi aktiviteler ve hangi yollarla kontrol edilmelidir gibi önemli soruyu ortaya çıkarmaktadır. Bu makale terrorizmle savaşta ve insan hakları arasında gözetilecek dengeyi incelemekte ve terrörizmle mücadelede ceza muhakemesindeki genel kurallar dışında özel yöntemlerin kullanılmaması gerektiği üzerinde durmaktadır.

Keywords: *Terrorism, legal policy, fundamental human rights*

Anahtar Kelimeler: *Terörizm ile mücadele, hukuk devleti, temel haklar.*

INTRODUCTION

This paper looks at the way that Western civilizations have dealt with the concept of terrorism. Not only does it delve into the different approaches, it also looks at the differing philosophies underpinning those concepts. Section I of this paper looks at the definition of terrorism as well as the different classifications. Section II looks at four questions central to how societies deal with terrorism in the investigative, prosecution, and punishment phases. Section III concludes.

I. THE NATURE OF TERRORISM

A. The Problem of Definition

Do we live in a perfect society? Is contemporary democracy the best political and economic order? Political systems have always been challenged by various groups on ideological, religious, or ethnic grounds. The legitimacy of different political structures, from ancient Greek cities to monarchies from the

Middle Ages, have been challenged. Now the people of most nations live in democracies, which are generally considered to be better regimes. After two centuries of democracy, the political systems of the 21st Century will probably be considered tyrannies by future researchers and analysts. The question we have now is identifying the method to change the political systems of contemporary states, especially those where these regimes only pretend to be democracies. In fact, it is a very difficult task to accomplish, since there are very few chances to change the ways of governing in the contemporary world, which makes many movements search for unusual ways to struggle. Are they all terrorists? Unfortunately, the answer varies depending on different and uncertain political backgrounds.

The definition of terrorism is not clear, although many would consider it to be a very important topic.¹ Some scholars think that this is the problem of legislation, since terrorism is punishable under law. Lawyers think that defining terrorism is the subject of politics and military activity, because officially labeling a movement with the word “terrorism” tends to have deepest political motives. This can be observed in the instances of Chechnya, Hamas, different wings of Hezbollah, ETA, and other groups.

The next problem is how to draw a distinction line between the “fight for freedom” and terrorism.² During the existence of a socialist camp, capitalist and socialist countries supported various fighting groups under the pretext of “supporting movements for freedom and democracy.” The PKK (Kurdish Party of Workers), which has been labelled a terrorist group by Western societies, was created and supported by the USSR. The Afghan Mujahedeens were deemed by the American government to be freedom fighters, but from the Soviet (USSR) view, they were criminals and terrorists. However, currently local fighters in Afghanistan are considered to be terrorists by NATO.

Many researchers of terrorism studies offer the following criteria in defining terrorism: whether a particular fighting group uses force against the civilian population or not. If the answer is “yes,” it is doubtlessly a terrorist group.³ If an armed group uses violence only against armed forces of the government, such a group would not be considered a terrorist group by researchers. However, when an armed group uses force and violence against the government and administrative bodies, some researchers would call such an activity “guerilla

¹ See Geoffrey Levitt, *Is “Terrorism” Worth Defining?* 13 OHIO N. U. L. REV. 97 (1986).

² Bruce Hoffman, *INSIDE TERRORISM* 17 (Columbia University Press 1988).

³ Sally Ann Baynard, *A Policy Brief Defining and Defeating Terrorism in Democracy*, in Istanbul Conference on Democracy and Global Security 2005, 28 (Recep Gultekin, Gary Cordner and Jonathan White, ed., Oncu Press 2006).

activity.”⁴ Despite these specifications, there is still not a universally-agreed opinion on the matter. The “UN Convention on the Prohibition of Financing Terrorism” states that the killing of a person who does not take part in military operations is an act of terrorism.⁵ There is an academic consensus on the definition of terrorism, though.⁶ According to one commentator:

Terrorism is an anxiety-inspiring method of repeated violent action, employed by (semi-) clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby – in contrast to assassination – the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (targets of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat- and violence-based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audience(s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.

...

Terrorism is a method of combat in which random or symbolic victims become targets of violence. Through the previous use of violence or the credible threat of violence, other members of a group are put in a state of chronic fear (terror). The victimization of the target is considered abnormal by most observers . . . which in turn creates an audience beyond the target of terror.... The purpose of terrorism is either to immobilize the target of terror in order to produce disorientation and/or compliance, or to mobilize secondary targets of demand or targets of attention.⁷

The definition of terrorism is closely related to issues of state sovereignty and individual rights. Although many countries call for an agreed definition, and the United Nations (UN) General Assembly’s Sixth Committee is working on

⁴ Richard Clutterbuck, *GUERRILLAS AND TERRORISTS* 12 (Faber and Faber, 1977).

⁵ E. A. Ruskevich, *Efficiency of Norm Regulating Liability for Terrorism*, at <http://nostalgia.ncstu.ru> (last visited Sep. 10, 2008).

⁶ Christopher Daase, Presentation at Ludwig Maximilians University HUMSEC Summer School: Defining Terrorism, at http://humsec.eu/cms/fileadmin/user_upload/humsec/SAc_06_PPP/PPP_Daase.pdf (last visited Jul. 2, 2009).

⁷ Alex P. Schmid, *POLITICAL TERRORISM* 111 (Transaction Books, 1983).

an international definition of terrorism, the different political motivations of countries hamper reaching a consensus.⁸

However, the legislative framework of many countries deals with terrorist activities and gives them certain definitions in criminal codes. Sometimes these definitions do not fit with commonly-accepted concept of terrorism. For example, it is widely accepted that terrorist activities should have political backgrounds. However, Russia's Criminal Code (Article 205) finds that terrorism is:

...commitment of explosion, arson or other acts creating danger of destruction of people, causing significant property damage, or bringing about other socially dangerous consequences if these actions are accomplished with the view of infringement of public order, intimidation of the population or coercing decision-making authorities, and also threat of fulfillment of the specified actions with the same purposes.

On October 25, 2001 the United States Congress enacted a new legislative definition, which Ronald Dworkin has described as "a new, breathtakingly vague and broad definition of terrorism."⁹ The American Congress has defined terrorism under U.S. Federal law; Title 18 of the United States Code defines terrorism and lists the crimes associated with terrorism:

...activities that involve violent . . . [or life-threatening acts] . . . that are a violation of the criminal laws of the United States or of any State and . . . appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and . . . [if domestic] . . .(C) occur primarily within the territorial jurisdiction of the United States . . . [if international] . . .(C) occur primarily outside the territorial jurisdiction of the United States . . .¹⁰

In the United Kingdom (UK) Terrorism Act of 2000, terrorism is defined as the use of force or the threat to use force that is calculated to influence the government or to intimidate a community or a part of community, and the use of violence or the threat to use violence for the purpose of advancing political,

⁸ Press Release, Fifty-Sixth U.N. General Assembly Plenary 17th Meeting, Assembly Hears Call for Definition of Terrorism, U.N. Doc GA/9925, at <http://www.un.org/News/Press/docs/2001/GA9925.doc.htm> (last visited Jul. 2, 2009).

⁹ Ronald Dworkin, *The Threat to Patriotism*, NEW YORK REVIEW OF BOOKS 49 (2003). Actually, according to U.S. legislation, the presence of violent acts with a view to influence the policy of the government by intimidation is enough to define such acts as terrorism.

¹⁰ 18 U.S.C. § 2331 (2009).

religious or ideological goals, and involves or endangers serious damage to life, health or property.¹¹ As we see, the difference between the definitions of terrorism in the legislation of the US and the UK is based on the activities of the terrorist.

It can be clearly observed in the legal definition of terrorism that the use of violence should be designed to influence the government or to intimidate the community or a part of the community which is done for the purpose of advancing a political, religious or ideological cause. These are the most commonly accepted aspects used to describe terrorism.¹²

The European Union (EU) has produced a more detailed definition of terrorism:¹³

Acts that may seriously damage a country or an international organization when committed with the aim of seriously intimidating a population, or unduly compelling a Government or an international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization; attacks on a person's life which may cause death; attacks upon the physical integrity of a person; kidnapping or hostage taking; manufacture, possession, acquisition, transportation, supply or use of weapons, explosives or nuclear, biological or chemical weapons; as well as research into, and development of biological and chemical weapons.

After such a comparison, I would like to render a basic definition of terrorism both from political and legal aspects. Terrorism is:

- An activity motivated by ideological, ethnic or religious reasons;
- An activity which constitutes unlawful (prohibited) use of violence or threat of such use;¹⁴

¹¹ See David Williams, *Terrorism and the Law in the United Kingdom*, 26 NEW SOUTH WALES L. J. 179 (2003).

¹² Mark Burgess, *A Brief History of Terrorism*, at <http://www.cdi.org/friendlyversion/printversion.cfm?documentID=1502> (last visited Jul. 2, 2009).

¹³ 2002 O.J. (L 164) 4.

¹⁴ Emile-Francois Callot, *The Fight Against Terrorism in France*, in *ISTANBUL CONFERENCE ON DEMOCRACY AND GLOBAL SECURITY 2005*, 169 (Recep Gultekin, Gary Corder and Jonathan White, eds. Onco Press 2006).

- An activity which does not constitute a main goal of group committing it;¹⁵
- A main unlawful activity of a group;
- An activity threatening life and property of people; and
- An activity directed against random and innocent victims.

B. Terrorism: Kinds, Reasons and Aims

We can classify terrorism into ideological, national (ethnic), and religion-based terrorism. Ideological terrorism is mostly related to political, economic and social problems.¹⁶ This classification is useful; it helps us to find out the reasons for terrorist activities, and then in turn to seek measures to reduce or cease such activities. Terrorism can also be classified into “conventional” terrorism, technoterrorism, and cyberterrorism.¹⁷ There are some other classifications for terrorism as well.¹⁸

Before making the next step in investigating terrorism as a social illness, we should accept the fact that members of some social groups are pushed to challenge the official system. Political oppression, religious intolerance and divine revelation are only a few of the most common reasons cited by terrorists as justification for their attacks.¹⁹ Thus, protest against the prohibition of some activities is the main cause of terrorist activities. In this sense, terrorist activities are one’s protest, or way of fighting against the prohibition of an activity which constitutes a main aim of a social group or person.

However, on the other hand, it is impossible for a state and society to tolerate every kind of human activity, especially when such activity is aggressive and

¹⁵ Mehmet Afacan, *Local Policing, Using Community Policing Principles as a Tactic in the Time of Terror*, in UNDERSTANDING AND RESPONDING TO TERRORISM 253 (H. Durmaz, B. Sevinc, A. S. Yayla, eds., IOS Pres, 2007).

¹⁶ Ertan Bese, *The Paradoxical Impacts and Transformation of International Terrorism Literature*, in ISTANBUL CONFERENCE ON DEMOCRACY AND GLOBAL SECURITY 2005, 726 (Recep Gultekin, Gary Corder and Jonathan White, eds., Oncu Press 2006).

¹⁷ Matthew J. Littleton, *Information Age Terrorism: Toward Cyberterrorism*, at http://www.fas.org/irp/threat/cyber/docs/npgs/app_a.htm#AppA (last visited Jul. 2, 2009).

¹⁸ Tom O’Connor, *The Criminology of Terrorism: History, Law, Definitions, Typologies*, at <http://www.cultsandterror.org/sub-file/TOConnor%20Lecture.htm> (last visited Jul. 2, 2009).

¹⁹ Carroll Payne, *Reasons Behind Terrorism*, at <http://www.globalterrorism101.com/ReasonsBehindTerrorism.html> (last visited Jul. 20, 2008).

intolerable. That is why it is very important to maintain a balance between prohibition and tolerance. When a group feels that they cannot reach their goals through the legal means of a certain country, they would think about other possible ways of achieving them, including illegal or violent methods. If these methods include the use of violence or threats against society, there is a problem that is labeled “terrorism.” The system of prohibition should be stage by stage and absorbing. Where possible, this absorbing system should provide certain concessions. However, such concessions must not contradict the basic concepts of a democratic society.

Terrorist acts may also be motivated by revenge; historically there have been many terrorist acts based on such motivation. Revenge could be based on national or religious prejudices. For example, the Armenian group ASALA or the “Islamic Jihad” have acted with such motivation. It is hard to prevent such terrorist acts because terrorist aspirations are difficult to satisfy, especially when these aspirations could be considered to be unjust, like in the case of ASALA.

When terrorist acts are performed with the claim of divine revelation, these acts are not a protest by nature. Sometimes they might constitute the main aim of a person or group. In such a case, the purpose and the aim of terrorist activities merge. For instance, in India one of religious groups (Aum Sinrike) believes that the murder of a victim will rescue both the soul of the killer himself and the soul of the victim.²⁰ It is more difficult to prevent such kind of activities when then motivation is religion than the ones performed as protest against prohibition.

There are many obstacles in the fight against terrorism because of the irrationality and extraordinariness of terrorist actions.²¹ In terrorist organizations, the ratio of aggressive schizophrenics is usually very high.²² It is difficult to foresee the actions of a terrorist – they are irrational and usually unsuitable to accomplish the aim of the terrorist group.²³ That is why researchers in this area think that terrorist acts are performed with a view to

²⁰ A. V. Sheglov, *Anatomiya terrorisma: problemno-psixologicheskii analiz* [The Anatomy of Terrorism: Psychological and Casual Analysis], 5 JOURNAL PRAVO I POLITIKA [JOURNAL OF LAW AND POLITICS] 7 (2000).

²¹ Schmid, *supra* note 7, at 107.

²² Vitaliy Solovyov, *Terrorism - Psychological and Political Aspects*, 10 JOURNAL OF FOREIGN PSYCHOLOGY 33 (1998).

²³ Jawad Bargothi, *International Terrorism in Historical Perspective*, in *COMPARATIVE CRIMINAL JUSTICE: TRADITIONAL AND NON-TRADITIONAL SYSTEMS OF LAW AND CONTROL* 135 (C.B. Fields and R.H. Moor, eds., Waveland Press 1996).

making a show in public.²⁴ Thornton states that the “relatively high efficiency of terrorism is derived from its symbolic nature. If a terrorist comprehends that he is seeking a demonstration effect, he will attack targets with a maximum symbolic value.”²⁵

What is the aim of terrorist activity? The purpose of terrorism is either to immobilize the target of terror in order to produce disorientation and/or non-compliance, or to mobilize secondary targets of demand or targets of attention.²⁶ Also, most researchers accept that terrorist activities are carried out to coerce governments to take some action or to refrain from taking some action or making decisions.²⁷ Many countries’ legislation has such provisions regarding terrorist activities.

III. LEGAL POLICY AGAINST TERRORISM

There are two vital principles that should be considered regarding legal policy issues in the fight against terror:

- Protection of society and its members from terrorist attacks, including the prevention of terrorism and the reduction of terrorist behavior; and
- Respect for the provisions of human rights and rules of law.

In the light of these principles, a legal definition of terrorism is very important. The legal regime to be applied to terrorist activities must be considered from the aspects below:

- what conduct and activities must be considered to be terrorism;
- preventive measures, their scope and application grounds;
- criminal investigation measures, level and scope of increasing the authorities of investigation bodies if committed crime is terrorism; and
- penalties, types of punishment, and their deterrent effects against terrorist behavior.

²⁴ Thomas Perry Thornton, *Terror as a Weapon of Political Agitation*, in INTERNAL WAR: PROBLEMS AND APPROACHES 77 (Harry Eckstein, ed., Free Press of Glencoe, New York 1964).

²⁵ *Id.* at 77.

²⁶ Schmid, *supra* note 7, at 111.

²⁷ Thornton, *supra* note 24, at 83.

A. What Conduct and Activities Must Be Considered to be Terrorism?

The criminal procedure legislation of most countries authorizes the investigation of terrorist crimes under a more rigid and serious regime. For instance, the U.S. PATRIOT ACT²⁸ allows for longer detention of suspects, expanded surveillance and expanded intelligence gathering powers for federal authorities when terrorist threats are involved. This is one reason why the scope of definition of terrorist acts should be narrowed, and other socially-threatening conduct should be considered to be independent crimes, where applicable. Some countries of Eastern Europe – the CIS countries²⁹ -- consider the killing of people during terrorist acts to be assassination.³⁰ However, widening the legal definition of terrorist activities could be misused for political purposes.³¹ Laqueur defines terrorism as the illegal use of force against innocent people in order to achieve political goals. He also adds that attempts to go beyond the framework of the simple definition are vain, because the term is very inconsistent.³² Formulating the definition, Laqueur acknowledges the presence of certain problems, since the term "terrorism" has various meanings for different interested parties. Laqueur has come to the following conclusion: terrorism is a form of political or criminal violence using tactics directed to change behavior by means of fear. This approach does not solve the problem of definition, but enables the security services to create a vicious circle of infinite debates.

The second approach, which is very popular in European countries, concentrates on the legal aspects of terrorism. "Terrorism" is understood to be the commitment of criminal acts for political interests, or as a way to create political disorder. Thus, terrorism is defined as an infringement of law, and terrorists who violate law are subject to certain legal measures. The governments of Germany³³ and the U.S. have used approaches similar to this model in dealing with the issue of terrorism. The U.S. Congress, aiming to protect its diplomats, has allowed U.S. government agents to arrest people

²⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub.L. 107-56 (2001).

²⁹ The Commonwealth of Independent States was an organization created after the collapse of the USSR.

³⁰ See Article 109 of Russian Criminal Code, Article 112 of Ukrainian Criminal Code, and Article 120 of Azerbaijani Criminal Code.

³¹ See Ben Golder and George Williams, *What Is 'Terrorism'? Problems of Legal Definition*, 27 NEW SOUTH WALES L. J. 272 (2004).

³² Walter Laqueur, *THE AGE OF TERRORISM* 72 (Little, Brown 1987).

³³ Beau Grosscup, *THE EXPLOSION OF TERRORISM* 217 (New Horizon Press, 1987).

involved in terrorism in the territory of other countries.³⁴ In my opinion, attacks on innocent people that cause injury to random victims should be the key criteria to focus on while defining terrorism. If the existence of an attack or threat against an innocent or random victim does not exist, the act of violence would need an alternative definition. Criminal legislation might define it, depending on the specifics, as an attempt to riot, or to assassinate a political or public figure, or to lead an armed organization. Attacks on governmental bodies must not be defined as terrorism, but might constitute the crime of sabotage, as provided by Criminal Code of Russia (Article 281) or of Azerbaijan (Article 282), for example.

B. Preventive Measures: Scope and Application

It is clear that protecting society against terrorist acts is impossible without preventive intelligence-gathering activities and national or local security forces. However, it is probably fair to assume that most people would not want their country's (or another's) security forces to monitor and control their e-mail traffic or to monitor their telephones.

With recent technological developments, it has become easier to uncover any sort of information. However, the current legislation of most countries frequently forbids collecting information without a court warrant, and improperly collected information is deemed to be inadmissible evidence.³⁵ Such extraction of information, especially when information is needed for preventive purposes, is considered to be an interference with private life. In that case, do governments use the concept of terrorism as a trump to justify abuse of powers?

The life of a man in a society can be increasingly complicated because the legal status of a person constantly changes: individuals may take more obligations and restrictions related with business, taxes, education, or property management; organic connections with the state continue to grow and they grow for the benefit of the state; and finally citizens (voters) want good governance, safety, social welfare, and social security policy to be provided by state. In turn,

³⁴ *Bills to Authorize the Prosecution of Terrorism and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing before the Senate Subcommittee on Security and Terrorism of the Committee of the Judiciary*, 99th Cong. (1985).

³⁵ Article 125 of Azerbaijan Criminal Procedure Code, Article 135 of Turkish Criminal Procedure Code, Article 171 of French Criminal Procedure Code, Section 24(2) of Canadian Charter of Rights and Freedoms, enacted as Schedule B to the Canada Act 1982, Decision of German Federal Constitutional Court, (Sept. 19, 2006), 2 BvR 2115/01, para. 71. Section 9 of UK 1985 Act, *Halford v. the UK*, Judgement of 27 May 1997, para.56. For the U.S., the exclusionary rule was established by the U.S. Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961).

the state needs the means to attain these goals – the state needs new laws binding voters with new obligations. Sometimes these obligations might generate a new wave of discontent in society. Only time will show whether such discontent will be transformed into acts of violence, and whether such violent acts must be labeled as “terrorism.” It is not a mere coincidence that the latest law on terrorism in England extends the definition of terrorism – the law considers hacking of a public computer network to be a terrorist act.³⁶ We have to acknowledge that this century will bring an increase in terrorist activity and subsequent reductions in the personal freedom of citizens. Increasing the preventive power of state bodies will result in the reduction of personal freedoms.³⁷

Thus, the main point of the analysis should be “how we can protect human rights and security of society simultaneously.” The legal protection of human rights is a basic rule, but there are certain exceptions. It is possible to restrict rights and liberties under certain circumstances and conditions. So what are those reasons?

Under emergency conditions like war, disaster, epidemics, riot, etc., rights and liberties are restricted automatically without official restriction order. For instance, a disaster could cause epidemics; epidemics in turn threaten such essential rights as the right to live. For the prevention of this threat, the right to freedom of movement is subject to restriction through the application of a quarantine. Thus, the restriction of one’s fundamental right is justified when such restriction is enforced to protect a more important and essential right. To protect the right to live, you can restrict property rights, but you cannot do vice versa. Moreover, the restriction of rights must be necessary, rational and proportional to the legitimate aims.³⁸ On the other hand, these restrictions must be provisional. As soon as necessity vanishes, the state has to lift the restriction on the rights.

Moreover, we can analyze this problem from three viewpoints: what are the reasons for restrictions, what level of restrictions should there be and how should rights be restricted. In certain countries, this matter is regulated by national law, although often they incorporate supranational human rights law where there are certain central and indisputable principles.

³⁶ UK Terrorism Act of 2000, Section 1, Schedule 9, Part I.

³⁷ Bese, *supra* note 16, at 727.

³⁸ ECHR, Freedom and Democracy Party (Özdep) v. Turkey, App. 23885/94, 8 December 1999, para. 44-45.

The European Convention on Protection of Human Rights and Fundamental Freedoms establishes the broadest criteria to control the restriction of human rights. The Convention is an inseparable part of national legal systems across Europe.³⁹ These criteria are:

- the interests of public safety (Articles 8/2, 9/2, 10/2, 11/2),
- the interests of public order (Article 6/1),
- the interests of national security (Articles 6/1, 8/2, 10/2, 11/2),
- the interests of territorial integrity (Article 10/2),
- the protection of health (Articles 8/2, 9/2, 10/2, 11/2),
- the protection of morals (Articles 8/2, 9/2, 10/2, 11/2),
- the protection of the private life (Article 6/1),
- the interests of juveniles (Article 6/1),
- the interests of fair trials (Articles 6/1, 10/2),
- the interests of the economic well-being of the country (Article 8/2),
- the protection of the rights and freedoms of others (Articles 10/2, 8/2, 9/2, 11/2),
- the protection of the reputation of others (Article 10/2),
- the prevention of public disorder or crime (Articles 8/2, 10/2, 11/2),
- the prevention of disclosure of confidential information (Article 10/2).

The fundamental rights, recognized by the Convention, that could be restricted under counter-terrorism activities, are the:

- right to liberty and security;

³⁹ According to Article 148 of the Constitution of Azerbaijan, international agreements wherein the Azerbaijan Republic is one of the parties constitute an integral part of legislative system of the Republic of Azerbaijan.

- right to live;
- the right to not be exposed to torture;
- right to a fair trial;
- right to respect for family and private life;
- freedom of thought, conscience and religion;
- freedom of expression;
- freedom of assembly and association; and
- freedom of peaceful possession of property.

As we can see, most of the rights recognized under the Convention could be restricted. But the restriction of some of them is unlawful, like the restriction of the right to not be exposed to torture and inhuman treatment. In addition, peaceful enjoyment of one's possessions could not be restricted as a measure against terrorist activities.

Supranational human rights law leaves to the high contracting parties (nation-states) the way (method) of restrictions, i.e. how states may restrict rights. The only provisions are "prescribing by law" and "necessity in a democratic society" (Articles 6/1, 8/2, 9/2, 10/2, 11/2).⁴⁰ The criterion of "necessity in a democratic society" is very indefinite and broad, but the European Court of Human Rights has made enough rulings to provide additional measures and standards.⁴¹

There is discussion in the U.S. regarding whether the "due process" clause should regulate investigations of terrorist crimes. The U.S. Constitution provides that in cases where a person could be deprived of life, liberty or property, the due process of law has to be applied. However, in the case of Guantanamo Base, we saw that the U.S. government didn't apply these rules to

⁴⁰ Mehmet Semih Gemalmaz, *ESAS BELGELERDE İNSAN HAKLARI [HUMAN RIGHTS IN PRINCIPLE DOCUMENTS]* 315 (Kavram Yayınları, İstanbul 1996).

⁴¹ ECHR, *Handyside v. The UK*, App. 5483/72, 07 December 1976, para. 49.

investigations carried out beyond the US borders. The European approach to investigations outside of national borders is different.⁴²

Classical democracies are regimes that provide the broadest support for human rights. Restrictions that breach the core of rights and liberties cannot be considered to be proper practices in a democratic society. Democratic regimes should also be liberal; the rule of law and personal liberties are the cornerstones of democracies. From this point of view, along with the levels, reasons and methods of restrictions, when assessing the rules of a democratic society, possible remedies are also very important. We can definitely say that protection of fundamental rights is a matter of public order within the European concept.⁴³ That is why rights can and must be restricted only in cases when democracy itself is under threat. In a democratic state, where law is the only hegemonic power, human rights cannot be restricted by means unsuitable to this regime, and restrictions should never totally remove the use of a concrete right.⁴⁴

Thus, preventive measures in the fight against terrorism could essentially restrict the following fundamental rights:

- respect for private life;
- freedom of thought, conscience and religion;
- freedom of expression; and
- freedom of assembly and association.

Preventive measures such as interference in private life are the most problematic in this regard, because generally people have no idea whether their private life has been breached or not. One can guess, but one cannot completely ascertain whether such an intrusion exists (such as the “tapping” of a telephone). The problem is that in Europe, one cannot obtain a court injunction

⁴² In the ECHR case of *Loizidou v. Turkey*, App. 15318/89, 18 December 1996, the European Court of Human Rights ruled that the territorial application of the European Convention is not limited to official borders but extends to all territories which are under the actual control of “High Contracting Parties.”

⁴³ Gemalmaz, *supra* note 40, at 91.

⁴⁴ Turkish Constitutional Court, File 1985/8, Decision 86/27, 26 November 1986, as published in Official Gazette No. 19554, 14 August 1987. In this case, 93 members of Turkish Parliament applied to Constitutional Court in order have a review of the constitutionality of some articles of the Police Duties and Powers Act of 1985. The Court ruled that the language of that articles was very vague and ambiguous, providing police with very wide and uncontrolled powers. The Court held that there was a violation of Turkish Constitution.

in order to prevent being “tapped” or having his/her personal communications monitored. The problem is that investigative bodies have various means to intervene in a person’s private life without a court warrant. In fact it is very easy to change national legislation to supersede the decisions of a judge. The question arises whether the state should authorize investigative bodies to listen randomly to a person’s telephone as a preventive measure. The case law of the European Court of Human Rights says that, although legislation may empower the authorities to secretly monitor the correspondence and telephone conversations of citizens, who may be unable to establish whether such measures had in fact been applied to them, amounts to an interference with Article 8 rights, such an interference could be justified in certain circumstances.⁴⁵ If we do care about the future of fundamental rights, we have to say “no” – interference in private life should be possible only after serious individualized suspicions regarding a particular person’s actions can be articulated. Thus, random listening and control over personal communications has to be held unlawful.

Interference with the freedom of thought and religion as a preventive measure could be applied only in the context of their expression. If the thoughts and beliefs of a person do not call for violence, then the expression of such beliefs should be allowed. It is necessary to note that the criterion of violence in this regard is only a direct call or appeal to violence. If such a direct call to violence does not exist, then personal freedom should not be restricted. Any expression of religious belief which does not contain violence, intolerance and does not breach society’s moral should not be restricted. For instance, one who is praying onboard a plane must not be prevented from doing that. Such kind of preventive measure is absolutely inadequate. The question is whether he or his luggage could be searched in such a case – the answer has to be “no” as well.

Interference with the freedom of assembly and association is an area more suitable for restriction and control. States can create mechanisms for the control and registration of associations, especially before they are established. These control mechanisms are: information about the founders and assets of association, the main area of activity of an association, information about the headquarters, and the membership of the association, etc. States can set up some financing and support systems for associations, and control them in this way. An association’s refusal to accept funding and support under such conditions would be suspicious and the government might strengthen oversight as a response. But we have to admit that terrorists usually do not operate under the guise of an organization. Terrorists try to function in deep cover. In fact, the European

⁴⁵ ECHR, *Halford v. The UK*, App. 20605/92, 25 June 1997, para. 56.

Convention on Human Rights provides a wide margin of appreciation for preventive means and measures, but these measures go hand in hand with rigorous European supervision.⁴⁶ Restriction of the freedom of assembly is possible under Article 11/2 of the Convention for legitimate aim of “national security,” but such restriction has to be “proportionate to the legitimate aim pursued” and the reasons adduced by the national authorities to justify it have to be “relevant and sufficient.”⁴⁷ Thus, taking into account that terrorist organizations function under deep cover, restriction of the freedom of assembly is not a proper preventive measure in the fight against terrorism. On the contrary, freedom of assembly is the mechanism to absorb social protests in a less violent way.

By placing locator “chips” in firearms it is possible to track where they go and who buys/carries them, but in that case terrorists will turn to weapons and ammunition from abroad, or use old-style firearms. Therefore tightening and complicating the lawful purchase of firearms is not the most effective way to struggle against terrorism.

The solution could be the invention of technology (technical equipment) to find or detect any kind of explosive within a certain radius. Instead of forbidding passengers to take hand luggage onboard an aircraft, it would make sense to have the means to check the luggage from afar for the presence of dangerous substances.

A very important preventive measure would be destroying the root causes of terrorism.⁴⁸ The most effective tool in the struggle against terrorism could be an increase in the educational level of the people who might be potential candidates for recruitment into terrorist organizations. However, this method of prevention is useful only in the struggle against nationalist and religious terrorism. In case of ideological terrorism originating in poor social and economic conditions, improvement of social and economic conditions of society can result in the establishment of a good and effective environment for reducing terrorist activities.

C. Criminal Investigation Measures Applied to Terrorist Acts

O’Connor finds it impossible to agree with this statement of Fuller, who outlines one of the primary differences between a war on terrorism versus a war

⁴⁶ ECHR, *United Communist Party of Turkey and others v. Turkey*, App. 19392/92, 30 January 1998, para. 46.

⁴⁷ ECHR, *Jersild v. Denmark*, App. 15890/89, 23 September 1994, para. 31.

⁴⁸ See O’Connor, *supra* note 18.

on crime or other social problem, and argues that “a terrorist enemy does not enjoy U.S. legal protections (at least fewer constitutional protections).”⁴⁹ Such an approach is unacceptable in light of the European Convention on Human Rights as well.⁵⁰ The difference between a terrorist and an ordinary criminal who slaughtered 15 men is only that the terrorist acts with political motives, while the ordinary criminal does not, even if the motives are more severe and brutal. However, there is no basis to treat the terrorist with less mercy than the ordinary criminal.⁵¹ Anyway, terrorism is a kind of crime in national criminal legislation, and there is no reason to force us to neglect general provisions. However, by classifying terrorism as a felony and a particularly grave crime, we can investigate and prosecute terrorist acts similar to other such crimes.

Criminal investigations and measures against terrorist activities could be analyzed from these aspects: a) grounds for arrest, search and confiscation; b) duration of detention; c) method of detention; and d) methods of interrogation (with or without lawyer, duration of interrogation etc). The grounds for arrest/and detention mean the facts and level of individualized suspicion sufficient for restriction of liberty. The duration of detention specifies the allowed maximum period of detention for pre-court investigation.

The method of detention covers a broad area – from the right to communicate with the outside to an opportunity to exercise (play sports) during detention. From this point of view, considerations like whether the prisoner should be kept in the solitary cell, or if she/he may communicate with others, how many hours a week she/he may walk while in custody, or whether methods of psychological oppression should be applied to the arrested person or not. Guantanamo is a vivid example of a harsh method of detention.

During interrogation, a detained person could be granted the right to a lawyer and a physician. Duration and time of interrogations must be established so as to provide efficiency and speed of investigation, but at the same time not encroach into the realm of inhuman treatment. For example, when there is a risk to the lives of others, interrogation can be carried out at night, or prolonged until late

⁴⁹ *Id.*, citing John Fuller, CRIMINAL JUSTICE: MAINSTREAM AND CROSSCURRENTS (Prentice Hall, 2006).

⁵⁰ ECHR, John Murray v. the UK, App. 18731/91, 08 December 1996, para.59-69.

⁵¹ Amos N. Guiora, *Counter Terrorism and the Rule of Law*, in ISTANBUL CONFERENCE ON DEMOCRACY AND GLOBAL SECURITY 2005, 48 (Recep Gultekin, Gary Corder and Jonathan White, eds., Oncu Press, 2006).

at night.⁵² However, an uninterrupted interrogation of a prisoner for 12 hours is considered to be inhuman treatment.

There is a risk that terrorists could be treated and punished on political grounds, not just for the sake of justice. That is why it is obvious that there is no necessity to provide a special mode of investigation in the legislation for the crimes connected with terrorism. Investigation of terrorism should be carried out under the mode of grave crimes accomplished by organized group, even if the terrorist operated alone.

D. Punishment Policing in the Fight against Terrorism

In criminal law, it is commonly accepted that punishment for a crime has two purposes.⁵³ The first purpose is to punish, to correct and to deter guilty offenders. Second, punishment also provides the society with a sense of justice and something to deter potential criminals from the idea to commit a crime.⁵⁴ Members of terrorist organizations are mostly antisocial, and they have a lot of irrational behaviors and prejudices.⁵⁵ So the question is, which purposes should we pursue while punishing terrorists?

Taking into account the mental condition of terrorists, it would be better if punishment of the terrorist would seek to understand the purpose of his antisocial behavior and correct it, rather than rendering bitterness against his criminal act. Society should punish terrorists for the sake of justice and correction; before committing a crime a terrorist considers society to be his enemy. After convicting a terrorist, we have to explain to him that she or he is a part of the society, and that they can never exist without society. In my opinion, a terrorist criminal should serve neither a sentence in solitary confinement (segregation) nor in the company of other terrorists or murderers. Terrorists should be placed in cells with less dangerous criminals. Measures should be taken by the prison administration to bar terrorists from negatively affecting other prisoners.⁵⁶ For this purpose, it is necessary to provide for the physical and intellectual development of prisoners in cells. Selective training and educational courses in different areas should be offered to terrorist prisoners. These selective courses would be to pursue one fundamental purpose – the psychological and intellectual reform of the terrorist.

⁵² Such a provision is included in Article 233.2 of Azerbaijani Criminal Procedure Code.

⁵³ Sulhi Donmezer, *THEORY AND PRACTICE OF CRIMINAL LAW* 47 (FK Press 1997).

⁵⁴ Wayne R. LaFare, *CRIMINAL LAW* 27 (4th ed., Thomson West, 2004).

⁵⁵ Robert Pape, *The Strategic Logic of Suicide Terrorism*, 97 *AM. POL. SCI. REV.* 344 (2003).

⁵⁶ Marilyn Ford, *International and Security Issues with Pretrial Detainees in an Era of Terrorism and Democratic Principles*, in *ISTANBUL CONFERENCE ON DEMOCRACY AND GLOBAL SECURITY* 2005, 39 (Recep Gultekin, Gary Cordner and Jonathan White, eds., Oncu Press, 2006).

The punishment of a terrorist should not serve as negative labeling after release because this situation can push him back towards terrorist activity. Terrorists feel alien in society;⁵⁷ therefore imprisonment should not increase but reduce the level of alienation of a terrorist.

CONCLUSION

While modern societies seek to balance liberty and civility, the notions of security, democracy and concern for human rights are also at work. The appropriate policy for investigation and punishment of terrorist activities should be chosen. For those who promote the spread of the human rights, it would be wise to remember the critical impact that law enforcement bodies have had on this effort, thus police and security forces need to be trained for this purpose. However, in the end, terrorism should be handled like any other felony.

When discussing criminal penalties, anger forms in society against terrorist actions, as well as against the terrorist him/herself and his/her social group. That is why punishment for an act of terrorism should satisfy these emotions and anger. In most classic democracies, capital punishment has been abolished.⁵⁸ Thus a sentence of life imprisonment could be regarded as a proper means, especially for those crimes when the result of a terrorist attack is the loss of human life. However, if the prisoner appears to have improved, programs such as conditional release, probation and parole must be available. Such application of imprisonment is severe, but at the same time, it is productive and humane.

On the other hand, punishment for terrorism should not strengthen the belief of terrorists that the society against which they act is cruel and that the society where the terrorist acted deserves destruction. All processes of sentencing and punishment should be open to the general public and facilitate the environment where people involved in violent actions could re-examine their views on inhuman terrorist intentions.

⁵⁷ Solovyov, *supra* note 22, at 33.

⁵⁸ Article 2 of the European Convention on Human Rights recognizes the right of a state to impose the death penalty, but in 1983, Protocol Six to the European Convention on Human Rights was adopted to abolish execution in times of peace. This protocol effectively established Europe as an abolitionist continent. In 1994, the Parliamentary Assembly of the Council of Europe declared that "the willingness to ratify the Sixth Protocol will be made a prerequisite for membership in the Council of Europe." The U.S., which considers itself a leader in the protection of human rights, has rejected this trend. However, in 1997, American Bar Association called for an immediate moratorium on executions. See *ABA Death Penalty Moratorium Project*, at <http://www.abanet.org/moratorium/policy> (last visited Jul 2, 2009).

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