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Terrorism and human rights

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Abstract:

In determining the legal framework of the battle against terrorism, there are decisively two prevailing viewpoints that are excluding each other in principle. According to one, the phenomenon cannot be dealt with in the normal framework of constitutional democracy, and thus, it requires an exceptional legal order and the waging of war. The representatives of the other viewpoint claim the opposite.

We need to insist on our moral judgment that the perpetrators of acts of terrorism are not belligerents, but criminals – although the motivation behind their acts is usually not the desire for profit, ruthlessness or something similar, that we usually connect to everyday crimes, but typically a political motivation of some kind.

The aim of the policies against terrorism is to prevent terrorist attacks, defeat the terrorists and finally to eliminate terrorism.

The primary system of instruments to prevent and overcome regional and international terrorism lies in a more democratic distribution of the authoritative, so the cultural, political and economic licenses and chances on a local, regional and international level.

Keywords: *terrorism, human rights, torture.*

1. On the relation between terrorism and human rights

The relation of terrorism and human rights cannot be considered as a decidedly new problem in the disciplines of criminal sciences (and the constitutional law), as many studies have been written previously in this topic. However, one can sense a legislative activity of such volume and nature in many states of the world since the New York attacks of 2001 in terms of the war on terror that fundamentally reformulates those opinions on human rights which were formerly considered as standards, and this counts as such a novelty that raises the attention of researchers.

In determining the legal framework of the battle against terrorism, there are decisively two prevailing viewpoints that are excluding each other in principle. According to one, the phenomenon cannot be dealt with in the **normal framework of constitutional democracy**, and thus, it requires an exceptional legal order and the waging of war.¹ The representatives of the other viewpoint claim the opposite. Actually, there is even more to it than that, as the proclaimers and appliers of the “**warlike**”

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¹ Cindy C. COMBS: *Terrorism in the Twenty-First Century*, Upper Saddle River, Prentice Hall, 2003, pp. 236–237.

conception do not even wish to comply with the rules of international military law and humanitarian law, as a terrorist cannot be considered a warrior in a legal sense.²

By the way, this is the legal basis for keeping the people at Guantanamo Naval Base imprisoned even today for several years without any court sentence, and torturing them in some cases, as, according to the legal viewpoint of the USA flaunting in the role of “the policeman of the world,” they do not qualify as prisoners of war, so the directives of the Geneva Convention are applicable on them, so they can be “legally” injured. I am of course not arguing for the sake of terrorists, I am only emphasizing the importance of the guarantees of the government of laws, as what happens for example in the case, when a person assumed to be a terrorist turns out to be innocent?

According to István Szikinger, it is not an overstatement to say that the difference between the two viewpoints above – at least in their extreme, but rather consequently carried-out form – is that one tries to realize the battle against terrorism **inside the law**, while the other **outside the law**. Those who advertise the exceptional nature of the battle against terrorism end necessarily up **denying basic values of law** even when they otherwise intend to make concessions for the sake of protecting the remnants of these very values.³

As for me, I share the opinion of Zoltán Miklósi, who says that the war on terrorism may result in unacceptable consequences regarding the restriction of freedom rights and the demolition of legal state norms, furthermore, our moral attitudes toward belligerents are not in accordance with what we are thinking of the acts of terrorists. We need to insist on our moral judgment that the perpetrators of acts of terrorism are not belligerents, but criminals – although the motivation behind their acts is usually not the desire for profit, ruthlessness or something similar, that we usually connect to everyday crimes, but typically a **political** motivation of some kind.⁴

2. On the dogma of the “new type” of terrorism

2.1. Difficulties of definition

According to public opinion – and also to several researchers of this topic – the history of terrorism entered into a new, previously unknown phase with the New York attacks. As far as I am concerned, I agree with those who question this notion. After September 11th, 2001, we much rather need to re-evaluate our notion regarding safety. We received **new kind of glasses of safety politics**: we see much clearer and understand problems better, which had previously emerged. The attack against the World Trade Center and the Pentagon is not epoch-marking, but rather means that terrorists also adapt to the general trends of development in the world, meaning that in a world of globalization, terrorism is also becoming **globalized** as a rule.⁵

² Tonay Bunyan: *The War on Freedom and Democracy statewatch*, <http://www.statewatch.org/news/2002/sep/analysis13.htm>; Conor A. Gearty: *Terrorism and Human Rights*, European Human Rights Law Review, 2005/1, pp.1–6;

³ Szikinger, István: *Terrorizmus és jogkorlátozás* [Terrorism and restriction of rights]. Fundamentum 2005/3. p.73

⁴ Miklósi Zoltán: *A terrorizmus elleni „háború” és az emberi jogok* [„War” against Terrorism and Human Rights]. Fundamentum 2004/3. p. 48.

⁵ Tálás Péter: *A terrorizmusról hét évvel 9/11 után* [On terrorism, seven years after 9/11]. Európai Tükör 2008.október. pp. 69–80.

The available special literature on terrorism could fill a whole library. It is a fundamental issue during the fight against terrorism that terrorism does not have an **internationally accepted legal definition**. Although during the more than three decades of modern international terrorism the special literature discussing this topic formed and published more than a hundred definitions of terrorism, none of them were agreed on on a wide international scale.⁶

In the absence of a consensual definition, the international community uses two methods **on the global level** at the moment to define terrorism. According to Péter Tálas, it strives on the one hand to define **what does not describe terrorism** (thus, the fight for national liberation and independence against foreign occupation is not considered an act of terrorism by international law; furthermore, the international community also emphasizes that terrorism cannot be bound to any religion, nationality or culture, and this cannot be validated by committing such crimes in the name of these either; also, it prevents the criminalization of steps taken for the sake of creating or re-establishing democracy and constitutionality, and for the sake of the assurance of human rights – thus, excluding them from under the scope of acts of terrorism). On the other hand, they are trying to describe the notion based on those **characteristics of the terrorist acts**, which are regularly condemned by the international community (so the all-out violent attacks, mostly which result in innocent civilian victims, or any forms of all-out violence executed by sub-national groups or secret agents).

In this sense – according to Tálas – there is a relative consensus formed regarding the question of what we can consider – or what the Criminal Codes of the specific countries consider **in a general sense of criminal law** – as **acts committed by terrorist methods** (manslaughter, taking hostages, hijacking planes, rigging cars with bombs, suicide bombings, assassinations and mass-murder etc.), or **terrorist activities** (participation in a terrorist group as a member or leader, supporting terrorist activity and organizations financially or in any other way, intimidating or threatening the public, damaging public or private services and systems of vital importance etc.). It is worth to point out in this regard that mostly those acts are considered as terrorist activity which would otherwise also qualify as criminal acts.⁷

2.2. What do the numbers show?

After surveying the databases of different organizations and institutes⁸ on the status and dynamics of terrorism, we can state that compared to the level of 2001, the situation has undoubtedly **worsened globally** (e.g. the increase in the number of death tolls). So when the politicians who campaign for the war on terror speak about the increase in the volume of the threat of terror on the world, usually utilize this type of argumentation.⁹

Further analysis of the numbers will refine the picture, as when the above data is broken down into specific areas, it shall become obvious that the threat of terror has

⁶ Tálas, Péter: *A nemzetközi terrorizmus és a szervezett bűnözés hatása a nemzetközi biztonságra és Magyarország biztonságára* [The effect of international terrorism and organized crime on international security and the safety of Hungary]. ZMNE Stratégiai Védelmi Kutatóintézet Elemzések 2007/1. p. 5.

⁷ Tálas (2007) p. 6.

⁸ E.g. National Memorial Institute for the Prevention of Terrorism (MIPT).

⁹ Tálas, Péter: *A terrorizmus elleni küzdelem néhány dilemmájáról* [On some dilemmas of the fight against terrorism]. Hadtudomány 2005/4. p. 4.

increased **in certain areas** of the world (e.g. on the Middle East, South Asia and the post-Soviet area), but in other places, it significantly **decreased** (so in the United States, East Central Europe, and considering its tendency, also in Western Europe).

Based on the data of the National Counter-Terrorism Center, it can be clearly demarcated, in which countries are the most attacks committed (e.g. in Iraq, in areas occupied by Israel, in Kashmir, Columbia, Thailand, Afghanistan) and where do the attacks result in the highest death tolls (e.g. in Iraq, Russia, Kashmir, Columbia, Pakistan etc.).¹⁰

I agree with the opinion of Péter Tálas, in that not even these numbers represent the real extent of **terrorist threat**, as although 11th September, 2001 really had a high death toll, but following that, the number of attacks resulting in deaths in the United States decreased significantly.

The extent of the terrorist threat is largely affected also by what type of terrorism does a certain country or area have to face. The majority of the terrorist groups today are only active on a **local, national** or sub-regional level. Another part of them is regional all right, and may have an inter-regional scope, but in most cases, the areas threatened by these groups can also be located relatively precisely as well (e.g. the Turkish-Kurd, Iranian, Palestinian militant groups). And finally, there are the representatives of the new type of terrorism, the global one, who became known for the public in September 2001, but they already committed attacks before that, only these were not covered to such an extent by the media.¹¹

2.3. Characteristics of the “new type” of terrorism

The early type of terrorism formulated concrete **political goals**. As opposed to that, a brand new type of terrorism appeared in the nineties, which is fundamentally different from the previous one, because its groups are not preoccupied only with terrorism. They maintain schools, hospitals or enterprises, so that they can gain the support of the society. Although the claims of terrorists are many times legitimate, the methods with which they are trying to realize them are illegal. While early terrorism had claims that mostly could be fulfilled in practice, the new type of terrorism has irrational claims. For example, Islamic organizations have been demanding the United States ever since the 1990s to withdraw from the Middle East. It is hardly possible that the greatest power in the world would decide on leaving after a demand from any terrorist organization.

The new type of terrorism does not have clearly tangible goals, they have an all-out war on the Western civilization.

The trio of authors Péter Tálas, László Póti and Judit Takács¹² – relying on the research results of Garth Whitty – summarize the different characteristics of the old and new type of terrorism in the following table:

¹⁰ Counterterrorism 2016 Calendar

¹¹ Tálas Péter: „...A szabadságjogok korlátozásával a terroristák céljait teljesítjük be magunkon” [„... By limiting the freedom rights, we are fulfilling the aims of the terrorists on ourselves”] Fundamentum 2005/3., p. 60,

¹² Tálas Péter – Póti László – Takács Judit: *A terrorizmus elleni küzdelem fogalmi és tartalmi keretei, különös tekintettel annak katonai dimenziójára* [The notional and content framework of the battle against terrorism, with special attention to its military dimension]. ZMNE Stratégiai Védelmi Kutatóközpont Elemzések 2004/3, p. 2.

Old type of terrorism	New type of terrorism
Realizable goals (every party is ready to negotiate and to compromise)	Non-realizable goals (requires full surrender)
Self-restraint	Attack options are unrestrained
Differentiated targets (security forces, politicians, economy)	Differentiated targets on macro-level (symbolic objects), undifferentiated targets on micro-level (civilians)
Conventional weapons (guns, explosives)	Conventional and unconventional weapons
Localized effect	Effect on a large area
State-level (although attacks can happen on foreign land as well)	International
Coded warnings	No warning
No suicide attacks	Suicide attacks

3. The superweapon against terrorism: torture

According to the principle of „**nemo tenetur prodere seipsum**”, nobody is obligated to give a damning testimony against themselves; thus, nobody can be forced to contribute to their own conviction by providing evidence against themselves.

The aim of the policies against terrorism is to prevent terrorist attacks, defeat the terrorists and finally to eliminate terrorism. But it can only try to realize these goals with restricted means, as democratic states have to adhere to the rules upon which their political system is built, even if they make it difficult for themselves to reach their goals with this.¹³

One must ask the question, whether it is more important to be faithful towards law, or the global and total war against terrorism?¹⁴ Are we allowed to throw basic human rights that had been fought out after centuries, out the window for the sake of the alleged or actual effectiveness of the investigation against terrorism?

Respecting human rights during the planning and execution of the policies against terrorism is undoubtedly a difficult task.

Terrorists who are acting in a conspiring way must often be fought with secret service methods (e.g. tapping phones), but can all this provide legal basis for certain authorities to keep anyone under surveillance and to map their network of friends and relatives in their own right, as opposed to any preliminary judicial decision?

Well, those interpreting terrorism as “war” come forth in these cases with their “super tip,” the revival of a good old, effective method: torture.

The arguments of those accepting the torturing of terrorists is relatively simple. A terrorist is not a soldier, thus they do not fall under the directives of the Geneva Convention, they do not qualify as **prisoners of war**, so their torturing is not forbidden.

¹³ Vadai, Ágnes: *A terrorizmus elleni fellépés és az emberi jogok tiszteletben tartása [Fighting against terrorism and respecting human rights]*. Fundamentum 2001/4. p. 132.

¹⁴ Levinson, Sanford (ed.): *Torture A Collection*. Oxford University Press. Oxford, 2004. pp. 23-29.

Basically, this is the summary legal basis of reference for what happened at Guantanamo Naval Base.

Naturally, in such cases there are always theoreticians whose views are easily adopted by politicians. I am thinking of the “criminal law of the enemy” concept of Günter Jakobs. According to him, an enemy is someone who ignores the rules of civilization and against these people, torture is allowed.¹⁵

But the questioning of the right **for the accused to remain silent** (enlisted as a guarantee of **due process**) also arises. Although according to the principle of **nemo tenetur**, nobody can be forced to confess against themselves in a criminal case¹⁶, but what if a confession extorted from a terrorist could save the life of a thousand people, by revealing the defusing code of an armed bomb?

Unfortunately, it happened a lot that although the person suspected of being a terrorist had been tortured, the lives of the innocent could not be saved based on the confession. It is also doubtful to what extent is a confession obtained in such a way acceptable in the formulation of the judicial conviction.¹⁷

Terrorism is the **Trojan horse** of the democratic political establishment. Trying to stop the terrorists, who stealthily emerge from this horse to raze the democratic establishment, by methodically curtailing the freedom rights can turn any avid promoter of the war on terror into a dictator.

The Rubicon between lawfulness and unlawfulness can even be crossed unnoticed. Torture is only allowed in the case of terrorists in the beginning, then with the perpetrators of pedophile crimes, then with burglars, then with bicycle thieves, and then with those who beat the red traffic light... as they obviously wanted to severely violate the traffic order of a democratic society...

4. Constitutionality is the right answer to terrorism

The phenomenon of international terrorism¹⁸ is necessarily born in the international economic, political, social and cultural systems and sub-systems of the globalized world which are based on imbalanced power relations, when certain weaker participants of these systems, in search for solutions to actual problems, for the sake of their specific political and social goals, in an organizational framework of conspiracy, utilize an irregular armed force that is illegal in the given system but considered legitimate by them, when going against the dominant parties who make the rules of the system.¹⁹ The public security, national security and **military measures** currently utilized are not suitable, or

¹⁵ Nagy Ferenc: *Az ellenség-büntetőjogról, a jogállami büntetőjog eróziójáról* [On criminal law of the enemy, and the erosion of constitutional penal law]. In: Ad futuram memoriam – Tanulmányok Cséka Ervin professzor 85.születésnapja tiszteletére (Szerk.: Nagy Ferenc). Pólay Elemér Alapítvány Könyvtára 13.. Szegedi Tudományegyetem Állam-és Jogtudományi Kar Büntetőjogi és Büntető Eljárásjogi Tanszék - Pólay Elemér Alapítvány. Szeged, 2007. pp. 244-259.

¹⁶ Bárd Károly: *A hallgatás ára* [The price of remaining silent]. Fundamnetum 2005/3. p. 5.

¹⁷ Elek Balázs: A jogerő a büntetőeljárásban. [Legal force in criminal procedure.] DEÁJK, Debrecen, 2012, pp.46-52.; Elek Balázs: A bírői meggyőződés és a megalapozott tényállás összefüggései. [Relations of the judicial conviction and the grounded statement of facts.] JURA, 2014/1. pp. 40-55.

¹⁸ Gál István László – Dávid Ferenc: *A terrorizmus büntetőjogi oldala: a terrorcselekmény és a terrorizmus finanszírozása* [Terrorism in relation to penal law: financing terrorist acts and terrorism.]. Belügyi Szemle 2015/7-8. pp. 91-93.

¹⁹ Gál István László – James Park TAYLOR: *Financing Terrorism: Afghanistan and the Haqqani*. International Enforcement Law Reporter 2012.10. pp. 346-351.

suitable **only in a limited way**, to overcome this phenomenon. The primary system of instruments to prevent and overcome regional and international terrorism lies in a more democratic distribution of the authoritative, so the cultural, political and economic licenses and chances on a local, regional and international level.²⁰

As far as I am concerned, I consider perceiving terrorism as war a faulty approach, and I consider the solution of this damaging phenomenon as something that should belong under the competence of **criminal investigation** and **criminal jurisdiction**.

Research conducted in the subject of effectiveness of law verified that in case the legislator stands up too strictly against the violator of the law, then, after a certain level of strictness, the retaining force of legal provisions is not applicable anymore. This can basically be observed in the war against terrorism as well, as when even only the suspicion of preparation of a terrorist act already deserves torture and death, then the principle of gradual severity of legal provisions fails, obviously along with the preventive nature of penal law.

Human rights must be respected, and fair trials must be conducted²¹, otherwise we might step onto such shaky grounds which could degrade citizens, who are law-abiding in "normal" conditions, to the level of terrorists²² both mentally and in their deeds.

If the concept of the "criminal law of the enemy" prevails, those ideas and practices familiar from the Middle Ages would and will return, which would degrade our whole society to an age we could already leave behind us, owing to the ideas of Renaissance and Enlightenment.

²⁰ Póczik Szilveszter: *A nemzetközi terrorizmus fontosabb összetevőiről* [On the more important components of international terrorism.]. Magyar Tudomány 2005/10. p. 1277.

²¹ Elek Balázs: *Bizonyítási teher az eljárási funkciók megosztásának tükrében* [Verificational burden in light of the sharing of procedural functions.]. Jogtudományi Közlöny 2016/1. pp. 31-41.

²² Finszter Géza: *Az alkotmányos jogállam esélyei a terrorizmus elleni küzdelemben* [The chances of the constitutional state in the fight against terrorism.]. Belügyi Szemle 2002/6-7. pp. 156-166.