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International Terrorism and the Rule of Law

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The issues of terrorism are multifarious and highly complex. The lives of victims are changed forever by acts of terrorism. It is not only the immediate victims and their close relatives that are hit—one day, out of the blue—by terrorism but also society at large. Its socio-psychological impacts could transform the society hit by the terrorist activities, in various forms such as restriction on personal freedom or on privacy. Outrage tends to give in to emotional reactions. While its root causes often run deep—a subject which I do not intend to go into in this forum—terrorism presents an enormous challenge to each society and to the international community as a whole. I wish to commend the initiative undertaken by the governments of Switzerland and Spain to organize this workshop in the framework of the Euro-Atlantic Partnership Council and Partnership for Peace with a view to sharing the experiences and looking ahead for further co-operation to tackle the issues. Today I will share some of my thoughts with you on how we members of the international community should fight this common threat to our society from the viewpoint of the legal framework for such a fight. Needless to say, these are strictly my personal thoughts. Moreover, I shall approach this problem purely from the viewpoint of the basic legal framework relating to international terrorism, while a number of important issues falling within the purview of this workshop on "Civil Society Facing the Consequences of Terrorism" will be left out.

1. Historical Overview

Terrorism has existed as long as the history of human society, manifesting itself in such forms as political assassination or hostage taking. However, "terrorism" as a modern term of art dates back to the late 18th century political situation in France, where a form of governmental terrorism, in which the authority arbitrarily inflicted severe acts of violence upon a population, was permitted as was exemplified by the expression "the reign of terror" at the time of the French Revolution. The 19th century witnessed a spread of terrorist attacks against heads of State. Group terrorism made its appearance in particular in the czarist century Russia in which a number of governmental leaders fell victim to terrorists. At the turn of the 20th century, group terrorist activities became further linked with the movement of self-determination starting from central Europe and Turkey, a link which survived up until the present day in the context of secessionist movements

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throughout the world. Terrorism and counter-terrorism have indeed occupied a large part of present-day conflicts in many corners of the world. Today, the international community is further being confronted with the new dimension of globalized terrorism, generating in the international community an acute sense of the need to come up with consolidated approaches to tackle the issue. Terrorism in the contemporary forms can be considered not only to be aimed at undermining and subverting the public order of a given State but also against international public order.

The very fact that terrorism is used as a means to achieve a political goal has created certain ambiguity about the definition of terrorism: acts of terrorism for some are for others acts promoting a cause. However, a consensus has been gradually formed that, regardless of the motives that underlie the acts of terrorism, it is not acceptable to resort to acts of terrorism in order to achieve political objectives and should be criminalized as they attack public order of society. Such awareness was reflected already in the 19th century in the form of the *attentat* clause whereby an exception is made to the general principle of non-extradition for political crimes; assassination of heads of State or members of their families was designated as a common crime; it was provided in bilateral and multilateral treaties that culprits of such offences be extradited to be subject to trial and punishment. In the present setting, the remarkable normative development of international human rights law, international humanitarian law and international criminal law has come to generate the sentiment of condemning the culture of impunity for terrorist acts, whether these acts are committed by secessionist movement or by oppressive regimes.

2. Responses of the International Community to terrorism

Against the background that terrorism is threatening not only the very basis of our domestic society but also the prospect of sound development of the international community, it is legitimate for the international community to give serious attention to terrorism from the viewpoint of international legal order. The essence of international legal order is to uphold the rule of law in international society as society of human beings. If the pursuit of happiness and welfare of human individuals is the reason why human kind came to form a society, it is natural that society is entitled to protect itself from the violence of terrorism which attempts to destroy this *raison d'être* of our society. The rule of law is the key to pursue this goal. However, in approaching the issue of terrorism from this angle, it is important to keep in mind the two aspects in which the rule of law is relevant to the issue of terrorism—*i.e.,* first, the aspect that the rule of law has to prevail to protect society from acts of terrorism by criminalizing terrorism and, second, the aspect that the rule of law has to be strictly maintained in exploring effective measures for countering terrorism.

Before exploring these two aspects, it may be useful to address the underlying problem of how we define terrorism as a preliminary point to be considered. As I mentioned earlier, the unparalleled unity that now prevails in the condemnation of international terrorism in the contemporary world is not matched by a universal understanding of what we mean by the term. This is a point we have to keep in mind in addressing the issue of terrorism as an issue of the rule of law in society. Without knowing what is precisely to be criminalized, we cannot decide on the rule of law to be established. It is in fact for this reason that, as will be seen, the international community has seen a proliferation of legal measures without however concluding a universal convention on terrorism—a fact that betrays political controversy underlying the issue.

With a view to circumventing this difficulty, the international community has adopted instead a "piecemeal" approach, concentrating on identifying specific criminal conducts to be prevented and punished and on particular targets to be protected. Nevertheless, it is essential, even in this piecemeal approach, that there should be a shared common understanding on some basic constitutive elements of terrorism as an international crime. In order to constitute an act of terrorism, it has to be a violent act that is destructive of human life and thus in contravention of the criminal justice system of the State in which it is committed; it is aimed at destroying public order of society, in most cases through causing casualties to persons, public or private; and it has to be an act carried out with the intent of spreading a state of terror (intimidating or coercing a civilian population) or to influencing a policy of a government or organization by intimidation or coercion including mass destruction, assassination or kidnapping. In addition, international conventions addressing "international terrorism" restrict their application to terrorism with a cross-border, international element.

(A) The Need for Upholding the Rule of Law through Containing Terrorism

Efforts have been made to contain terrorism through the development of both domestic as well as international legal norms on this aspect of the problem. Starting with the prohibition of terrorism on the high seas in the form of piracy—a most long-standing proscription under international law—a number of multilateral conventions and protocols have been concluded in recent years under the auspices of the United Nations and its specialized agencies, especially since the second half of the 20th century.

Since the 1960s, more than a dozen universal legal instruments concerning the prevention and suppression of terrorism have come into existence. They include conventions for such unlawful acts as those against the safety of civilian aviation, and attacks against internationally protected persons including diplomatic agents and the hostage taking, as well as the Protocol of 2005 to the Convention for the suppression of unlawful acts against the safety of maritime navigation and the Protocol of 2005 for the suppression of unlawful acts against the safety of fixed platforms located on the continental shelf. While these acts are not defined as terrorism *eo nomine*, the acts covered by the conventions clearly target acts perpetrated in the context of terrorist activities. In addition to these specific conventions, similar provisions are included in multilateral conventions of more general scope, such as provisions relating to the prohibition of acts of piracy under the 1958 Geneva Convention on the High Seas.

By comparison, the International Convention for the Suppression of Acts of Nuclear Terrorism adopted by the General Assembly in 2005, as well as the Amendment to the Convention on the Physical Protection of Nuclear Material can be regarded as being targeted more specifically at the act of terrorism in their purview, given the nature of the acts involved. In a broad sense, these universal conventions can be said to constitute the fundamental global legal regime against terrorism and serve as sources for international co-operation in countering terrorism.

As for actions taken by political organs of international organizations, there has been a growing involvement of the Security Council of the United Nations in countering terrorism. A number of resolutions have been adopted in the aftermath of terrorist attacks, condemning such attacks as a threat to international peace and security, with legal effects. (Examples are numerous of such Security Council resolutions which relate to major terrorist attacks such as Resolutions 1368 and 1373 of 12 and 28 September 2001 on the terrorist attack of 9/11; Resolution 1438 of 14 October 2002 on the terrorist attack in Bali; Resolution 1530 of 11 March 2004 on the Madrid attack; Resolution 1611 of 7 July

2007 on the London attack.) The increasing involvement of the Security Council provides one of the important aspects of international co-operation in creating a legal framework through legislative acts for containing terrorist acts and enforcing the anti-terrorist measures taken in the name of the international community.

It is to be recalled, however, that these anti-terrorism conventions and Security Council resolutions cannot be implemented in a vacuum, just as terrorists cannot operate without some link with a territory. In order to implement this system of international co-operation for preventing and punishing acts of international terrorism, it is essential that every State is placed under the obligation to integrate the substantive and procedural requirements of those international conventions and Security Council resolutions into its own existing criminal law system. For this purpose the State is often required to establish certain legal nexus between the acts in question and its own criminal justice system, such as the principle of territoriality, or of nationality by which the State party to the legal instrument is to exercise jurisdiction in relation to the defined offence in accordance with *aut dedere aut judicare* principle. The introduction of universal jurisdiction on the basis of international agreements with regard to the acts of terrorism assumes a cardinal importance in this context.

Of essence in this regard is the need for harmonization and integration of these principles in international law and in domestic law. It is only then that the legal regime against terrorism can be effectively enforced as part of international public order through co-operation of the domestic legal system. This aspect, *i.e.,* effective domestic legal regime in line with international conventions criminalizing terrorism, is all the more important because acts of terrorism are not always prescribed as part of the core international crimes subject to international criminal jurisdiction in the current international criminal law. For example, terrorism is not included within the purview of the Rome Statute of the International Criminal Court (ICC) nor of the International Criminal Tribunal for the former Yugoslavia (ICTY). By contrast, the Statute of the International Criminal Tribunal for Rwanda (ICTR) covers the taking of hostages and engaging in acts of terrorism as violations of the second Additional Protocol to the Geneva Conventions and makes them punishable by the Tribunal, as well as that of the Special Court for Sierra Leone which also includes a specific prohibition of terrorism in armed conflict. In any case, the limited scope of application contained in these exceptions in relation to armed conflicts would seem to testify to the absence of a broader consensus on the definition of terrorism in the international law community.

(B) The Need for Abiding by the Rule of Law in Countering Terrorism

With a view to protecting the civilian population in society against the terrorist attacks in the name of the general interest of society, many international and regional conventions relating to human rights allow certain categories of derogation from individual human rights protection as guaranteed under the conventions, provided such measures fulfil specific conditions set out therein. Situations of national emergency thus allow room for restricting civil liberties to a certain extent, such as allowing wire-tapping and mail surveillance subject to judicial scrutiny by the treaty organs in many cases.

However, a fundamental question arises: to what extent are such derogations to be allowed? Where does one draw the line? If the protection of society from the consequences of terrorism is the goal to be attained in our fight against terrorism, the suppression of fundamental human rights of individuals in society, even for the purpose of combating terrorism, would seem to fall into the pitfall of creating a self-contradiction, if allowed without stringent circumspection. Only such a stringent circumspection would

offer a satisfactory ultimate solution in coping with the threat that terrorism would pose. It is my view that measures taken to counter terrorism could ultimately be counter-productive if they should result in the total negation of the basic principle of the rule of law, as well as the protection of fundamental human rights as an essential ingredient of the rule of law. This is so for the reason that the powers that the authorities responsible for the protection of individuals in society for their safety and welfare may exercise derive their legitimacy from the fact that such powers are essential for the protection of those individuals as members of society with their fundamental human rights. In carrying out their duty to restore and secure public order in society by exposing and preventing terrorist plots, and apprehending and interrogating suspects of terrorist attacks, however objective the need to protect and restore public order may be, the authorities must have a choice of means for achieving those objectives. Obviously some means would be easier to implement and more effective in achieving the desired objective; the cost-benefit equation could come into play in the minds of the authorities. Nevertheless it is imperative that this choice of means should be made in such a way as not to infringe the fundamental human rights of individuals at large in society, including those individuals who are suspected of the very crime in question. There are fundamental human rights standards in this regard, based on such principles as the presumption of innocence and the due process of law. Even the imperative of society to contain terrorism through effective means cannot be above the law. It would be contrary to the basic notion of the rule of law to justify, even in the name of maintaining the rule of law in society, an action that would end up in the denial of the fundamental human rights, which constitute one of the basic ingredients of the very principle of the rule of law in society.

It is true that in a concrete situation, striking the right balance between the legitimate imperative of protecting society as a collectivity of human beings and the imperative of protecting individual members of this society as human beings that constitute this society may not be always easy. Cases that have come under judicial scrutiny of the European Court of Human Rights demonstrate this difficulty in concrete circumstances. Nevertheless it is essential to achieve this. We need constantly to ask ourselves in the concrete context of the situation whether the imperative to protect society, whose very existence is put in jeopardy by the threat of terrorism, and the imperative to protect the fundamental human rights of individuals are to be juxtaposed through a judicious choice of means. It should always be kept in mind in choosing the means that the consideration for the public order of a society, be it national or international, ultimately is meant to serve the purpose of protecting individuals who constitute the society. In reality there are always choices available for responding to the imperative of the society without infringing the fundamental human rights of the constituent members of society to an unreasonable degree. It is my view that unless there is absolutely no other way but to suppress certain civil liberties of the members of society in order to secure the survival of the society in question, the resort to such extreme measures as the suppression of fundamental human rights in the hands of the authorities should not be attempted. In any case, what is essential from the viewpoint of the rule of law is that such measures must be subject to judicial review. After all, the ultimate judgment on this question cannot but lie in the hands of society itself.

3. International Terrorism from the Viewpoint of International Legal Order

It must be recognized that at present we are faced with a new type of terrorism that has come to appear on the international scene—*i.e.*, terrorist acts waged by non-State entities which attempt to cause the death of large numbers of people, and whose activities are growingly globalized in scope just like the activities of States with their international

political agenda. In this new situation the distinction between the issue of terrorism by individuals as a subject for criminal law sanction at the national level and the crime of international terrorism by non-State entities as a subject for enforcement action at the international level, like the use of force, is growingly being blurred. This underlies the context in which a collective response—be it through a group of States or through the Security Council—becomes a critical factor in deciding on our approach to international terrorism in the new situation.

In this respect, the tragic event of September 11, 2001, was a shattering experience to the whole of the international community. It posed a direct challenge to the public order of the international community as such, and not just a threat to the public order of a particular nation. This indeed could be described as an entirely new type of threat involving the use of force on the international plane by a non-State actor. In this sense, the situation created by this attack was something which did not fit easily into the traditional nomenclature of terrorism as a criminal act to be disposed of within the framework of national criminal justice system.

Faced with this new challenge, two options are open to the international community. One is to follow what the United States in fact pursued in reliance upon Article 51 of the United Nations Charter. This action by the United States was immediately accompanied by similar actions by some other members of the North Atlantic Treaty Organization (NATO) acting within the framework of the right of collective self-defence under Article V of the Treaty. Subsequently the Security Council adopted a resolution which could be regarded essentially as endorsing this approach of the United States.

I submit that there is, however, yet another approach to this situation, *i.e.*, to look at this situation squarely from the viewpoint of a direct challenge to the public order of the international community. In this approach, we should look for measures to be taken from the viewpoint of meeting the situation as a threat to the international peace and security.

It would appear that the course followed, as well as the view of the majority of writers on the 9/11 situation, was to endorse the former approach. The approach of the United States was complemented by the invocation of corresponding right of collective self-defence by a number of member States of the NATO under Article V of the North Atlantic Treaty.

In light of the rationale for the right of self-defence and the genesis of this doctrine as enunciated in the Caroline case, there is little doubt about the availability under international law of the right of self-defence as reflected in the former approach, even in the case of an armed attack by non-State actors. Nevertheless, I venture to submit that it may legitimately be asked whether the latter approach, at least conceptually, would not be the better approach. The Security Council could have dealt with the situation squarely as the case of a direct breach of the peace, as well as the threat to the security of the international community which could immediately set in motion the action to be taken by the Security Council.

There would seem to be no room for doubt that the terrorist attack carried out by a non-State entity in this case posed a direct serious challenge to the public order of the international community as such, going beyond a mere infringement of the legal interest of a particular State victim of this attack. The situation would seem to fit more appropriately to the framework of the Charter regime on collective security, which is a framework

conceived primarily from the viewpoint of ensuring the public order of the international community.

It is my submission that in addition the validity of this latter approach will be even clearer, if one were to suppose a hypothetical case in which an international terrorist group, instead of resorting to the use of physical force amounting to an “armed attack”, resorted to the clandestine dissemination of some lethal chemical or biological agent, such as hitherto unknown virus or radioactive material, whose effect upon the population would be equally or even more devastating. While it might be arguable also in such a case of the terrorist act that such means of destruction would fall within the category of “arms” and the terrorist act in question within the ambit of an “armed attack”—a stringent constituent element for triggering the resort to self-defence by a State—there should be even less ambiguity in this situation that such a large-scale dissemination of lethal material with the intent to kill the population would amount to the threat or breach of the peace under Article 39 of the Charter of the United Nations.

4. Conclusion

Internationalization of terrorism can no longer be adequately dealt with by the purely national responses based on the traditional nomenclature of terrorism as a crime within the purview of the domestic criminal justice system of a nation State; global terrorism calls for global response based on the consideration of international public order of the international community with its non-derogable imperative of fundamental human rights of human individuals as part of the universal justice of this community. If we accept that the rule of law on the international plane is based on the sanctity of human dignity, international terrorism that constitutes a most serious and violent challenge to this core value of the rule of law is best countered through resorting to those means which could uphold and strengthen the rule of law, rather than those which would result in undermining it by denying this core value.

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