Human Rights and Counter-Terrorism: How to Reconcile the Irreconcilable?

The French Method

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The severe attacks in Madrid in 2004 and London in 2005 and Paris in 2015 have shown with horror the urgency of designing a common European strategy against terrorism supplementing the national normative system developed after the attacks of 11 September 2001 in the United States.

Confronted with the reality of terrorism, the EU has had to adopt a legal framework, tools and sufficient resources to effectively fight against terrorism, but – and this precision is of primary importance – with regard to respect for the rule of law and protection of human rights, "constitutional" principles of European law which *Albrecht Weber*, the dedicatee of this short paper has, better than anyone, shown the need for continuity in to ensure success.[1]

For its part, France has a long experience of terrorism as the word terrorism originates from the "Terreur" period, a totalitarian regime that took place after the French Revolution. So the first form of terrorism was a State one. However, in France human rights were confronted with Terrorism within the second half of the 20th century, in the historical context of decolonization. This period led to the development of legislation but also provoked deeper thinking on terrorism in a state governed by the rule of law. In cases of hostage taking by terrorist groups, France is also distinguished by the meticulous intelligence work which is very characteristic and most often ends up locating alive the kidnapped persons while refusing on principle to pay a ransom. This success led international observers to wonder whether a counter-terrorism model was about to take shape. But is there a French method of fighting terrorism? The answer is yes, without a doubt, whether it is to prevent (1), punish (2), or remedy terrorist acts (3).

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[1] See, in particular, Weber 2004.

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1 Preventing Terrorist Acts

Unlike other countries, France never legally defined terrorism as an act of war. Its symbolic dimension and its purpose (taking down democratic constitutional institutions) allow differentiation between terrorism, serious criminality and armed conflict. This explains why the French method has always been based on police-related actions and human intelligence rather than military actions.

There are two ways to fight terrorism:

- Consider terrorism an act of war. Then the terrorist is an enemy and must be fought with military means. There is then no real place for the judiciary; only military authorities and courts have jurisdiction.
- Consider the terrorist a dangerous criminal. In this case, he must be fought using police forces with extended powers but always within the limits of legality and criminal proceedings; cases are brought before the regular courts. This is the approach chosen by French law, as it considers that a democracy does not declare war on a person but only on a State, and does not condemn groups of people *a priori* but only individuals committing criminal acts.

To prevent the spread of terrorism and in addition to intelligence actions led by the police, Act n° 1432 passed 21 December 2012 related to security and the fight against terrorism prohibits incitement and glorification of terrorism.

The French method is to determine the terrorist crime with the highest possible accuracy, both for the upstream where the aim is to prepare and plan an attack and for the downstream after the crime has already been committed.

In other words, any violent attack against the people, unlawful use of explosives, any expression of opinion, even one that is radical or fundamentalist, is not enough to constitute in itself a terrorist activity. The democracy is not totally defenceless, as these acts or activities are punished using other methods that share a common characteristic: they involve ordinary crime law and not counter-terrorism law.

The opposite attitude weakens the rule of law. In this struggle, with unequal arms, against terrorism, to abandon the rule of law and to embrace a security ideology is no more effective than allowing the use of torture "in exceptional circumstances".[2]

French legislation presents a series of possible options to bring to justice perpetrators of acts of terror, even when committed abroad, if the victims, or the terrorist, are French nationals or have their usual residence in France. Furthermore, French law allows, on the one hand, prosecution of people who trained in terrorist camps even if they have not committed any objectionable or criminal act, and on the other

[2] U.S. Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program, Findings and Conclusions, Executive Summary approved December 13, 2012, updated for Release April 3, 2014; Declassification, Revisions, December 3, 2014, http://www.intelligence.senate.gov/study2014/sscistudy1.pdf, (accessed 10 December 2014).

hand, the freezing of financial assets of persons or entities that have a terrorist activity abroad, or who, by their actions, encourage anyone to acts of terrorism.

Efficiency relates mostly to the moment in a case where judges are referred to by intelligence services. The risk of excessive legalization of proceedings is either arriving too early or, conversely too late: too soon so that the intelligence services have not been able to collect enough evidence for the case; too late to prevent the terrorist act. The French system is therefore based on a specific approach to terrorism cases led by the police thus preventing an exceptional military-style legal regime.

But even within a police regime, it remains difficult to find a balance between the need for information and the protection of freedoms since the terrorist phenomenon hardly lends itself to legal analysis.

This protean character[3] is probably the origin of the lack of unitary definition of terrorism. The fight against terrorism expresses however, for each state, a prerogative of sovereignty. This explains why it made a very discreet and almost indirect entrance into the current French Constitution, i. e. on the occasion of the introduction of a provision on European judicial cooperation, regarded as effecting a transfer to the European Union of skills inherent in the national sovereignty, therefore requiring a prior revision of the Constitution.

France is a party to several Terrorism conventions such as the European Convention on the Suppression of Terrorism signed in Strasbourg on 27 January 1977[4] or the Convention for the Suppression of Nuclear Terrorism adopted in New York on 13 April 2005.

The difficulty is that these sectorial agreements on the fight against terrorism do not include a comprehensive definition of terrorism, but the listing of a series of acts that can be qualified as "terrorism". Thus, negotiations on an international convention generally defining the crime are in stalemate, due to differences in the application of the definition, for example, the states of the Organization of Islamic Cooperation that wishes to exclude from this definition acts committed against occupying armed forces and, in contrast, willing to include in this definition the actions of said armed forces.

The European Union has tried to adopt a common definition of terrorism. The Council Framework Decision of 13 June 2002 on the fight against terrorism[5] gives a broad outline of a definition of terrorism offences: In this respect, this text is one of the earliest international instruments to define a terrorist act by direct reference to the aim of destroying the foundations of democracy.

[3] Fletcher 2006, p. 894 et seqq.; Hennebel and Lewkowicz 2009, p. 17 et seqq.

[4] European Convention on the Suppression of Terrorism ETS n°90; Protocol amending the European Convention on the Suppression of Terrorism, 2003, ETS n°190.

[5] See also: Council of the European Union, 30 November 2005: The European Union Counter-Terrorism Strategy, 14469/4/05 REV 4, DG H2 and Council Decision 2007/124/EC of 12 February 2007 *establishing for the period 2007 to 2013, as part of the General Program "Security and Safeguarding Liberties", the Specific Program "Prevention, Preparedness and Consequence Management of Terrorism and other Security related risks"*, O.J. L 58/1 (2007).

But beyond this apparent diversity, in the French law method, three factors, constant and cumulative, are always taken into account when applying the legal qualification of acts of terrorism.

1st element: the exceptional severity o violence

Terrorism is usually considered to be a heinous crime endangering society.

All international instruments related to terrorism refer to its exceptional violence (e. g. "serious, particular gravity" or "cruel and treacherous means"). This violence is not only a mean but also an image, a feeling that terrorists want to disseminate. They play with emotions following their actions to divide society on the methods that should be used to respond to the terrorism threat. Therefore, terrorism is mostly a propaganda tool used to spread ideologies that are very often difficult to identify because they are heterogeneous, unstructured, and sometimes promoted by tiny, little-known terrorist groups. Of course, terrorism can also be used as a governance tool by dictatorial regimes (State terrorism) or by autonomous movements in localized conflicts. But the most famous form of terrorism is the international one. It results from tensions and conflicts within the international community claiming to serve the cause of ethnic, political or religious streams and can be seen as a modern substitute to ideological war.

2nd element: the purpose of the aggression

Targeted victims of terrorist acts are not chosen as individuals, with their specific characteristics, but solely because of the social function occupied or devastated areas: the "target" displays the subliminal message suggested by the attack. Therefore, both victims and terrorist strikes are only media used to disseminate the message. This explains why the press shows more interest in the claims and motives of the terrorists rather than in the future of the victims.

Moreover, this is also one of the grounds why terrorism benefits from a democratic constitutional framework where it can justify itself and find some legitimation. Under such a regime, it benefits from freedom of speech as the media and press becomes its involuntary and objective ally in spreading its propaganda. The difference of regime is crucial to differentiate terrorism from resistance. *M. Duverger* stressed that resistance is the use of violence against a violent and repressive regime, whereas terrorism is the use of violence against a democratic regime where peaceful forms of contestation are allowed.

Therefore, we consider that terrorism should be defined as being the pursuit of a political, philosophical or religious ideology, the purpose of which is to undermine the foundations of a pluralist democracy without using, as a matter of principle, its legal means of expression.

An assault may be committed without any ideological support. Instead, terrorism is still a vector of consciousness. In other words, terrorism is intended to replace the power of the state by another form of authority, political structure by another form of organization, denying the fundamental rights.

However, unlike organized crime, which can still serve its interests, terrorism is not primarily motivated by greed. Conversely, compared to targeted violence of any

ordinary offences (e. g. the destruction of public property by dismissed employees or by disgruntled farmers), terrorism uses the same mode of expression: a symbol of media use. The aim is to destabilize a society, its infrastructure; the choice of the target has only one goal: amplify the scope of this event, vector an ideological message and exert pressure on the public using mainly images and symbols to communicate. And this symbol can be a public building, the daily presence of political authority, a person enjoying a public, religious or moral authority deemed illegal or undesirable. In each case, it is not an individual's vulnerability which is concerned, but it embodies the power challenged.

This is the content of the idea of "motive" or "purpose" of the terrorist act: seriously disturbing public order by intimidation or terror. This consideration of the motive of perpetrators is not to be confused with the intentional element of the offence. Although its consequences have been criticized, in particular as regards the requirements of the fight against international terrorism, the French law of 1986, which defines a terrorist offence taking into account mainly the purpose of violence, does not show an originality since this same approach is used to define the notion of crimes against humanity.

3rd element: the terrorist undertaking

It is in this third aspect that the fight against terrorism joined the fight against organized crime, which implies a strengthening of European and international judicial cooperation.

The legal characterization of terrorism requires that the act was prepared. To this end, the French Criminal Code provides that terrorist acts are parts of an undertaking ("une entreprise") and therefore it supposes some premeditation, preparation and organization to prevent any arbitrary factor: "Constitute acts of terrorism, when committed intentionally in connection with an individual or collective undertaking aimed at seriously disturbing public order by intimidation or terror, the following offences [. . .]."

The reference to the notion of "undertaking", in the light of the debates in Parliament and the circular application, implies that the infringement is committed (or planned) in a more general context. The terrorist agent may be, in theory, a "lone wolf". But reading websites dedicated to terrorism or having travelled to countries affected by terrorist groups, is not an element sufficient by itself to characterize a person as a "terrorist".

Upstream, at the stage of preparing an attack, the qualification of terrorism involves demonstrating:

1) an intentional element (e. g. the desire to cause destruction, death or serious injury to civilians),
2) a motive (the purpose of seriously disturbing public order by intimidation or terror),
3) finally, not one but two material elements of the offence, such as, for example, on one hand, the giving or receiving of terrorism training, and secondly, to possess,

to seek, obtain or manufacture weapons, objects or substances likely to create a danger to others.[6]

In other words, in French law, the offence of terrorism is characterized on the one hand, *by belonging to or supporting a network of activists*, on the other hand, as *a preparation, a sufficient organization.* According to the circular application of the Criminal Code, "the concept of enterprise excludes any idea of improvisation", it implies "preparation and a minimum of organization, some premeditation [...], an organization where chance is excluded."[7]

In 1986, this formula was included in the Code of Criminal Procedure (Art. 706-16) before being introduced in the provisions of the new Criminal Code (1992, Art. 421-1), in the first chapter "Acts of terrorism", in Book IV. So in France, the legal classification of the offence of terrorism can only constitute a "Crime against the nation, the state and the public peace" within the meaning of Book IV.

One of the important advancements made by the French legislation was to consider terrorism as a separate and autonomous offence with its own legal basis. Thus, in France, to "punish without characterization" is unquestionable: the terrorist infraction under French law is in line with the constitutional principle of strict legality defined by Art. 8 of the Declaration of the Rights of Man and the Citizen of 26 August 1789.

2 To Punish People for Committing Acts of Terrorism

Solidarity and cooperation are the EU's response to the terrorist threat. Solidarity, because specialized European agencies are now responsible for coordinating investigations and preventing terrorist attacks (Europol and Eurojust) as well as establishment of rapid responses to attacks[8] and a European action plan to protect against chemical, biological and nuclear terrorism.

[6] The recent evolution of the terrorist threat leads to the fact that isolated individuals are committing or preparing, more and more frequently, violent acts of a terrorist nature. The French legal system (Act of 13 November 2014) allows prosecuting those who are preparing a terrorist act in a sufficiently concrete manner without being linked to a criminal association. But their preparations, even undertaken individually, must, like any offence of this nature, be related to a terrorist undertaking, which clearly distinguishes this model from the law of the UK. Law No. 2014-1353 of 13 November 2014 strengthened provisions on the fight against terrorism, Journal officiel de la République Française, n°263 of 14 November 2014, p. 19162.

[7] Thus, a simple endangering of the security of the State, even violent, is not in itself an act of terrorism: French Constitutional Council, Decision n°86-213 DC (3 September 1986) para 24. Similarly, the mere fact of helping an undocumented person to remain in the territory who commits an act of terrorism may not, without an act of participation in terrorist action, itself be considered an act of terrorism: French Constitutional Council, Decision n°96-377 DC (16 July 1996) para 7 et seqq.

[8] Of the 294 attacks recorded in Europe in 2009, only one is assigned by Europol to Islamist terrorism: http://www.consilium.europa.eu/uedocs/cmsUpload/TE-SAT%202010.pdf, accessed 10 December 2014.

Judicial cooperation, because the European Union not only promotes the use of the vital instrument named "the European arrest warrant", but also requires states to blacklist anyone suspected of terrorism (or business financing) activities; registration on these lists having the consequence of a freezing of assets.

In practice, if the Court of Justice of the European Union has seemed to want to give priority to protection of individual freedoms, namely by cancelling a European regulation implementing a special resolution of the UN Security Council[9], never could it be said that this choice, inspiring respect for fundamental rights, weakened the repression by the Member States.

And here again, the French law on terrorism is interesting in that it seeks to establish a balance between the fundamental principles of criminal law and the requirements of efficiency in the fight against terrorism. Whether it concerns prosecution rules (Sect. 2.1), judgment rules (Sect. 2.2) or the scale of penalties (Sect. 2.3), incrimination of being involved in terrorism shows derogation from the general rules, which at first glance, may raise doubts as to its constitutionality.

2.1 Prosecution Rules

Art. 706-17 of the French Criminal Procedure Code provides that for all terrorist investigations and judgments the prosecutor, an investigating judge, the criminal courts and the criminal courts of appeal of Paris have competence. This special competence applies to the whole French territory, but only when the prosecutor of the Parisian court decides to seize the case. In practice, this happens in almost every case. Thus, the Paris Tribunal has an anti-terrorist section, bringing together seven prosecutors, eight judges and several judges for enforcement of sentences.

Police custody can be extended up to a total length of 96 hours (4 days) instead of the 48 hours for ordinary criminal procedures, which may be applied by the prosecutor, by the liberties and detention judge or by the investigating judge. In exceptional cases, police custody can be extended up to 144 hours (6 days) if there is a serious risk of an imminent terrorist act or when it is necessary due to international cooperation. The first meeting with a lawyer can be postponed until the 72nd hour of police custody (Art. 706-88 Code of Criminal Procedure) but must be motivated by the imperious circumstances of the investigation, or to ensure evidence collection and conservation, or finally to prevent harm against individuals.

It must be kept in mind that in France those investigative measures initially used only to fight terrorism are now becoming more widespread and can be used in general criminal procedures against organized crime (e. g. infiltration operations, telephone tapping, geolocalization technologies etc.). The list keeps growing with-

[9] Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v. Council and Commission* (ECJ GC 3 September 2008) p 461; Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission et al. v. Yassin Abdullah Kadi* (ECJ GC 18 July 2013), p. 518. Comp. with Joined Cases T-208/11 and T-508/11, *Liberation Tigers of Tamil Eelam (LTTE) v. Council* (GC 16 October 2014), p. 885.

out criticism from the French Constitutional council despite the fact that a lot of those activities violate fundamental rights. In France, like in many other democracies, freedom is slowly being put aside under the pretext of security.

In its decision of 19 January 2006, the French Constitutional council, however, ruled that legislators must "ensure the balance between, on the one hand, the prevention of harm to public order necessary to safeguard the rights and principles of constitutional value and on the other hand, the exercise of constitutionally guaranteed freedoms, among which are respect for privacy and freedom of enterprise". Fortunately, the control made by an independent judge during the criminal procedure remains a constitutional requirement before any intrusive investigation.

Fortunately, the discretion of the legislator is not without limits: on the one hand and even for terrorism, control by an independent judge is a constitutional requirement prior to any measure of intrusive investigation, while on the other hand, the excessive administrative detention of a terrorist agent waiting to be expelled from the country undermines the individual freedoms of this criminal.

2.2 Judgment Rules

Judgment against an accused adult being prosecuted for terrorist acts follows the rules of composition and functioning of the criminal court ("Cour d'assises") in line with Art. 706-25 of the Criminal Procedure Code.

The reference to this provision shows, only from the procedural side, the consideration of terrorist violence as a war act in peacetime. Therefore, in terrorist-related cases, the rules derogate from the usual ones; the criminal court consists of one president and six professional assessors (without a jury) and for appeal procedures of eight professional assessors. The assessors are all professional judges chosen by the first president of the Court of Appeal for the duration of one quarter. Thus, unlike any other criminal court, the special criminal chamber for terrorist activities does not have a jury and the decision to condemn is not taken by a qualified majority (75 %) but by a simple one. Even if juries are a French tradition with regard to criminal law, it could be considered to be constitutional as there were always exceptions in French legal history. Moreover, the French Constitutional council has ruled in its decision of 3 September 1986 that the absence of a jury was beneficial for a proper administration of justice, with the motivation of this decision being the ground that pressures and threats could be made against jury members to alter their independence.

Security concerns have also led the legislator to allow the general prosecutor, after consulting the president of the "tribunal de grande instance" concerned, the representative of the bar of Paris, and when applicable the president of the criminal court of Paris, to decide that a court hearing will, exceptionally and for security reasons, take place in a location other than the usual one. Thus, in France, terrorists can be legally judged outside the confines of the courthouse and if necessary, without any public hearing.

Once taken, the decision of the criminal court can be appealed like any other court decision, which will follow the usual procedure.

2.3 The Scale of Penalties

The scale of penalties applicable to terrorist infractions is raised by one degree compared to ordinary law. This rule of increased penalties is part of a mechanism derogating the general principle of Art. 131-4 of the Criminal Code which states that there are no derogations to the scale of penalties provided there. However, the penalty for terrorism is in line with the principle of legality and the necessity of criminal offences and penalties formulated in Art. 8 of the 1789 Human Rights declaration.

Nevertheless, the law can, complying with the Constitution, create a system of exemption or penalty reduction for terrorists or accomplices who have prevented or mitigated an infraction by informing the public authorities. Also, the judge is always allowed to adapt the penalty to the personality of the offender.

Finally, a terrorist act can also be sanctioned by complementary and facultative penalties provided by the criminal code such as banning orders (not applicable to French citizens) or withdrawal of French nationality (applicable for individuals having acquired the French nationality and only if they have a second one).

3 Remedy

For a long time, the French State refused to allow terrorism's victims to benefit from a legal regime for damage compensation. Indeed, it was hardly understandable why the State should be required to compensate damage caused by terrorism. Terrorist actions are sudden and unpredictable, and thus no negligence from the police forces could lead to a liability of the State. Therefore, tribunals have refused all claims going in this direction.

Later, France adopted a special legal regime of compensation for victims of terrorism within the 9th of September 1986 Act on the fight against terrorism.[10] Since then, several texts have completed this special regime and the result was added to the insurance code so that finally, this compensation relies on ordinary mechanisms such as those that apply for car accidents. Thus, it does not matter whether the victim is a French citizen (only when a terrorist attack takes place in France) or whether the terrorist act was committed in France or abroad. Since 1990, the fund in charge

[10] Renoux 1988.

of those compensations has seen its mission evolve and is now the Guarantee Fund for victims of terrorist acts and other offences.[11]

Since its development, this system of compensation by the State has inspired a large number of international conventions, including in the Council of Europe.[12] These international compensation mechanisms are not contributions paid for national solidarity, but for the lack of solvency of the perpetrator of the terrorist act. In other words, these international conventions are limited to merely inviting signatory states to ensure on the one hand payment of a lump sum only for bodily injury caused by the attack, on the other hand to provide financial assistance for the victims of terrorism and their families.

However, in France the Guarantee Fund for victims of terrorist acts and other offences is only designed to establish a compensation amount for personal damages of victims from terrorist acts and cannot serve for any decisions regarding the amount of compensation for other offences. Indeed, for other offences the fund is just a payments entity and the decision to grant compensation or not is made by the board of compensations of victims of offences of the court. Thus, this does not prevent the parties from lodging a claim for damages before the relevant court.

It must also be noted that the compensation granted by the fund to terrorism's victims falls under the specific legislation for war damages, found to be consistent with the French Constitution. This means that the victims have a right to a civil pension similar to the one granted to veteran soldiers, a right to free health care and to specifically reserved employments. The fund is just an emergency measure to provide physical and mental comfort to the victims but also to help them manoeuvre administrative processes, engage with the court trial, provide individual assistance, social loans or financial aid.

Such an improvement in the compensation of victims of terrorism clearly reflects the French conception of the constitutional requirement of national solidarity, which has spread since to other areas in other fields such as disabled person's rights. The French method could be seen as defining terrorist acts as being a very serious form of organized criminality, thus a criminal matter regarding its prevention and punishment, but also to consider them as war acts requiring national solidarity with regard to victims' compensation.

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[11] A contribution (about 5 €) is thus levied on each insurance contract of goods in France. Revenues coming from this contribution largely feed the Guarantee Fund for victims of terrorist acts. See Articles L. 422-1 and R. 422.1 et seq. of the Insurance Code.

[12] European Convention on the Compensation of Victims of Violent Crimes, ETS n°116; Council of Europe Convention on the Prevention of Terrorism, CETS, n°196, entry into force 1 June 2007.

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