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8 Terrorism and Rule of Law

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The most suitable way of examining and defining terrorism as a phenomenon is probably that offered by criminology.[1] Among the core concepts, the first thing usually stressed is that violence always serves an ideological objective, based on feelings of desperation and helplessness, and the violence serves to mask these feelings with a sense of omnipotence. That is, it uses the tool of terror to impose an effect on the public mood. For this reason, the consequences of fulfilling any given group of terrorists' demands, as a way of resolving conflicts with terrorist groups, are unforeseeable.[2] Methods of terrorism have significantly changed. Assassinations by firearm have been largely replaced by bomb attacks, then by airplane hijackings, blowing up of buildings and attacks against busy public places. Looking back at the counter-terrorism efforts made during the fifteen years since 9/11 should make us sceptical, because, even though the European Union adopted action plans in 2005 and 2006 in order to anticipate and block terrorist acts,[3] the enacted measures[4] proved unable to prevent recent attacks in London, Paris or Brussels.

These trends are perfectly illustrated by an image in Hans-Dieter Schwind's book *Kriminologie*, page 623, which shows four steps in a staircase. On the first stair stands a person with a knife in his hand; on the second, an assassin holds a round bomb with a burning fuse; on the third, the assassin has a remote-control bomb; while on the fourth stair, there is a death's head figure with plutonium in one hand and poison in the other one.[5]

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1 "Terrorism is a (transnational) social phenomenon occurring typically within the state or across state borders, which intends to make illegal and targeted assaults against persons or goods of substantial value, in order to achieve social and political objectives that serve equally as its ideological basis and as a legitimation of the brute force applied by all members of the organisation in question. The classic characteristics of this special multicultural phenomenon are its invisibility, diversity, unexpectedness, its high-level mobility and its perfect reproducibility." See Dr. Róbert Bartkó: 'Gondolatok a terrorizmus fogalmáról', *Belügyi Szemle* 6/2005, p. 88.

2 The most famous organisations and persons in the history of terrorism are the Basque separatist group ETA, the Irish IRA, the German RAF, Osama bin Laden and Al-Qaeda.

3 See SEC (2005) 272: Commission Staff Working Document 'Fighting Terrorism'.

4 We have to mention here projects that focused on IT developments at EUROPOL, strengthening the security of public transport, enhanced control of EU borders, defence against cyberterrorism, the security of air transport, as well as the development of mutual exchanges of information between Member States. See in details Dr. Róbert Bartkó: 'A terrorizmus elleni küzdelem jogi és adminisztratív eszközei az Európai Unióban II', *Miskolci doktoranduszok jogtudományi tanulmányai* 8 (Miskolc, 2007).

5 Cited by Róbert Bartkó on p. 58 of his study 'A terrorizmus aktuális kérdései', *Miskolci doktoranduszok jogtudományi tanulmányai* 7/1 (Bíbor Kiadó).

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If we examine the legal view of terrorism as a social phenomenon, we will find a clear, fairly straightforward situation. In accordance with the fundamental thesis of jurisprudence, every human being is entitled to dignity, and this applies also to terrorists. Accordingly, on the level of constitutional principles, we cannot distinguish someone from others just because he is a member of a terrorist group or he is planning a terrorist attack. Nevertheless, should he carry out some part of the crime of terrorism, criminal law will strike down on him, and measures within the framework of criminal procedure can be taken against him.

As a consequence of the aforementioned evolution of terrorism, state authorities put special emphasis on prevention, especially on gathering information. Actions taken in order to stop a terrorist attack in progress, or to arrest the terrorist, will sometimes affect the victims' (or hostages') human rights from a very special perspective. As an example I would like to mention the case *Tagayeva and others v. Russia*,[6] where surviving victims of the September 2004 Beslan school siege, as well as family members of those who lost their lives, brought an action before the European Court of Human Rights. The applicants referred, amongst others, to the violation of the right to life and the right to an effective remedy. The Court declared the petitions based on the alleged violation of these rights as admissible, thus it will adopt a judgment on their merits later. However, the Court pointed out in the justification of its decision that Article 2 of the Convention may imply a positive obligation on national authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual.

The fundamental principle of the dignity of individuals somewhat contradicts the way in which actions taken against terrorists are depicted by the media. From 1996 to 2001, there were 102 fictional scenes of torture depicted in US TV dramas. The series '24' accounted for 67 such scenes during its first five seasons. In mid-November 2006, creative staff members of one TV channel had discussions with acknowledged interrogators from the army along with human rights activists, in order to make the torture scenes more authentic. Although the meeting focused on awaking a sense of responsibility among creative team members who considered torture as a dramatic device, and not on making bloodier or more savage scenes, the mere fact that the use of torture against terrorists is presented as a daily routine in these action dramas is very telling.

So, while torture is imperatively prohibited in the universe of law, it exists as an everyday practice in the world depicted by the media. The legal system is consistent when

6 See *Tagayeva and others v. Russia*, Appl. No. 26562/07. The applicants alleged the violation of the right to life, because despite the terrorist threat, the state authorities failed to control the administrative border between North Ossetia and Ingushetia, neither did they guarantee the security of large gatherings like the school ceremony on 1 September 2004. Another group of applicants considered that the authorities failed to exhaust all peaceful means to resolve the situation. They argued furthermore that during the storming of the school, the special forces of the Federal Security Service (FSB) applied disproportionate lethal force and caused a fire which the firefighters could not handle properly, furthermore there was inadequate medical care of victims.

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looked at in isolation, but its consistency becomes questionable when compared with media depictions.

The above contradiction could easily be resolved by saying that the world reflected by the media is unreal. But examples from history show that we ought to be suspicious.

On 18 January 1978, the European Court of Human Rights announced its verdict in the case *Ireland v. United Kingdom*, where the facts involved forced testimony.[7] On 29 November 2004, an article in New York Times mentioned that the International Committee of the Red Cross had raised in a confidential report to the United States government serious charges against the US Army. According to the report, psychological and physical coercion was used on prisoners at Guantánamo Bay, Cuba, in order to obtain information. The handling of prisoners amounted to torture and was helped indirectly by several doctors working at the detention facility, as they conveyed information about prisoners' health and vulnerabilities to the interrogators.

Jurists addressed these problems using constitutional provisions for states of emergency, for instance, in the aftermath of several major terrorist outrages in the 1970s and 1980s (Klaus Straube, Hans-Martin Schweier, Peter Lorenz).[8]

International law provides a worked-out body of theory for the fight against terrorism, as it acknowledges the right of self-defence as an exception to the general prohibition of the use of force. In the present case the application of the international-law approach is restricted, as it pertains to interstate relations and not to the use of force in purely internal affairs. Nevertheless, international tribunals provided on several occasions a useful interpretation of the prohibition of use of force, establishing that in certain cases, that prohibition can be also violated by arming or training particular groups.[9] They interpreted also the concept of 'armed attack', in response to which self-defence can be exercised, inasmuch as they established a quantitative requirement (the attack must reach a certain level of gravity), but also a qualitative one (the attack can be attributed to a particular state). In

7 See *Europäische Grundrechte Zeitschrift* (EuGRZ) 1979, p. 149 and following. The acts of the case involved obtaining a statement by coercion, which was, however, not restricted to the special situation where the life and dignity of innocent persons are directly and obviously endangered, i.e. where the infringer 'has his finger on the trigger', but at the same time has the opportunity to eliminate the danger.

8 Meinhard Schröder: 'Staatsrecht an den Grenzen des Rechtsstaats – Überlegungen zur Verteidigung des Rechtsstates in außergewöhnlichen Lagen', *AoR* 103 (1978), p. 121 and following. See also Ernst-Wolfgang Böckenförde: 'Der verdrangte Ausnahmezustand – Zum Handeln der Staatsgewalt in außergewöhlichen Lagen', *NJW* 1978, p. 1881 and following, furthermore: 'Rechtsstaat und Ausnahmerecht', *ZfParl* 11 (1980), p. 591 and following.

9 *Nicaragua v. USA*, ICJ Reports (1986) 12, paras. 187-190. In the judgment, the ICJ made references to Resolution No. 2625 (XXV) of the UN General Assembly, according to which "Every State has the duty to refrain from organising or encouraging the organisation of irregular forces or armed bands including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organising, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organised activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."

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this respect, the question has also been raised whether the armed attack can be conducted in an indirect way, e.g. by sending irregular troops.[10] Customary international law formulated in the 19th century the so-called Caroline test (or the Webster formula) which set requirements of necessity and proportionality for the justification of pre-emptive self-defence as follows: "A self-defence claimant would have to show that the necessity of self-defence was instant, overwhelming, leaving no choice of means, and no moment of deliberation (…)"

International law is unarmed when the qualitative requirement is not fulfilled, i.e. the terrorist attack cannot be traced back to a particular state. Ignoring this requirement, however, would have unforeseeable consequences, therefore this idea is not supported by international-law literature,[11] even though efforts in this direction can be observed from time to time.[12]

Surprisingly, it is constitutional law which, in states of emergency, provides the state with rights exceeding the framework of positive law.[13] In an article written by András Jakab, there is a chart summarising that several noted legal thinkers argue that in states of emergency the state is entitled to act without legal restrictions.[14]

In the 1990s, legal scholars in Germany were occupied with the question of whether the state can resolve terrorist attacks by means of illegal actions. At Humboldt University of Berlin, a round table discussion was organised on the topic, and a professor from Heidelberg published a detailed analysis with the following title: 'Can the state in exceptional cases torture?'[15] In this paper, the problem is addressed by posing the question whether torture can serve a just purpose? According to the hypothetical case, the police have captured a terrorist who says that somewhere in the city he has hidden a bomb loaded with chemical agents, and he has also activated the detonation system, so within three hours, the bomb will explode and city dwellers will face terrible pain and suffering before death. He will disclose the exact location of the bomb only if the authorities release his 'comrades in arms' serving their prison sentences. Furthermore he demands money and, for the purpose of escaping, an aeroplane and the handover of well-known politicians as hostages. It is impossible to evacuate the city within such a short period of time. Thus, the police

10 See n. 9, *Nicaragua v. USA*.

11 See Gábor Kajtár: 'A terrorizmus elleni önvédelem a XXI. Században', *Kül-Világ* 2011/1-2, p. 19.

12 As to the changes of the state-centered approach, including also the Bush Administration's harbouring theory after 9/11, see Hannes Hofmeister: 'To harbour or not to harbour? Die Auswirkungen des 11. September auf das Konzept des "bewaffneten Angriffs" nach Art 51 UN-Charta', *Zeitschrift für Öffentliches Recht*, December 2007, Vol. 62, No. 4, pp. 475-500.

13 See András Jakab: 'A szükségállapot alapvető dilemmája és jogi természete a német alkotmányjog és irodalma tükrében', *Jogtudományi Közlöny*, 2007/2, pp. 39-49.

14 He mentions Böckenförde, Stern, Schröder, Kirchhof, Siegers as well.

15 Winfried Brugger: 'Darf der Staat ausnahmsweise foltern?', *Der Staat*, Heft 1, 1996.

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officers face the question: is it permissible to 'extract' the location of the bomb from the terrorist by means of torture?

Taking the positive law of Germany as a basis, there are two possible solutions. Disclosure of the location of the bomb is necessary for preventing direct threat of life, so the terrorist is obliged by law to provide this information, regardless that by making this statement he would incriminate himself. Nevertheless, application of direct coercion for the purpose of obtaining a statement is prohibited by police law. The prohibition is approved also by the Constitution which considers dignity as a basic right, and stipulates in particular the general prohibition of abuse against persons in detention. This legal norm, however, does not define the conditions under which the prohibition itself applies (hypothesis), so from a theoretical perspective, any interference qualifies automatically as a violation. The relevant international conventions, for instance the European Convention on Human Rights, also confirm this standpoint.

The author draws our attention to another possible solution which is based on the argument that a due consideration of the city dwellers' basic rights and interests cannot be derived from the provisions above. Without such consideration, automatic application of the prohibitive legal norms will result in the violation of innocent people's rights. Police law stipulates that a choice between enforcement measures shall be made in due consideration of the nature and gravity of the threat, in accordance with the principle of proportionality. The scale of measures includes references to the use of firearms, leading up to fatal shooting which is subject to very strict requirements. Now the question is, whether we can reason analogically that the proportionality test for fatal shooting applies also to torture? The author demonstrates the resemblance between the two situations by conducting a thought experiment: if the terrorist in the hypothetical case had the bomb in his hand, then we would consider the requirements for a fatal shooting to be satisfied. A purely formal interpretation of the relevant legal norms fails to take similarities between the two situations into account. The professor thus argues that the general prohibition must be restricted through teleological interpretation: a forceful interrogation subject to the proportionality test is plausible.

But how can this interpretation comply with the Constitution? The author puts his argumentation on a constitutional level, emphasising that the city dwellers' rights to dignity and life must also be part of the overall consideration. Each basic right has a subjective, as well as objective, sense. In the subjective sense, the state must refrain from interfering with an individual's right, while in the objective sense, the state has a positive obligation to protect that right. The objective sides of dignity and right to life are mentioned expressly by the Fundamental Law of Germany. As these rights cannot be restricted, their objective sense, i.e. the state's positive obligation, cannot be restricted either. Consequently, the aforementioned thesis, according to which any interference with these rights qualifies automatically as a violation, is at least questionable. Taking the circumstances of the

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hypothetical case into account, the positivistic interpretation of law would give way to illegality, so the conflict between the captured terrorist's rights to dignity and life and the city dwellers' same basic rights should be resolved by applying the proportionality test.

A criminal law expert may argue for applying the concept of 'means of last resort', which would abolish the legal consequences of torture or forced interrogation in order to obtain information that is necessary for saving the potential victims' lives. Namely, any person who engages in conduct to save his own person or property or the person or property of others from an imminent danger that cannot otherwise be prevented, or acts so in the defence of the public interest shall not be prosecuted, provided that the harm caused by the act does not exceed the peril with which he was threatened.[16]

The correctness of this criminal-law approach is, however, doubtful in light of the position taken by the European Court of Human Rights in the case of *Gäfgen v. Germany*.[17]

As to the facts of this case, the applicant, who at the time was a law student, murdered the youngest son of a well-known banker, abandoned the corpse under a bridge near Frankfurt, and then demanded a ransom of 1 million euros from the parents. Several hours later, the police arrested the applicant, and the police officer responsible for the questioning threatened that if he did not reveal the boy's location, he would be tortured by a person specially trained for such purposes. Out of fear of being subjected to such treatment, the applicant disclosed the exact location, where the police found the corpse. The applicant was sentenced to life imprisonment in 2003. In 2004, the two police officers involved in making threats of torture were convicted of coercion and were given suspended fines. In the reasoning of its judgment, the Court underlined that torture and other inhuman or degrading treatment could not be inflicted even in circumstances where the life of an individual was at risk. Therefore, the modest punishment, which was imposed by national authorities by reason of the urgent need to save the victim's life, was disproportionate to a breach of one of the core rights of the Convention, and did not have the necessary deterrent effect in order to prevent further violations of that right.

The Supreme Court of Israel which, considering Israel's special situation, often has to resolve conflicts between the basic right to security and the rights of persons who endanger it, pointed out in its judgment dated 2nd May 2002 that

> This combat is not taking place in a normative void. It is being carried out according to the rules of international law, which provide principles and rules for combat activity. The saying, 'when the cannons roar, the muses are silent,' is incorrect. Cicero's aphorism that laws are silent during war does not reflect modern reality. I dealt with this idea in [earlier case No.], noting: 'When the

16 Section 23(1) of Act C of 2012 on the Criminal Code (Hungary).

17 *Gäfgen v. Germany*, 22978/05, 1 June 2010.

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cannons roar, the muses are silent. But even under the roar of the cannons, the Military Commander must uphold the law. The strength of society in withstanding its enemies is based on its recognition that it is fighting for values that are worth defending.'[18]

18 HCJ 3451/02, *Almandi v. The Minister of Defence*, Mr. Benjamin Ben-Eliezer (2.5.2002).