



United Nations
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UNICRI

INTERNATIONAL TERRORISM AND GOVERNMENTAL STRUCTURES



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Preface

The United Nations Interregional Crime and Justice Research Institute (UNICRI), located in Turin (Italy), is a fully-fledged UN body, established by the UN Economic and Social Council (ECOSOC) resolution of 1968. UNICRI contributes, through research, training, technical cooperation and information sharing activities, to the formulation and implementation of policies in the field of crime prevention and criminal justice. UNICRI carries out activities in close collaboration with other UN organisations, law enforcement agencies, criminal justice networks, and distinguished academic institutions at regional and international levels.

At present, UNICRI is actively involved in the areas of security/counter-terrorism, justice reform, anti-corruption and trafficking of human beings.

In the field of security governance/counter-terrorism and in accordance with the priorities set out by the entitled UN bodies, the overall aim of UNICRI is to create new channels facilitate the exchange of technical and strategic information and to support the flow of knowledge among national and international experts. The ultimate goal is to improve the capability of states to face terrorism/security issues that require international cooperation and to contribute to strengthening an interdisciplinary approach in this field by: a) creating technical-political platforms through which national, regional and international bodies, organisations and experts can share information and knowledge; b) developing an analytical support action aimed at information sharing; c) establishing concrete technical cooperation initiatives.

Within this framework, UNICRI is focusing on four main thematic areas where the exchange of information needs to be strengthened: a) security during major events; b) illegal trafficking and criminal use of chemical, biological, radiological and nuclear substances (CBRN); c) exchange of information between intelligence and law enforcement, and d) witness protection. Within these areas the security governance/counter-terrorism Cluster emphasizes the importance of involving civil society in its activities.

Introduction

This booklet is the outcome of one of six sessions that made up a symposium organized by the International Affairs Institute (IAI), the European University Institute and the Representation of the European Commission in Italy entitled "The EU, the US and the Reform of the United Nations Charter: Challenges and Perspectives" that took place in Florence on the 21 and 22 October 2005. This occasion was a follow-up to a successful Regional Forum convened in Rome in May 2004 aimed at informing the debate of the High-Level Panel on Threats, Challenges, and Change. Organized by UNICRI, this fifth session of the symposium in Florence entitled "International Terrorism and Governmental Structures" brought together international experts, practitioners, and representatives of civil and political society to discuss international terrorism in the context of appropriate legal and governmental structural policies needed to effectively combat this international threat. The material contained herein is divided into two parts.

The first part contains the text of a speech delivered at the opening of the above-mentioned session by Mr. Giandomenico Picco, President, GDP Associates Inc., New York. The next section of Part I is a brief summary of the discussion that took place immediately following Mr. Picco's speech.

The second part of the booklet is focused on the original commentaries of Mr. Stefano Dambruoso, Attaché for Legal Affairs, Permanent Italian Mission, UN, Vienna, and Mr. Francesco Cappè, in charge of the coordination of the UNICRI's Security Governance/Counter-Terrorism Cluster. A list of participants who attended the conference follows these two articles.

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The Editors,

Francesco Cappè and Fionn Herriott

The opinions expressed in these articles are those of the authors and do not necessarily reflect the official political views of UNICRI.

Part I

Giandomenico Picco* **International Terrorism and Governmental Structures**

Are there different kinds of terrorist groups? Did the terrorist groups we came to know twenty and thirty years ago differ from those that came to fame over the last decade?

Far from me to give a definitive answer I will simply try to offer a few considerations for the purpose of our discussion. Governments as a matter of principle do not negotiate with terrorist groups or at least they take the political position that they do not. Strictu sensu that may be true as the individuals involved in those negotiations may not be officials of the governments who are the real counterpart of the groups. And I hasten to add; in many cases negotiations have not been held. However...

In the mid nineties, no less than the US Government engaged in negotiations with Jerry Adams, leader of what some call the political wing of the IRA and whom the UK Government had defined as terrorist. The negotiations, spear-headed by a group of Irish-American private citizens, indeed very prominent in the business community, lead eventually to the Good Friday agreements of 1998. To be sure, John Hume, later Nobel Prize winner for Peace, brought Jerry Adams into the picture. Earlier in that decade, and indeed since the late eighties, I found myself rather deeply involved in negotiations directly with the groups responsible in Lebanon for the kidnapping of several Western hostages. A number of times those negotiations took an unorthodox form. I was myself taken away, blindfolded and driven into safe houses to engage in the final portion of a process that led to the liberation of several individuals.

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My activities were carried out with the full knowledge of the governments whose nationals were detained and indeed of Israel, who was involved as a party in the elaborate formula. Both the IRA and Hezbollah had, by the time these negotiations were undertaken, been involved in military operations for quite a while. Both had used the military tool as their weapons of choice in order to achieve their declared aims. Yet both found a way to “negotiate”, indirectly at least, with their declared enemies. Indeed the instances I mentioned were not the only ones that saw the two groups involved in negotiations.

To be sure, the decision to enter negotiations is finally up to the terrorist groups for it implies a decision to limit, at least partially or even temporarily, some of their terrorist activities. And definitely negotiating with the enemy sends out a message to their supporters that maybe at variance with the rhetoric of their position. Entering into negotiations, whether directly or indirectly, whether in orthodox or unorthodox ways is, in my view, a factor that defines what kind of groups are we dealing with. It may even help us understand more about it. In the IRA and the Hezbollah cases the negotiations themselves involved somewhat unusual actors or intermediaries.

There is no question that the entire peace process in Northern Ireland would not have started or even proceeded without the hands on involvement of the Irish-American business community which had a specific role to play in bringing jobs to the region or to stop that from happening. The small groups of major players in this regard were also able to influence significant part of US public opinion with regard to the issue of the use of force to achieve a political goal. The group led by a famous Chairman of an insurance Company, was of course in constant touch with the US Government. Eventually the White House itself entered the fray directly. The results in this case were almost a complete success even if tampered by delays and hick-ups that we see today; but by-and-large they are a major success.

In the case of the hostage saga in Beirut, the objective was much more limited, as we did not convert Hezbollah to a non-violent path but only secured the release of the hostages. One chapter of their history so to speak came to an end with some loose ends still unresolved, or only partially resolved ever since. Again, curiously enough, the intermediary this time was an organization hardly familiar with such operations. The office of the UN Secretary General was not only a curious choice, in theory, but also an instrument without many tools, surely not the economic influence of the Irish-American business leaders.

In both cases I dare say, it was not the impartiality that mattered but the ability to deliver. Indeed, in neither case were the intermediaries impartial: in the Irish case it was made clear that the use of violence was not acceptable to the intermediary and in the case of Lebanon it was not a matter to show understanding for the taking of innocent civilians as hostages. To the best of my knowledge in neither case did the groups ask for a political or ethical position that would place the intermediary in an "impartial position". This in itself says a lot about the groups. There was no claim that they alone knew the truth and that everybody else who would disagree was wrong.

There was, or may be still, another commonality between the IRA and Hezbollah: they both had/have a political wing and a military wing. I believe the first time I received a business card by the Lebanese group that said "political office" was in the late eighties. The two-headed structure of those groups is also very telling about their modus operandi and most of all about their future ambitions and role. It provides the opportunity to interface with one part of the world that the military wing could not possibly do.

It sends the message that the group stakes a role in the social fabric of the nation it is rooted in and last but not least it may imply a potential for transformation that may be remote, that may not be very likely but nevertheless a potential for a different future than the past.

The IRA and Hezbollah were not born at the same time thus their journey works on a different calendar. By the time Hezbollah was created in the early eighties, the IRA had been active for many years. There are of course no comparisons that can be made in guessing the future of one or another of the groups that had embraced violence against civilians as a tool of a political fight. Far from me to suggest that either case is not but unique and different as indeed they are. I am trying here to look at some aspects of groups that were established long ago and possibly see how they compare with groups of more recent creation.

A credible two-headed structure takes time to be established. In the case of the two aforementioned groups it manifested itself eventually with the election of some its members to the local parliaments. Some of the Palestinian groups for instance have followed a very similar path. The political objective of these groups is also characteristically "well known". Openly declared, and at least in the rhetoric, it remained unchanged over time. Accordingly the

area of operation is, by and large, quite limited and again well known to friends and foes. As the objective was/is so germane to the place of birth of these groups, attempts to convert the world were not in the cards.

Ideology so to speak was tempered by a sense of reality, which smells more of realpolitik than of holy war, both at the local and international level. The clarity of the goal means specificity and focus. It follows that for these groups the enemy is also well defined and, so to speak, limited. These are groups that had been very careful in not creating unnecessary enemies for themselves, thus further defining the boundaries of their struggle. This attention to avoid creating more fronts is another aspect of the more traditional kind of terrorist groups we have known for decades. I call these groups the tactical terrorists. Terrorism was and is used as a means to achieve a very focused and, in a sense, limited political goal with a possibility of a lot of compromising along the way.

Different is the new kind of terrorism we witnessed in the last ten years or so by the Al Qaeda type of organizations. The Al Qaeda virtual groups have provided an almost opposite image from the tactical terrorists. The *weltanschauung* they offer is one of deep and profound exclusion and one of "us and them" which is rooted in an ideology of religious overtones and the arrogance of being alone in the possession of the truth on every single issue. The takfiri imprint is at the core of that vision. Thus negotiations have no place in the vision of the new terrorists.

Perhaps an example of this is the way the Al Qaeda type of group has dealt with hostage taking. A cursory review of this phenomenon over the last ten years indicates that hostage taking by these kind of groups have resulted in the murdering of the hostage well over 60% of the times, (in fact it may well be that those who were released were not being held by Al Qaeda types); this compares with less 10% over a period of 25 years by tactical terrorists. In the latter case negotiations were the norm, in the former case real negotiations were the exception.

The new terrorist organizations do not seem to be structured with a political and a military wing but rather with operational wings of different levels of decision-making, which are in no overt contact with the outside world. Thus their stake holding role in the real society is practically non-existent. I would submit that we are unlikely to see declared members of Al Qaeda type of groups running for parliament under their own colours.

The objective, or I should say objectives, have varied over time since the mid-nineties: from the defeat of the other super power, to the change of regime in Saudi Arabia, to the Palestinian cause, to the overthrow of Musharaff and so forth. One objective has remained the same but that is a cosmic objective: the creation of a caliphate from the world of war to the world of Islam. Interestingly enough the new terrorists have devised a cosmic objective because it is the only one, being unachievable, that can assure the perpetual war and the enemy for ever. Indeed without an enemy Al Qaeda would melt like snow in the sun. This is a major difference with the tactical terrorist groups. Some may well continue to exist without an enemy. Accordingly these new groups do not worry about making more enemies; actually it serves their purpose. This explains the exponential growth of their targets: from the Hazaras tribe in Afghanistan to other Shiite groups, to India and Russia, some say even to China and only later to the West and various Muslim countries.

I call them the strategic terrorists for their objective goes much beyond the re-address of what they perceive are injustices. They are moved by a global strategy. The ideology with heavy religious overtones behind it is that of the monopoly of truth. The mentality of the monopoly of truth is at the very origin of extremism and indeed of all kinds of exclusionism. Clearly any ideology based on dogmas has the potential of generating more and more confrontation.

In other words, tactical and strategic terrorism are simply different phenomena and may need different approaches. But this is easier said than done. Both in the Islamic world and in the West, terrorism has been a feature of life for decades. There have indeed been some successes in dealing with it in various countries. In the past the ace in the hole has been infiltration. And I should add, it would have been rather hard to defeat the Italian terrorist groups without a full involvement of the Italian authorities and of the German authorities in the case of the German terrorists. The people who share the territory, culture, and language of the terrorists are best suited for infiltration. Globalization has engendered asymmetry, which means that the small can affect the large and not only vice versa. This has given new possibilities to strategic terrorists. This, and an ideology based on the conviction of having the monopoly on the truth, produces a rather powerful mix. The challenge that strategic terrorism poses goes beyond the random killing of civilians and the destruction of infrastructure, it raises the bar to the level of a challenge to many, if not all, established institutions and then it tries to win the hearts and minds of many.

As for the first challenge it has to be repeated that any weltanschauung that is based on the belief of having a monopoly of truth is exclusive, divisive and I would dare say a bit out of sink with reality; a reality that is of increasing interdependence of all with all. The monopoly of truth concept which is rooted on the 'holier than thou' concept and the concept of superior or holier group, would fit better a world where autocracy was still a possibility; but autocracy is a long-gone concept in an intertwined and interpedent world. To instigate exclusiveness is in fact to march against time and most importantly against the facts of life, as they exist today and not 1000 years ago.

In July 2003, having read the pronouncements of Al Qaeda and its exclusiveness logic, I dared to suggest that the real enemy of Al Qaeda was the UN, for its philosophy namely inclusiveness is directly opposite to that of the strategic terrorist. Ergo, I predicted a major attack against the UN. It came only months later in Baghdad. The challenge to the institutions and to the international system as we know it today is thus a direct one by those extremists that believe in the monopoly of truth.

The second challenge is for the hearts and minds of the young generation and needs to be addressed. The key factors here are to target the potential supporters of strategic terrorism, not so much the members of it. The potential supporters are still sitting on the fence from Indonesia to the UK and they are the most valuable sectors of the population, as far as the future of strategic terrorism is concerned.

What side of the barricade will they join?

Both these major challenges cannot be answered on the short-term and they cannot be answered by one country alone. In the short-term, the counter-terrorism measures adopted by governments and institutions will continue being implemented one day at a time for the security of civilians in every country. But as far as the medium-term is concerned, in what direction to go? I wish I knew the answer. In my view the "monopolists of the truth", as I like to call them, are a small minority across the globe. Nevertheless even as a minority, a very small minority, they have succeeded in snatching away from the majority, at least partially, the agenda setting role for society. That role has to be taken back by the large majority of the world.

We may well need a "global coalition of the sane"; as Prince Hassan used to call it before he was told that it was not politically correct. A coalition of the

sane would have to be pursued across divides of all kinds and under a flag that would be recognized by all peoples to be their own: from the old lady in Montreal to the young man in Jakarta. That flag would need the voice of the role models of our societies to be appealing to the young and the not so young: role models who I am afraid would not come from the institutions only but from the various sectors of life. The idols of today may be thinkers or actors, entrepreneurs or media people. They too have a role in the fight against terrorism and a bigger role than they may think.

These advocates of a coalition of the sane would need to raise their voice in support of the large majority of the world who does not have the arrogance to believe they own the truth alone, but instead has the wisdom to know we are profoundly interconnected and interrelated. A strategy of a global coalition needs a coalition of peoples. That may be a task for "leaders who can lead without enemy."

Do these exist?

Summary of the fifth session: “International Terrorism and New Governmental Structures”*

As already stated in the introduction section of this pamphlet, the session was a gathering of international experts, practitioners, and representatives of civil and political society around the table in Florence, to express opinions and share their views on the most relevant issues that need serious attention when approaching the subject of international terrorism today. On the subject of countering international terrorism four broad areas were returned to with notable frequency. These were: (i). History, root causes and perspectives, (ii). The lack of a definition of ‘terrorism’, (iii). Approaches to combating terrorism and the role of regional organizations, (iv). Current lack of cooperative legal instruments and tools. Other interrelated topics permeated and enriched a very interesting and expansive discussion.

History, root causes and perspectives

A recurring sentiment expressed throughout the course of the discussion was the need to make a clear analysis of the history of today’s type of terrorism, to discern the diverse factors that have caused the phenomenon to surface and spread throughout the globe and to understand the for divergent perspectives in all global quarters. In sum, a majority of participants expressed the view that an understanding of these factors is indispensable to the international community’s process of formulating an effective response to international terrorism.

The word terrorism was originally invented in 1795, in connection with the French revolutionaries who executed their enemies - and suppressed opposition - with the guillotine. However, the concept of terrorism took greater hold during the 1870s in Russia, when revolutionaries began to practice it. It was a means for weaker or smaller forces, without the kind of funds or numbers at the

* This summary is an outcome of a Chatham House Rules (off-the-record) discussion. The opinions expressed in this publication do not necessarily represent the official policy of UNICRI.

disposal of larger countries, to wage war - an easier option for those unable to fight an orthodox struggle. Today through the globalisation of trade and communications the terrorism has become veritably international in terms of potential harm, loss of life and destruction of property. In his opening speech Mr. Giandomenico Picco very clearly made the distinction between the 'tactical' terrorism of the I.R.A., Hezbollah and E.T.A. witnessed mainly in the 1960's, 70's and 80's and the new type of 'strategic' terrorism witnessed over the past ten years or so. This strategic terrorism is being waged on a global level threatening international peace and the security of all nations. Thus, participants noted, in terms of a State's responsibility to protect its citizens, the effort against terrorism needs to be coordinated and internationally orientated.

Participants pointed out that extremist terrorist groups like Al-Qaeda have an ideology loaded with religious overtones and a stated cosmic objective of forming a world-governing Islamic Caliphate, however material (social, political, economic) factors create the conditions that spawn potential supporters of extremism. The collapse of the Soviet Union and globalisation has led to a highly competitive integrated global economy, some of the side effects of which are increasing global economic inequality (the proportions of which were described in the 2003 UN Human Development Programme Report as "grotesque") and the wide marginalisation of many people around the world.¹ It was noted on a number of occasions throughout the discussion that marginalisation, poverty and a lack of hope for the future are some of the root causes behind the extremism and the terrorism we are witnessing today. It was stated by a number of discussion members that without a preventive approach that deals with the culture of extremism and xenophobia, without effectively engaging on social, political and economic issues, international terrorism will continue.

The reasons behind, and the consequences of, the linkage made in the West between Islam and international terrorism were analysed. Al-Qaeda welcomes this linkage as it feeds into an "Islam versus the West" dichotomy. Participants noted that with this in mind, Al-Qaeda and other extremist terrorist groups have continually attempted to rally marginalized Muslims to their radical agenda by playing off political tensions that exist between the Muslim world and the West over long-standing political debates such as Palestine and Israel or more recent issues like the war in Iraq. Though extremist terrorist groups have been unsuccessful in their aim of 'rising up' Muslim masses against Western States and their allies, many in the Muslim world feel that the majority of citizens in Western countries continue to link international terrorism with Islam

instead of explicitly making the distinction between extremist groups and the vast majority of peaceful Islamic peoples. The observation was made that such a linkage is counterproductive and prevents an open and coordinated Islamic-Western response to the common threat of international terrorism. Furthermore it was noted that this linkage is perceived by many Muslims in Europe to be the main cause of a rise in prejudice against them since the inception of the "war on terror". Some members returned to the point that a legitimacy deficit before and since the Iraq invasion of 2003, violations of Iraqis human rights in prisons there, reports of similar violations in Afghanistan (including torture), in Camp X-Ray in Guantanamo, reports in the world media of the US policy of 'rendering prisoners' to countries that practice torture and all other violations of human rights in the name of the "war on terror", feed into international terrorism.

The discussion noted the very real need for cooperation between Muslim and Western nations as regards to taking a preventive approach toward the roots of terrorism. In Arab countries it was stated that there needs to be more political, social and economic programmes implemented to combat extremism and the causes of terrorism along with the necessary implementation of security measures. Some members made the point that access to national democratic political forums reduces marginalization and its associated negative tendencies toward extremism and violence. However, in the case of politicisation of terrorist extremist groups, a number of participants expressed their pessimism regarding the probability in the near future of such groups adopting a political wing signalling a willingness to engage politically (like Hezbollah, the I.R.A. or E.T.A.). Even if they did adopt any such a political wing, this should only be accepted as an act of transition some commentators noted. The armed element would have to disappear. The I.R.A transition into politics has seen its infrastructure transformed to serve as the hub of a criminal organisation, albeit localised. In the case of international 'strategic' terrorists, it is not just the elimination of these groups but dismantling their infrastructure that are key security objectives.

The view was expressed that today's type of terrorism has international parameters and yet the international response thus far has been characterised by a lack of multilateralism. One expert remarked that purely from an economic point of view, thus far the "war on terror" does not seem to be cost effective and that, because of a reluctance to look seriously at the causes of terrorism, precious time has been lost in the long-term aim of eradicating international terrorism and support for it.

The lack of a definition of “terrorism”

French, Czech and Polish Resistance movements during World War II - all of which were backed by Britain’s Special Operations Executive - were dubbed ‘terrorists’ by the Germans, because of their activities - ambushing, destroying bridges and railway tracks, and killing German officials. This raises one of the problems of how to define terrorism. To the Germans, these acts were experienced as ‘terrorism’, but to the British, and to those carrying out the acts, they were justifiable tactics of war. Since then acts that some countries experience as terrorism are not considered terrorism by the groups responsible for them.

It was noted repeatedly that a prerequisite to providing a legal framework for prosecuting terrorist acts is a common definition of terrorism. An internationally accepted definition of terrorism is urgently needed. It is a complicated issue that presents real political challenges but the absence of such a definition has had an undermining effect on international efforts to tackle this threat to humanity. Since 2001, the Security Council has adopted general legislative measures against terrorism - with serious legal consequences - without defining it, giving rise to assertions of universal jurisdiction over terrorism.² A non-binding UNSC definition of late 2004³ fails to remedy the serious difficulties caused by the lack of an operative definition in UNSC practice. Some complex issues regarding such a definition are recognition of the right to self-determination (including armed struggle), the role of armed forces and legitimate struggle against foreign occupation. There was general agreement between discussion members that the delay of an internationally acceptable definition of terrorism is due more to political causes and was more of a political problem rather than as a result of technical legal issues between States.

More than one member made the point that there seems to be a real reluctance by some States to define violence for political reasons. The failure of States to agree on the definition of terrorism is a symptom of such reluctance, one member pointed out. A call was made by a few participants for the convocation of a UN conference to deal with the current political delay in defining international terrorism. It was accepted by the majority of those involved in the discussion that a subjective imagination is helpful when trying to understand the causes of terrorism but there is a danger of this subjective imagination muddying up the waters when it comes to defining international terrorism. Certainly there is a need to be honest about history but there is also a need to be objective about the crime of terrorism. Some members highlighted the point that the most important part of the negotiation of a Comprehensive

Convention on Terrorism is the question of a definition. It was clearly expressed by all that any definition of terrorism, in order to be credible and legally effective in international law, had to be agreed upon within the framework of the United Nations, despite the failure of member countries to do so thus far.

Approaches to combating terrorism and the role of regional organisations

Terrorism does not happen in a vacuum, but rather occurs for reasons of economic degradation, as well as social and political alienation. Many participants stressed the importance of a preventive approach to tackling international terrorism. The 7th of July London bombings beg many profound questions over and above security breaches on the London Bus or Underground. The fact that second generation British citizens, fully integrated into society, chose to explode themselves at rush hour, in order to inflict maximum casualties among their fellow citizens, is significant and worrying. This terrorist crime, therefore, deserves serious intellectual scrutiny.

In order to formulate an effective long-term response to today's international (suicide) terrorism we need to fully understand the phenomenon, its root causes and the reasons that motivate young people to support such violence and extremism. The need to define terrorism as a crime and avoid using imprecise labels such as "Islamic terrorist" or satisfy ourselves with expressions like 'one man's terrorist is another's freedom fighter' was expressed as an important step in forming an effective long-term approach to combating a crime that indiscriminately threatens all people. Of course States and the international community as a whole need to fight terrorism; attacks like those that occurred in London on the 7th of July 2005 cannot be tolerated, but security measures alone cannot contain terrorism - a comprehensive strategy dealing with the causes that feed into extremism is the key to solving the problem in the long-term.

Terrorism is transnational because it cannot be satisfactorily addressed by any State acting alone. The admission that counter-terrorism policy requires the cooperation of other States is a reflection of the changing nature of terrorism itself as well as the consequences of globalisation. Yet governments continue to vigorously defend areas of sovereignty that are disappearing. In areas like global finance, global competition, technological innovation (including the absence of global regulation of the Internet, genetic engineering, food safety etc.), illicit trafficking of CBRN (chemical, biological, radiological, nuclear)

weapons and materials, the threat of high-tech international terrorism and the use of weapons of mass destruction, climate change, etc. the sovereignty of national governments alone cannot deal with the plethora of real and hypothetical challenges.

It was generally agreed that the United Nations, with its global membership, is the ideal forum and that the UN Charter provides the most legitimate framework for the international community to formulate a collective counter-terrorist policy. However, some made the point that State reluctance to sacrifice jealously guarded elements of sovereignty to the UN structure precludes full cooperation of States in fighting terrorism on any comprehensive multilateral basis. According to many members this unwillingness of States to fully cooperate remains the main obstacle the formulation of a coherent, normative and operational international response to international terrorism at the United Nations.

Due to the shortcomings of the international community it was indicated that a course of future action regarding security might be more effectively undertaken at a regional level. The point was made by many participants that closer attention should be paid to the possibilities of an increasing role of regional organizations in the fight against international terrorism.

Many participants emphasized the point that regional organisations may offer States a more attractive and effective operational forum than the United Nations owing to the fact that the issues discussed in such organisations are "closer to home" and more States have more of a say in the decision-making process of these organisations. There now exist many forms of institutionalised regional cooperation and organization structures in Europe, the Americas, Asia, Africa, and the Pacific, some of which are supposed to interact with the UN in one way or another, as envisaged in Article 52 of the Charter. Some members of the discussion stated that national governments are naturally more inclined to these organisations. Thus, for example, because legislation providing for greater information sharing between Member States within a regional organisation like the European Union (EU), Commonwealth of Independent States (CIS), Organization of American States (OAS), Organization of African Union (OAU) or the Association of South East Asian Nations (ASEAN) would have more region-specific interests and more regionally-based input involved in the drafting process, it would be likely to meet less national resistance, speeding up the process of adopting important new counter-terrorist legislation, thereby saving time and perhaps lives.

Participants widely agreed that building a political consensus toward an internationally acceptable common definition of terrorism may be easier to initiate in a regional context. Following the September 11, 2001 attacks on the United States, the European Council concluded at an extraordinary meeting on 21 September 2001 that a European definition of terrorism was necessary. The European Justice and Home Affairs Council meeting held in Brussels on 6-7 December, 2001, reached a political agreement on a definition that was formally adopted by the European Council on 13 June, 2002. Though this definition was a political tool - leaving as it did sufficient diplomatic room for disagreements - it has come to form the basis of a 'solidarity clause' in the European Constitution. According to this clause the EU and Member States shall act jointly in a spirit of solidarity in the case of a Member State being the subject of a terrorist attack.⁴ The UN Security Council has encouraged States to unilaterally define terrorism in national laws, while permitting wide and divergent definitions. In the absence of an internationally agreed definition on terrorism, regional cooperation such as this should be utilized as an interim model for other regional organizations to find regional consensus until international consensus on the matter is settled.

Regional organizations offer a forum where States can forge a common counter-terrorist policy and produce an operative definition of terrorism in a multilateral atmosphere, thereby increasing levels of support and legitimacy. Obviously a United Nations Convention on Terrorism that includes a definition is the ideal but at present in the absence of such a definition experts asserted that a regional-based approach is most advisable. One expert commented that the United Nations needed to be more of a normative body and less of an operational one; suggesting that regional organizations could 'manage' the terrorism threat in their areas of interest under the overall normative guidance of the United Nations Security Council.

Current lack of cooperative legislative instruments and tools

Stepped up intelligence sharing, improved legal conventions and increased law enforcement cooperation between States were issues that were returned to throughout the course of the discussion. Many participants questioned whether the existing inter State cooperative legal instruments are adequate to fight global terrorism. The general view taken by those present was that the existing legal conventions and instruments pertaining to cooperative tools between States necessary to effectively fight terrorism remain insufficient.

Though we have seen great increases in the levels of intelligence sharing and law enforcement cooperation within the EU over the past four years, Members of the European Union have significant national legal restraints on their ability to share information. Different levels of optimism and pessimism about the prospects for 'real' intelligence sharing were expressed. It was noted by some experts that even among allies, jealousy persists and States are reluctant to share vital intelligence. Less pessimistic participants noted the surge in sharing of information between States since 11 September 2001 as highly significant. Notwithstanding this however, some made the point that institutional (UN) meetings will not produce a solution to solve the problem of State reluctance in the area of sharing information/intelligence even though it was recognized by all participants that law enforcement cooperation and sharing of intelligence are key to fighting international terrorism.

The issue of safeguarding human rights while introducing necessary anti-terrorist legislation was raised. By not upholding fundamental human rights, anti-terrorism legislation can sometimes lower the standard of the rule of law - the cornerstone of democratic societies and institutions - and can downgrade individual freedoms; those freedoms that States are fighting international terrorism to protect. The point was expressed that fight against terrorism is not only relevant in regards to human lives and property. Human rights principles and international human rights norms need to be upheld.

There have been positive outcomes in certain areas of new anti-terrorism legislation however. In the area of financing terrorism there have been important successes. The legal measures that have been created to deal with the financial support of terrorist activities are also applicable to other areas of international crime such as transnational organized crime.

The observation and relevance of the internal and external linkage of aspects of security was expressed by a number of experts. The fight against terrorism and organized crime is at the heart of maintaining international peace and security both outside and inside the European Union. Promoting the rule of law externally is essential to reinforce the area of freedom, stability, security and justice internally. The discussion closed with the point being made that increased cooperation between independent and efficient judiciaries and effective police forces functioning in partnership with their regional colleagues are vital to ensure terrorist and criminal suspects are not beyond the rule of law.

Part I Endnotes

- 1 www.undp.org/hdr2003
- 2 On September 28, 2001, the Security Council unanimously adopted resolution 1373 under Chapter VII of the Charter of the United Nations. This resolution established a body of legally binding obligations on all UN member States. It defined the common core of the new international campaign to deal with international terrorists, their organizations, and those who support, them but problematically in the absence of specific definition of the crime of terrorism.
- 3 UNSCR 1540. Adopted at 4956th meeting, 28 April 2004.
- 4 Chapter II, Title V (“Specific provisions relating to the common security and foreign policy”), Article I-43 and I-41 of European Constitution signed in Rome 29 October 2004.

Part II

Stefano Dambruoso* **The European Constitution Solidarity Clause Against Terrorism ****

Article I-43 of Chapter II in Title V of the European Constitution signed in Rome on 29 October 2004, entitled "Specific provisions relating to the common and security foreign policy", states in the "solidarity clause" that the EU and Member States shall act jointly in a spirit of solidarity in the case of one Member State being the subject of a terrorist attack or a man-made natural disaster. Therefore on receipt of a request by its relevant political authority and by means of this clause, the EU can mobilize all instruments at its disposal, including military means granted by Member States¹ in order to prevent any terrorist menace within their borders, to protect democratic institutions and the civil population from the eventuality of a terrorist attack and to provide assistance to a Member State on its own territory.²

The inclusion of the solidarity clause in the "Treaty Establishing a Constitution for Europe" leaves open the possibility of complex political interpretations. It recalls the so-called *casus foederis* typical of political-military alliance treaties, when it states "The Union and Member States act jointly in a spirit of solidarity in the case of a Member State being subject of a terrorist attack..." Nevertheless, the clause explicitly refers to "Member States (making) civilian and military capabilities available to the Union" as one of the instruments available to the Union. Although the implementation modalities of the clause itself reflect the typical complexity of the decision-making and implementation pro-

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cess of an enlarged Europe and saving the obvious right of Member States to provide military assistance in a bilateral manner or within the ambit of other international institutions (like NATO), it is important to underline one point. The field of common security is one in which it is unanimously recognized that the European process has been greeted with decisively inadequate progress in comparison to the challenges that await the Union. If we include the specific and particular terms of the terrorist menace in the debate on security, the Union appears less reluctant to take the initiative in this dramatic period.

Contained in the clause are strong and significant affirmations, which specify that the mobilization of even military instruments can be actuated in order to "prevent the terrorist threat in the territory of the Member States" as well as to "protect democratic institutions and the civilian population from any terrorist attack". Though the explicit reference to territory aims to play down its importance, the strength of the conceptual association of "prevention" with the "military instrument" implies that the possibility of preventive military action aimed at neutralizing terrorist networks or cells is not excluded. Obviously this is a reference to the consolidated concept of 'pre-emptive war' and not to that of its more revolutionary cousin, 'preventive war'. By this we intend to refer to ad hoc actions based on the imminence of a terrorist attack as perceived through investigation and intelligence activities as opposed to actions that would have greater aims and ambitions such as modifying those political conditions that tend to offer support to terrorists. This leaves open the case of an eventual attack towards institutions, which, even if located outside of the national territory, are considered an expression of State sovereignty. UNGA Resolution 3314 (XXIX) of 14 December 1974 seems to offer a catchall clause in this regard defining the term "aggression" as the use of armed force against the sovereignty, territorial integrity or political independence of a State.

The weakness of the general framework for a European Common Security Foreign Policy (CSFP), is the reason why present recourse to military instruments in the sense of a preventive action, should be merely interpreted as monitoring, surveillance and patrolling activities, not as activities aimed at the forward defence or the defence in depth of the European Union. The Clause therefore hides a virtuous paradox. The political subjectivity of the European Union entered into crisis over the consequences deriving from the eruption of terrorism in the international arena. Thus, it is exactly from the necessity to fight terrorism, that this same subjectivity could provide a fresh impulse.

The range of measures contained in Title V has provided³ for the elevation to EU-level of the second pillar (CSFP) - until then (29 October 2004) managed at an intergovernmental level. The creation of the EU Minister of Foreign Affairs is relevant in that he comes nominated by the EU Council with the recommendation of the President of the EU Commission and in that he presides over the Council of Foreign Affairs whose task is to elaborate the guidelines for the Union's foreign policy (according to the directives of the European Council). Essential for the enforcement of the second pillar was the recognition of the legal personality of the Union, thanks to which the Union can claim unity and autonomy on issues of international relations, especially when having to respond to international terrorism attacks such as those of New York in 2001 and Madrid in 2004.

If the September 11 attacks divided Europe over the proper course for preparation against a terrorist act⁴ the Madrid attacks resulted in a new consensus, giving rise to a domino effect accelerating the approval process of the European Constitution and further EU integration on the level of foreign policy. In light of this, a common willingness of Member States to counter terrorism on a military level rather than on that of justice administration under the heading "self-defence or law enforcement", has emerged since the European Council summit held in Brussels on the 25 and 26 of March 2004. During that meeting the Heads of State and government, the Presidents of the European Parliament and Commission signed a declaration in which they expressed the full support of Member States to Spain thereby predating by seven months the content of the Solidarity Clause that would be formally approved in Rome.

Through the declaration set on 25 March 2004 the heads of State and government furnished themselves with a mechanism capable of legitimising, under international law, an armed response to a terrorist attack that strikes a Member State. On the contrary, before the European Summit in Brussels had any reaction of a military character that would have been considered illegitimate in light of the ban on the use of force in international relations expressed in Article 2.4 of the UN Charter and would have justified the application of sanctions by the UN Security Council. In addition, the States participating in any such armed response would not have had recourse to Article 51, which allows for the use of force when it may be considered as an exercise of legitimate self-defence against an armed attack. A terrorist attack cannot be considered as an "armed attack" under Article 51, first of all because of the exempting character of this provision in relation to Article 2.4, secondly because the spirit of non-intervention contained throughout the UN Charter imposes the need for its

restrictive interpretation. Also, UNGA Resolution 3314 defines aggression (which included the notion of armed attack, as confirmed by the French version of Article 51) as the use of force by, or on behalf of, a State. Unless one does not want to consider, which was the case the day after the 11th of September, terrorist groups as *de facto* equal to State organs⁵ one could not but apply the system of provisions that form *jus in bello* – first among all those contained in the Geneva Conventions dealing with the treatment of prisoners of war.

Even from a summary analysis, it is clear that the gravity of implications that follow from granting States the right to respond to terrorist attacks by means of the use of force. It was perhaps a sharp awareness of this that induced the United Nations Security Council to affirm, in Resolutions 1368 and 1373 of 11 September 2001, “the natural right of States to legitimate individual and collective self-defence” against terrorist attacks defined simply as “threat to international peace and security” rather than “armed attacks”, in which case Article 51 would be required to be activated. This ambiguous formula has prevented the creation of an important precedent and has risked possible “legitimate” armed reactions (even in the absence of “hard evidence”) against States supposedly involved in the organisation and support of terrorist attacks, leading possibly to very dangerous spirals of violence.

The EU Constitution thus introduces into international law, unambiguously, the concept that terrorist attacks shall be characterized as a military act. Today, after repeated attempts on the part of the UN, and in the absence of a common definition of a terrorist act, the need to set down in an international Convention what shall be considered a terrorist act appears more and more urgent. Moreover, in Europe there are significant realities that until today were generally treated as terrorist, even though characterized by an independence-separatist objective. We are referring to the case of E.T.A. in Spain, of the I.R.A. in Ireland and of Corsican separatism in France. Until now, the response of institutions in those countries was typified as judicial and/or prevention, based on intelligence. From today onwards, will these institutions be able to call on either internal military or the solidarity type intervention described in the clause, and therefore external?

Article I-43 in fact commits the Union to mobilize all instruments at its disposal, including military means conferred by Member States, in order to prevent a terrorist threat on their territory. More surprisingly, however, in respect to the past, is the extraordinary speed with which such a revolutionary provision has been adopted by the European Union, especially if one considers the com-

plex procedures undertaken to create other instruments that can be utilized by the EU to counter terrorism. One should not forget that the proper functioning of ad hoc supranational law enforcement and judicial bodies created for the fight against transnational crime and terrorism (Europol and Eurojust) are still strongly inhibited as a result of traditional resistance by many Member States to the sharing of data and information (key to the carrying out of investigations). However, as already noted, the proper explanation of the speed rests in the unanimity expressed in Brussels on 23-26 of March by heads of State and government, who on that occasion suggested possible strategies in the fight against terrorism. In addition to the use of military force the States will, in any case, have the option of strengthening integration among their judicial, administrative and law enforcement systems and moreover in the field of information sharing, border control and victim assistance. This is the meaning that must be conferred on Article I-41 Paragraph 3 of the EU Constitution, according to which Member States put at the disposal of the EU civil capabilities in addition to military ones for the implementation of a common security and defence policy as defined by the Council. From the point of view of the legal practitioner, it is desirable that this interpretation, is more consistent with the type of threat today's terrorism represents, and that it should be developed and stalwartly put into practice.

Francesco Cappè*

International Terrorism Calls for an International Response: A Path that Requires Political Legitimacy

1 – Introduction

In the current debate, security is an enlarged concept, often generalised and abbreviated⁶, and not used correctly as a technical term. Thus, the concept has come to represent an amorphous body of assurances promising protection for the development of a person's life and that of their family. As a consequence of this imprecise use of 'security', 'insecurity' comes to represent simply the fear of the unknown. In the past, the general desire for greater security brought about major alterations to forms of social organization. The coming together of individuals and families, and the evolution of the community into the conception and birth of the modern nation state, all arose out of a need for better organization in order to counteract 'foreign' aggression or foreigners, or simply as a defence against any shared harm⁷. During the twentieth century the need for security was the driving force behind further integration between states and emerging regional and international structures.

In light of this evolution, however, and in spite of the conceptual controversies regarding the state⁸ (in both positive and negative terms), today's demands from citizens for greater security actually represent a challenge to the state. Is the modern state, the state of law, able to achieve the prime objective for which it was created? Does the state have effective strategies to face threats to international security that are not posed by other states (such as international terrorism and organised transnational crime)? Is the widespread feeling of insecurity among citizens caused exclusively by their perception of new unmanageable elements of danger and destabilization, and perhaps by a sense that the Leviathan is somewhat impotent to respond effectively to these forces?

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2 – International terrorism demands a further erosion of state sovereignty

During the twentieth century, states fought against each other in two world wars and then aligned themselves into two opposing blocks during the Cold War. The fall of the Berlin Wall in 1989 and the consequent globalization of the means of communication and transport (in which technologies have developed enormously), along with the geographic multiplication of independent states, have since eroded the boundaries of states and their traditional sovereignty. Today, the elements that undermine the security of citizens cross over the territorial confines of states and have become transnational. Therefore, states need to give up the exercise of some specifically determined powers to supranational organizations and become accustomed to co-existing with the other actors on the world stage (regional and international organizations). With this in mind, states are delegating economic and financial powers to the European Union, while the introduction of the euro was intended to avoid strong economic imbalances and dramatic currency devaluations between EU member states.

The matrix of extreme Islamic terrorism (Al-Qaeda or 'the base') represented by the attacks on 11 September 2001, which were aimed at harming citizens in their daily lives, represents a point of no return. The terrorist act itself lurked within globalization, striking at the heart of state sovereignty: the security of citizens. States that have fought against one another in the international arena find themselves for the first time having to confront a different actor, terrorism, which was never considered an international actor, or a 'non-state actor' as it has come to be defined in United Nations resolutions.

3 – Political legitimacy from the transfer of sovereignty with a view to an international response

International terrorism represents a turning point for international society, a turning point as significant as the one marked by the fall of the Berlin Wall and the end of the Cold War 15 years ago. Today we face a dramatic moment which forces us to assess – in terms of our social organization and the basic concepts of social co-existence as a whole – a period in which the response to international terrorism means a radical change in patterns of thought and discussion between citizens. Jürgen Habermas holds that before any political initiative⁹ occurs, a population's 'value' trends must first be modified. The level of popular support for the European Constitution in France and Holland confirms the German philosopher's view. In spite of this, the numerous terrorist attacks of

late confirm the stark inadequacy of present-day state-centric structures to face the transnational reality. Rather, they serve to reinforce the efficacy of the suprastate dimension. But is this political inclination perceived by citizens as an adequate response to their demand for security? If not, why not?

Let us look at one example. Immediately after the attacks in London on 7 July 2005, and before having participated in an extraordinary Justice and Home Affairs European Council meeting on 13 July, Home Affairs Ministers from many European states presented anti-terrorism measures in their national parliaments.

If terrorism is indeed an international phenomenon that demands an international response, the session of the European Council should have been considered a highly significant occasion, in which our active society – civil society – should have taken the appropriate amount of interest, both before and after the event¹⁰. This was not the case. It was discussed only marginally in the media, and in the majority of parliaments no one questioned the Ministers about their national position at this meeting, nor debated what should have been the national position presented in Europe. Yet from a cursory look at the process that followed the attacks on 7 July in London, one can discern the latest directions in the fight against this form of terrorism. That is, states did not limit themselves to agree to a solely ad hoc reaction, with its consequent concessions to the executive in terms of emergency measures and legislation that create temporary power imbalances between the different branches of government. Rather, they strengthened Europe's instruments for law enforcement and judicial cooperation.

If terrorism is an international phenomenon, the response must be international. If we can agree on this two-sided relationship, why is it that there seems to be such a dearth of debate in political parties, editorial offices and columns of newspapers, and more generally, in those moments of collective public reflection following terrorist attacks, about what should be the proper strategy of the suprastate organizations confronting this phenomenon? What should be a state's policy towards, and their role within, these suprastate structures¹¹? One possible answer that could be put forward by figures within civil society who play a role in institutions¹², such as representatives of political parties, is that under normal political conditions, foreign politics has very little impact on voter opinion towards an administration, except of course during wars. Another group within civil society could argue that the public is not primarily interested in this type of analysis following a terrorist attack. In other words, it is an infre-

quent and irregular occurrence for civil society to show active interest in formulating a position regarding first, the state's proper policy toward suprapstate structures, second, the state's proper policy when acting within a suprapstate structure, and finally, the proper policies of suprapstate structures in relation to international terrorism.

In light of the above, and noting the dichotomy between civil society and state – where civil society formulates the questions to which the political system has a duty to respond¹³ – one can discern a fundamental issue: the lack of questioning of the government by civil society regarding its policy towards international and regional organizations in their fight against transnational criminal phenomena. This lack of discourse between civil society and state causes a spread of uncertainty throughout society.

Nevertheless, recognising the limits imposed by the state structure, this lack of focused input from civil society on the subject of proper governmental response to transnational criminal phenomena has the effect of confronting the threat of international terrorism; it thus produces output aimed at strengthening the suprapstate dimension (albeit not always with firm convictions).

This discrepancy between input (either incorrectly formulated or not formulated at all) and output reveals a fundamental element of uncertainty in governmental strategy, responsible for the fragile political legitimacy upon which the current international response to terrorism is based. This fragile political legitimacy is hindering the proper functioning of the regional and international organizations, the very bodies charged with responding to the international terrorist phenomenon.

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Part II Endnotes

- 1 According to article I-41 paragraph 3.
- 2 It is intriguing, at a first reading, that terrorist attacks and natural disasters are both placed on the same level, triggering the solidarity clause.
- 3 In accordance with Article 11, Title III of the project on the European Constitution.
- 4 Abstractly configurable to an armed attack against a State under Article 51 of the United Nations Charter, that recognizes the natural right to legitimate self-defence.
- 5 According to the doctrine expressed for the first time by the International Court of Justice (ICJ) in the case of the American hostages in Tehran and reaffirmed in the International Law Commission's Articles on Responsibility of States for International Wrongful Acts approved in 2001.
- 6 Security from a technical point of view is a concept that encompasses more diverse themes, such as job security, environmental protection, economic and social security, and public order.
- 7 The conception of the state expressed here is the typical Hobbesian 'contractual' version of an artificial body. This typically nihilistic and constructivist Hobbesian conception, which departs from the premise that man 'is not a social animal', counterposes – to simplify – Aristotle's model, which is based on a more theological perspective of society, according to which society strives to realise an immanent order with nature itself.
- 8 'There are two negative conceptions of the state: the state as a necessary evil (Hobbes) and the state as a non-necessary evil (Marx–Engel)'. (Norberto Bobbio, *State, Government and Society – fragments of a political diary*, Einaudi, 1985.)
- 9 Jurgen Habermas, *The Postnational Constellation: Political Essays*, MIT Press, Cambridge, 2001.
- 10 Here we shall not delve into a complex historical discussion on the definition of civil society. We shall limit ourselves to considering the wide civil-state dichotomy in current political discourse, where civil society is the expression of any social interchange not regulated by the state. However, a major permeability and a more accentuated nuance between the concepts of civil society and state is that the opposition between the two represents an accurate picture of the real situation. According to the 12-member Panel of Eminent Persons on UN Civil Society Relations (A/58/817), chaired by Fernando Henrique Cardoso, 'civil society' refers to the associations into which citizens enter voluntarily to advance their interests, ideas and ideologies. 'The term does not include profit-making activity (private sector) or governing (public sector). Examples of civil society groups could be mass organiza-

tions (such as peasants, women, retired people), trade unions, professional associations, social movements, indigenous people's organizations, religious and spiritual organizations, academe and public benefit non-governmental organizations.'

- 11** Around 60 regional and international organizations were present at the 5 meetings convened by the UN Security Council Anti-Terrorism Committee (2002-2004) regarding the principles of broadening cooperation in international action against terrorism expressed in UNSC Resolution 1373. The following are examples of such organizations, which have a role in the fight against international terrorism: Interpol; the UN (Italy is the prime financer of the programme against crime, a programme headed by an Italian); Europol, who after 11 September created an anti-terrorism task force; the office of the EU Anti-Terrorism Coordinator, created following the attacks in Madrid on 11 March 2004; and the OSCE.
- 12** 'The parties have one foot in civil society and one foot in the institutions...' (Norberto Bobbio, *State, Government and Society* – fragments of a political diary, Einuaudi, 1995, p. 26.)
- 13** The proper functioning of a society can be evaluated on the basis of this relationship between questions and responses.