

Security on the European Path to fighting the Daesh Phenomenon¹

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The violence that constitutes the banner of some political movements is nowadays predominant in some areas of the world. Such movements as the self-proclaimed Islamic State, which transcend their borders, have at the present time a political rhetoric agenda based on terror and violence, leaving a bloody footprint beyond their regional borders. Daesh clearly states its purpose. So far and yet so close, we winnow on their ideological flag to preserve and expand the Islamic world, on the path of unification of the mythical Islamic caliphate which goes back to the beginning of the first millennium of the modern era, whose borders include Portugal and a significant part of the Europe we know today. To fully understand the Council of Europe Convention for the prevention of Terrorism, we must grasp the concept of Terrorism, before any other, especially the objective threats it poses to humanity in order to be able to fully achieve a particular delicate balance between the values and principles of law and democracy, in the light of the decisions that call for an imperious search for restraint, and imitation of humanity, in the face of this hiper-regional phenomenon.¹

Keywords: Terrorism; State; Europe; Humanity; Daesh; Security.

Introduction

One may safely claim that any citizen can define the concept of terrorism and classify a certain fateful occurrence as a terrorist act. However, such simplicity may be deceiving and take on an elusive nature, which could even be an obstacle to implementating justice. With a degree of empirical certainty, we could state that a serial killer– who terrorises a place or country during a certain period –is a terrorist, or that the attacks to synagogues and mosques are considered terrorist acts or, at least, mere hate crimes.

The line between the two is very tenuous and is not always easily perceivable to the judicial operators, oftentimes because the emergence of public opinion generates unspeakable pressures. This is especially true in very visible events to

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¹ For the study and approach of the exposition, present in section III of this paper, especially regarding the contents of the Council of Europe Convention for the Prevention of Terrorism, I followed the systematisation used by the Group of Jurists of the Portuguese Section of Amnesty International, in its legal opinion GJAIP22016, which has not yet been published. To those mentioned here, I give my thanks for their availability and consent to its use, in particular, the members of the working group responsible for the implementation of the opinion: Dr. Sofia Caseiro (rapporteur), Dr. Noémia Pizarro, Dr. Silvia Silva, Dr. Maria Paula Gouveia, and Dr. Joana Pinho – to all of them, my heartfelt thanks.

which add, by default, a conceptual indetermination of terrorism, jeopardising the imminently open nature of the objective and subjective elements that define it.

Terrorism started to be taken as a concern of the international community right in 1937, with the elaboration and approval of the Convention for Prevention and Punishment of Terrorism by the then League of Nations².

From that date onwards, not only the United Nations³ but also many other organisations have dedicated their efforts to fight this scourge, through the approval of several resolutions of legal and political scope that are fit to face terrorism.

The fight against the terrorism phenomenon only gained a real dimension and importance following the September 11 attacks, in the city of New York. This turning point, which followed the events of Ground Zero, made nations realise the need to approach terrorism as an unavoidable subject matter of their domestic and foreign policies.

However, this personification of fear started taking root in the governments and societies after the New York attacks, which were followed by those in Madrid, London and, more recently, Paris and Belgium.

In fact, this current discourse has led many European governments to urge their citizens to accept a curtailment of their liberties and rights, in favour of a greater good⁴.

In the wake of these tragic events, on the 28th of September 2001, the United Nations Security Council adopted, Resolution 1373, which condemned the September 11 acts and encouraged nations to adopt an emergent international cooperation to fight the terrorism phenomenon.

International Coordination

In September 2005, during the UN summit, a resolution condemning every form of terrorism was unanimously adopted, following the demands of several

² Henceforth, referred to as the Convention.

³ Henceforth, referred to as UN.

⁴ Perfect climax for the approval of legislation such as the *Patriot Act*, which has been deemed worthy of a dictatorship. A recent example can be found in France, where the deputies of the National Assembly approved – with 317 votes in favour and 199 against – a draft law for the constitutional revision that foresees the possibility to deprive the French nationality of citizens with dual nationality who are convicted of terrorism, as well as the inscription in the constitution of an emergency state regime. It should be noted that this alteration endangers the accomplishment of the international conventions that France forced itself to respect, that prohibit the existence of stateless people. On a very similar level to that of terrorism, and resulting from the fear that underlies the entry of refugees in Europe, we can see the example of the legislative alterations carried out recently in Denmark – in the voting and approval of the reform of the Immigration Law, in January 2016 (with 81 votes in favour and 27 against) – and the resulting restrictions with regards to the rights applicable to the respective claimants. Among these restrictions, we highlight those pertaining to eligibility requirements for the allocation of permanent housing and to the allocation of temporary visas, as well as the confiscation of assets worth more than 10.000 Norwegian kroner (around EUR 1.340) with no sentimental value for the owner, the extension of the foreseen period in the family reunification law (currently around EUR 900 per request).

nations and aiming at a stronger international coordination in the fight against terrorism⁵.

Though this remains a pressing and particularly current issue, even after the approval of several international mechanisms and instruments⁶, we still lack a satisfactory legal definition, which encompasses the modern concept of terrorism, and substantiates a universal and consensual interpretation. This situation causes several, frequent and relevant differences within the context of the UN, especially among the countries of the Middle East.

Those who study these terrorism-related matters easily notice that defining terrorism is not an easy task. Each state, country, organisation, and even each person have their own highly personal, definition of terrorism, and above all, see it as something undetermined.

Formally, we risk saying that terrorism results in the use of systematic violence, with political objectives, perpetrated against civilians, government officials or institutions but also strategic military targets, even in times of peace. It is, therefore, safe to say that there are many forms of terrorism.

We can state that there are religious terrorists, like the ones who perform attacks in the name of God; there are also mercenary-terrorists, who receive certain amounts of money for their actions; nationalist terrorists, who are prompted by a patriotic ideal or a certain state model; lastly, there are also the ideologists, who detonate themselves in order to put in practice a particular vision of the world.

We could say that just by closely examining the vague notions found on the so-called list of terrorist groups published by the U.S. Department of State, to understand the degree of the ambiguity we are discussing⁷.

Based on this vast and diversified range of conclusions, several men may have shaken some sacred pillars of political dogmatics, which supported for many years the terrorism phenomenon, and were later accused of committing acts of terrorism. In truth, History, for the most part, and the countries of origin of those men, in some particular cases, would eventually acknowledge the scale of their acts at the service of their states, in some cases, turning these men into rulers cherished by their people⁸. In another perspective, we can adopt a

⁵ That is, all Member States of the UN committed themselves to increase exponentially the measures and actions against terrorism and, above all, to confer more powers to the UN regarding this field and actions against this phenomenon.

⁶ E.g. Conventions and Resolutions.

⁷ Following the emergence of these types of groups in the current context of global society, we can list like Al-Qaeda, Boko Haram, Hamas, Daesh, Taliban, ETA, IRA, FARC, among others. In addition to these groups, there are dozens (or even hundreds) of other smaller terrorist groups spread across the world. There are other groups not listed here, such as the Caucasus Emirate or The Liberation Tigers of Tamil Eelam, because they are not included in the "official" list since they were officially defeated or lost their leaders, which put an end to their actions. However, the activity of these organisations has a long history, as confirmed by the example of the Sarajevo attacks in 1914, perpetrated by the Black Hand organisation and that culminated with the death of Franz Ferdinand, the heir of the Austro-Hungarian Empire.

⁸ Among these worldwide known personalities that have at some point been accused of terrorism, we find Nelson Mandela, in South Africa, and Yasser Arafat, in Palestine.

definition of terrorism that includes, on the one hand, violence and, on the other, the use of terror with political intents⁹.

At this point, we are compelled to distinguish between, the terrorism phenomenon and organised crime, since we believe they are not synonyms. In the light of the United Nations Convention against Transnational Organised Crime¹⁰, we believe that those who disturb and attack public peace, while completely curtailing the liberties and security of citizens, seek, to obtain, directly or indirectly, any economic or material benefit, thus making possible to avoid including in this concept both terrorism and criminogenic decisions that threaten humanity and that, by contrast, are the responsibility of the International Criminal Court.

For more than a century until the mid-1970s the adaptation of Muslims to contemporaneity did not face any especial obstacles or restrictions. Until then, the life conditions of citizens had undergone continuous improvement –a surge of opportunities for social promotion, first for men and then for women.

Since the 1930s, as a result of the first independence achievements in North Africa, ‘progress’ was used as a synonym for the development of all regional states, which translated in the modernisation of the institutions, civil society, intellectual life, laws, education, and women’s condition, in line with the philosophic currents originating and followed by western societies.

The dawn of the 1970s marks the beginning of the reversal of this cycle of progression and the turning point when the idea of returning to the real Islam and the supremacy of religion in all domains of life and State started gaining momentum¹¹.

This idea spread widely in a time when prospects of improvement of the conditions of life, both material and moral, were not encouraging. In fact, the literacy rate started to stagnate and, later declined. In general, individual freedoms were curtailed across all the Middle East¹².

It was in this context that extreme Islamic groups from various regions successfully spread their particular vision of the world. Therefore, it is no

⁹ In a free translation of Pereira (2004): “*The word “terrorism” is, thus, polyssemic and is and the phenomenon that it describes has a multifaceted nature. The question about if there is only one or various types of terrorism should be answered by rejecting the dichotomy. In fact, there is both one and various types of terrorism, insofar as all of its manifestations share a basic structure, although their diversity allows us to talk about ideological terrorism, independentist terrorism, Islamic fundamentalist terrorism and even State terrorism (...)*”

¹⁰ The United Nations Convention against Transnational Organised Crime states in its 2nd article, paragraph *a*), that a criminal group comprises three or more people, and strategically acts for a certain period of time with the goal of committing one or more serious crimes or infractions established by the referred Convention, and of obtaining, directly or indirectly, any economic or material benefit.

¹¹ In the origin of this return is the doctrine of QUTB, Sayyid (1906-1966), an Islamic Egyptian ideologist, who believed Muslims should reject modernity. He advocated that a developing society would become a society of disbelievers, which led to the emergence of the takfirist current (*takfir* means to proclaim someone as a disbeliever, which equates to a death sentence). In this sense, please see Saleh (2015).

¹² From Iraq to Syria, Libya, Egypt, Tunisia, and Morocco, the situation was similar. Only the head of state was truly free and he was often a dictator.

wonder that some of the countries listed among the richest in the world frequently rank last in the rates measuring the respect for human rights, namely, gender equality, democracy, and innovation in general.

Daesh

Regarding Daesh¹³, various factors and diverse causes have been indicated as the origin of the mediatic self-proclaimed Islamic State¹⁴ phenomenon, which led the movement to present itself in the international scene as a real state.

¹³ Henceforth, referred to as Daesh. There are several toponyms pointing at the same reality – the so-called Islamic state. Among them, we can find *IS* (Islamic state), *ISI* (Islamic state of Iraq), *ISIS* (Islamic state of Iraq and Shams/Syria), *ISIL* (Islamic state of Iraq and the Levant).

¹⁴ We can summarise some points that consubstantiate the diversity of variants as being behind Daesh. We have closely followed Rogeiro (2015) at pp. 20-27. On the one hand, the disintegration of Syria and the combination of the results of the “Arab Spring” and the local civil war. On the other hand, the apprehension of light and heavy weapons belonging to Assad’s military forces by the moderate opposition groups, including weapons donated by the West. This division and disintegration of the insurrectionary groups opposed to the Syrian regime, along with the decadence within the so-called “Free Army of Syria” – the main figure of the moderate opposition to Assad’s totalitarian regime - offered an active contribution to the explosion of violence we are currently witnessing. Consequently, the permeability of the Turkish borders, facilitating logistic support in Iraq and Syria as well as the transfer of troops and war supplies, with surprise attacks and a decreasing ability of the enemy to counterattack, they frustrate any attempt to control violence. The fragmentation of the civil and political forces along with disagreements in Iraq, in view of the continuous errors in the administration of Al-Maliki (such as the dismissal of civil and military positions held by experienced Sunnis, corruption and nepotism) in the fields of defense and information services were also felt. Consequently, the marginalisation of the paramilitary groups “Children of Iraq/the awakening” by the Maliki regime, composed of the moderate Sunnis tribal militias and suppressed by Bagdad, and the infiltration of sleeping militants in Iraq’s military units who lacked any preparation and motivation to stop and win the Daesh war, and the desertion of the armed forces to join Daesh, all contributed actively to the degradation of the situation. The social and administrative dissatisfaction in the north-northwest of Iraq along with the creation of economic abysses in relation to some Shiites centers, as well as the increase of donations of certain regional interests in order to make stronger jihadists groups in the fight against secular power in the area, though totalitarian – for instance, the Damascus regime, which was, from the first moment, connected to the idea of organisation of Daesh. In another regional spectrum, the lack of cooperation between Turkey and the Kurd powers of Iraq and Syria assigned a wide margin of maneuver to Daesh that, on the track of security void left by the complete exit of the United States of America of Iraq, in December 2011, initiated like a decay of Kurdistan military mechanisms, centered in defensive tasks and in local public order, lacking offensive modern equipment able to break Daesh. Already the growth of new doctrines and doctrinaires in the jihadist camp came to prove truly galvanizing for the foundations of Daesh. And, still, the division in the Arab world “westernised” between United Arab Emirates (UAE), Saudis and Egyptians, on the one hand and, on the other hand, Qatar being Kuwait a type of referee came to create different understanding on the board of each zone, whether that is Daesh, whether it be as to the recommended solutions to contain their advances. The own evolution do “Arab Spring” will have lead, in most countries where the appearance of new alternative actors and disintegration of territorial units has been establish (Syria, Iraq, Libya, Lebanon). It stands out the exodus for Syria and Iraq expelled militants by the establishment of military power in Egypt; the attempt to unify “ethnic” of 70% of Sunnis from Syria and 30% of Sunnis from Iraq in a new nation (the caliphate); the simple, reductive and catastrophic message spread by Daesh is poorly

In summary, the strong internal instability in the Mediterranean African countries, the lack of control of the borders, and the conflicting behaviour of some of the Middle Eastern countries, which either condemn or support Daesh, do not fight, its growth and proliferation efficiently.

In our opinion, this limited categorisation of state is not correct. This could be a good starting point to seek the thread that will lead us to the touchstone, which could and should be, according to us, the central point in the international accountability of Daesh.

It is not enough, for us, that Daesh proclaims itself Islamic State so that, the international community recognises it automatically as a true State¹⁵.

On the 29th of June 2014, the Declaration of the Establishment of the Islamic Caliphate¹⁶ was read in public. This declaration resulted in an autonomic attribution of the condition of new State imbued with spiritual legitimation¹⁷. This created the need for this caliphate to be chaired, by a leader who will be listened to and obeyed, so that the community of believers stays united and his orders are executed; in other words, the institutionalisation of Abu Bakr as the one dynastically¹⁸ destined to be the head of Daesh, in a kind of theological foundation of its power¹⁹.

fought in the western and Arab world; the Arab inability to lead alone a coalition against DEDI, relegating the fight for USA forces above all and, in this way, strengthening the anti-Americanism. Lastly, protrudes the offensive, defensive divisive, and sometimes, paradox and contradictory action, various secret services and their indirect agents to help local elements that after having built Daesh and the roll of turkey as support in the anti-Assad movement, ally of some negligence in control of jihadist traffic.)

¹⁵ The international concept of State, as we know it today, assembles the following triad: people, territory and political power, which are the structuring elements of a state. The “people” comprises all residents of a territory, who are bound to the state by citizenship. This is a more restrictive concept of “population” and covers residents of a territory, both nationals and foreigners, since they may be citizens of a different state. In other words, according to Caetano (1987) at pp. 158-180 this is a “*human collectivity that, in order to accomplish its own ideal of justice, security and well-being, demands the implementation of apolitical power that guarantees a right that is suitable to their necessities and aspirations*”. The people that constitute the State must settle in a particular territory where the aforementioned political power is exercised in a sovereign manner, without the interference of other states. This territory includes the corresponding soil, subsoil, and airspace, and in case it has a coastline, its territorial waters. The physical limits of the State constitute its borders and in this predefined area, the supreme statal bodies will exercise their duties in a sovereign way. Territorial discontinuity is not an obstacle to defining the State. Still quoting Caetano (1987) the political power of the State is “*the faculty of a people, by virtue of its own authority (not granted by another power), establishing bodies that exert control over a territory in which they create and impose legal rules resorting to the necessary restrictive measures*”. In principle, this is a supreme and independent political power, which does not apply to Federal states and protected States. It is supreme because it is not limited by any other power at a domestic level and it is independent because in international society it is not obliged to follow rules and stands on equal terms with the supreme powers of other peoples.

¹⁶ The unabridged English text can be accessed at: http://myreader.toile-libre.org/uploads/My_53b039f00cb03.pdf

¹⁷ Since it was Allah who told the angels he would build a Caliphate on Earth.

¹⁸ Since it descends from Prophet Mohammed’s family.

¹⁹ After studying the declaration, the advisory council of Daesh concluded that, after that state had gained the necessary elements for the Caliphate by the grace of Allah, it would be a sin if

As for the territory element in our proposed definition of State, Daesh dominates a certain territory, robbed from both Iraq and Syria, and located in a geographical area now known as Siriaq. It covets the control of the mythical Levant and the vast areas of the six regional States²⁰, as the first step towards a universal Caliphate²¹. Its capital is Raqqah, in the territory known today as Syria.

Consequently, from a formal point of view, there is no bond of citizenship that unites Daesh and the people who live in the territory under its control. There are no records of these people willingly expressing feelings of belonging to the Caliphate. In theory, there is still the presumption that this type of citizenship is that of all Muslims on the planet²².

According to UN's Resolution 2170, from the 15th of August 2014, at the end of 2013, Daesh occupied twenty-two urban centers in Syria, twenty-one in Iraq, hundreds of villages, an economic infrastructure with certain characteristics and a group of six to eight million *souls*, caught in the crossfire, not to mention the alleged flame of faith.

Power – understood as an exercise of effective control of the institutions and military domination, within the occupied territories – even if practiced in a fragile, temporary or cruel way, can also be observed in this context.

In the organisation of the administrative and political apparatus there is a Council of Leaders which, in turn, controls Specialty Boards²³. These bodies are responsible for the management of finances²⁴, military operations, religious and public order observance, management of information and disinformation, national security and protection, propaganda, communications, and foreign affairs, among others²⁵.

There is also a Council for Justice, which integrates a new network of Islamic courts. There are still, several central and local political and military bodies, among others, of specialised inspection²⁶.

Muslims did not attempt to create it. The declaration questioned the whole international institutional Islamic system by declaring that, such Caliphate Declaration obliged all Muslims to pledge their loyalty and allegiance to the caliph and support him. Thus, the legality of all the emirates, groups, states and organisations is rendered null by the increasing authority of the Caliphate and the arrival of its troops to those areas. In conclusion, all Muslim citizens of the Caliphate pledge their allegiance to the caliph.

²⁰ In the height of the October 2014 events, the territory conquered by Daesh spanned from the north and northeast of Syria, with land near Aleppo, Raqqah, Tawrah, Deir el Zor, Abu Kamal, and from the West, to part of the Northwest and Center-East of Iraq, which included the cities of Mossul, Sinjar, Tal Afar, Al-Baaj, Al Qaim, Shirqat, Zowia, Awija, Baiji, Tikrit, Samarra, Al-Azim, Duluyah, Sadiyah, Jalawla, Suleiman Bek, Rawa, Kubaisah, Ramadi, Falluja, Al-Rutbath, Nukhaib, the latter on the southwest of Bagdad.

²¹ We have closely followed the description in Rogeiro (2015) at p.19.

²² According to the deliberations of the caliph quoted by Rogeiro (2015) at p.18.

²³ A type of ministries of collegiate leadership.

²⁴ It was decided to mint gold, silver, and copper coins, among others, as was the tradition in the old Mediterranean caliphates.

²⁵ We adopted the description of Rogeiro (2015) at pp. 192-200.

²⁶ Namely a Political Advisory Council composed by caliph Abu Bakr and the most remarkable figures of Daesh. The Religious Council analyses and enforces the *Sharia* (literal or fundamental Islamic law); in turn, the Military Council is responsible for military planning. At the executive level, there are still twelve ministries: the Ministry of Religious Affairs, the Ministry of Finance, the

Daesh has also adopted, its own flag: dark in colour, and featuring sacred symbols of Islam. To summarise, it should also be mentioned that no nation has ever acknowledged the self-proclaimed *Islamic State* as a true state.

Nowadays²⁷, states face enormous challenges posed by organised crime and international terrorism that, ultimately, can even jeopardise their survival as constitutional states; that is, as rightfully established legal orders based on a fundamental principle: human dignity.

Facing the potential dangers of Daesh, states have been making an effort to produce legislation including strictly preventive measures instead of disciplinary ones and long-term international resolutions and instruments²⁸.

Council of Europe Convention to Prevent Terrorism

In this context of continuous terrorism, we have witnessed the emergence of prevention and counter-terrorism policies, which, frequently end up undermining the humanist, democratic and free foundations, upon which the pillars of the contemporary societies were built.

Since the implementation of the Treaty of Amsterdam, the European Union has developed as part of its political construction the continuous interstate practise of creating a space for freedom, security, and justice. In fact, following the adoption of the Treaty of Lisbon, this is one of the EU's fundamental goals stipulated in article 3 of the TEU, and proceeding from the establishment of the internal market.

The establishment of this common European space has inevitably resulted in the states rejecting some of the prerogatives that were traditionally part of the core of its sovereignty, and which were accepted in return for the trust they placed in one another as well as in the institutions of the European Union.

Due to its nature or context, terrorist acts aim, above all, to seriously intimidate a certain population, or unfairly force a government or an international organisation to perpetrate (or not) any act, or even severely disturb or destroy the political, economic or social structures of a country or an international organisation.

In this context, the Council of Europe Convention to Prevent Terrorism was adopted in Warsaw on the 16th of May 2005 and approved by the Portuguese Parliament Parliamentary Resolution 101/2015 from the 23rd of July. This Convention does not apply if the infractions foreseen in articles 5, 6, 7, and 9

Ministry of Regions, the Ministry of General Administration, the Ministry of Women and Orphan Affairs, the Ministry of Social Affairs, the Ministry of Logistics and Supplies, the Ministry of Communications and Resources, the Ministry of Prison Services, the Ministry of Oil, and also a Ministry that coordinates the media structure as well as a sort of Ministry of Social Equipment.

²⁷ In this matter, we followed the doctrine of Gouveia, Jorge Bacelar (coordination), "Estudos de Direito e Segurança", Vol. II, Almedina, 2012, namely the text by Francisco Borges, "Organised crime and judicial cooperation in criminal matters in the European Union: general terms".

²⁸ Such as the investment in education as well as the use of more aggressive means at its disposal.

are committed within the territory of one single state, or if the presumable author is a citizen of that state and is found in such territory, or if no other state has grounds for exercising its power, in terms of the provisions in no. 1 and 2 of article 14, considering that the provisions in articles 17, 20, 21, and 22 apply to those situations.

The Convention stresses the role of the signatory States, recommending the implementation of national prevention policies²⁹ without, however, harming or curtailing freedom of speech, freedom of association and freedom of religion³⁰.

In the light of the Convention, these incriminations constitute a particular form of malice since they are addressed to the practice of an infraction considered terrorist. The crimes of public incitement to the practice of terrorist infractions, and of recruitment and training for terrorism are, explicitly, formal crimes, regardless of their consequences³¹. The accountability of corporate bodies is also expressly foreseen.³²

The discrimination clause in article 21 of the Convention is also particularly relevant for human rights. It prevents or mitigates a possible obligation of extraditing individuals in all cases in which the said extradition may be based on racial, religious, ethnic, and political discrimination, or in which the situation of the extradited may be hampered by any of these reasons³³. Cases of possible subjection to torture, punish mentor inhumane treatments, as well as death penalty and life sentence³⁴.

This European legal instrument brings to discussion the issue of choosing between the fight for security and the fight against terror in a democratic context based on the respect for human rights.

Strictly speaking, these realities are not necessarily antagonistic, but they should be viewed as complementary necessities instead; even though they sometimes may be difficult to combine, they cannot cancel each other out. We notice the Convention is receptive to the fulfillment and respect for human rights established and equally safeguarded in the most prominent international legal instruments, where we can find the necessary context for an effective response to terrorist attacks.

The defense and prevention strategy to fight terrorism will not be successful if anchored only on a Machiavellian strategy or grounded on the following talionic maxim: *the means justify the ends*. In fact, we also risk becoming the same source of terror we intend to fight.

Moreover, this may be one of the most devastating purposes of terrorism, since it promotes disorder based on fear in such a way that society plunges

²⁹ Namely, in article 3.

³⁰ Present in article 12.

³¹ According to the norms present in articles 5 to 8 of the Convention.

³² In article 10 of the Convention.

³³ In the words of Caiero (1998) at pp. 7 to 26, the Portuguese doctrine has been discussing the barring of extradition “*whenever the death penalty was abstractedly applicable, or, at least, whenever the alternative sentence was not already irrevocably foreseen in the legal and penal system of the State of the grant applicant (...)*”

³⁴ In accordance with articles 20 and 21.

again in a critical and apriorist void, where human beings are their own victims as well as prisoners of the selfish will of each other.

Conclusion

Presently, the Council of Europe comprises 47 States Parties, all of them signatories of the European Convention on Human Rights (ECHR), of which the European Court of Human Rights is a loyal guardian.

Throughout time, the Council of Europe has promoted the approval of more than 200 international law instruments, in the most various fields. The Convention signed in 2005 is one of those instruments that seek to enforce uniform – and, thus, effective – practices that contribute to preventing terrorism. By the time the Convention was signed, there were already plenty of legal instruments intended to fight terrorism which had been created within the same intergovernmental organisation and which the states were obliged to enforce.

The new Convention stands as a powerful instrument for the enforcement of those texts that can be found attached to it.

Considering this is a treaty – a normative and multilateral instrument that is not part of the general international law, that is, the peremptory norm and, therefore, does not follow the principle foreseen in article 8, no. 1 of the Constitution of the Portuguese Republic – the fulfillment of certain legal actions that make the Convention an integral part of the Portuguese legal and constitutional order was necessary.

The Convention requires the States Parties to adopt legal measures in order to protect and support the victims of terrorist infractions committed in their territory. These measures, which should be adopted according to the domestic law of each country, can also foresee, for instance, compensations and financial support to the victims and their families.

The Council of Europe defends, through various guidelines from different bodies, that the protection to the victims should put an end to other aspects, such as the urgent and long term assistance, the psychological support, the access to justice, namely, to criminal action, to information and protection of private and family life, its dignity and security, especially when the victims cooperate with justice.

These recommendations are especially relevant in the case of Portuguese legislation, which so far has still not developed a reasonably comprehensive framework on this subject, and should be able to improve the national legal *acquis*³⁵ regarding terrorism.

As we reach the conclusion of this text, and despite the visibly good intentions of the Convention, it appears to us that the Convention of the

³⁵ Consisting essentially of Law no. 104/2009, from the 14th of September, which approved the legal system that grants compensation to the victims of violent crimes and domestic violence, as well as Law no. 93/99, from the 14th of July (subject to amendments approved by Law no. 29/2008, from the 4th of July, and Law no. 42/2010, from the 3rd of September) on witness protection.

European Council for the Prevention of Terrorism constitutes in itself an ideological rosary, which reinforces the cooperation and the exchange of information among the signatory states— a real Intifada against terrorism. However, nations are responsible for implementing national prevention measures in accordance with article 3, while allowing for an excessive degree of substantial abstraction in the laws that each state should include in its legal system.

In the battle against the terrorist threat, not all means, especially those of investigation³⁶ and proof, can or should be validated and legitimated. The freedom of a citizen to feel safe and not threatened in their private space becomes a paramount obligation to be upheld in modern society, in which, as we know, this attack disguised as an obligation to ensure security in general becomes excessively simple.

Thus, it is necessary to assure that the right of respect for the private life is not threatened by abuses of power that are not legitimated by any purpose of maintaining the global order.

The use of invasive measures that may be applied to the victims of terrorism should be limited to the safeguarding of the rights that are paramount to preserving the health of the democracy³⁷ of a state.

Bearing in mind these circumstances and variables, the defense of fundamental rights and of democracy will necessarily be subject to a strict and rigorous observance of the principle of democratic legality, ensuring that any penal law and measure of this jurisdiction is based on facts and has the prospect of objective material proof, instead of representing mere abstractions of thought or vague suspicions.

We believe that only through the implementation of these principles within the internal definition of these European measures in the fight against modern terrorism will we guarantee an effective reality, where the value of security does not compete with the fundamental rights pertaining to the condition of being a citizen of any state.

Likewise, it complements the defense of a true feeling of security, one resulting from the respect and safeguarding of human rights.

Hence, we believe that assigning to the States Parties the unilateral ability of deciding on the extradition of a suspect of one of the crimes referenced in

³⁶ The duty to investigate does not raise particular questions about human rights. On the other hand, the rights foreseen in article 3 result from the Vienna Convention on consular relations (that ended in Vienna, on the 24th of April 1963, and was transposed into the domestic law by the Decree-Law no. 183/72). We praise the inclusion of the right foreseen in no. 5, which complements the ones from paragraphs a) and b) of no. 3, insofar as it foresees that the citizens or stateless persons living in the State Party who are “detained” in another territory, may request that the citizen be contacted and visited by the Red Cross International Committee.

³⁷ Indeed, counter-terrorist measures tend to multiply the number of arbitrary and provisional detentions, often for long periods of isolation and with no intervention of a judge. These measures can threaten many human rights and fundamental guarantees, like the prohibition of torture and of degrading punishments and actions, the presumption of innocence, the right to freedom or to a fair trial. A reference to these rights, foreseen in the ECRH, would have been desirable, as well as an explicit reference to the provisions in article 5 of the ECRH – the “right to liberty and security” – that defines the legal boundaries on the basis of which liberty may be curtailed.

the Convention –classified as terrorism in accordance with article 21 –should be a cause for concern to the international community with regards to the effective enforcement of the letter and teleology of the Convention, particularly if we conform to the diverse domestic policies of the States Parties. Thus, more security-oriented and protective policies will be developed, possibly hampering the prevention and fight against the persecutory mission of terrorism.

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