

“WAR AGAINST TERROR”: LEGAL CONCEPT?

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С усилением террористической угрозы в разных странах мира термин «война с терроризмом» становится все актуальнее. В статье дается правовая оценка данному термину с точки зрения норм международного гуманитарного права, анализируются новые тенденции в связи с эволюцией террористических групп, рассматривается проблематика терминологических пробелов в данной сфере.

Increasing threat of terrorism around the world makes the concept of “War against terrorism” more and more disputed today. The article gives a legal assessment of this term from the standpoint of international humanitarian law, explores new trends in connection with the evolution of terrorist groups, considered the problems of terminological gaps in this sphere.

Ключевые слова: война с терроризмом; вооруженный конфликт; международное гуманитарное право.

Keywords: War against terrorism; armed conflict; international humanitarian law.

Recent terroristic attacks in Paris and Brussels forced the international community to refresh memory about the terrorist attack on September, 11 and once again use the concept of “war against terrorism”. While the international leaders use this notion as simple as “war against AIDS”, “war against poverty” [5, p. 549], the fact is that notwithstanding the social and criminal phenomenon of such definition, we should take into account the legal point of view.

The first time when the world faced “war against terrorism” was the declaration of war to the social blight – terrorism, by USA President George Bush right after 9/11. But the legal consequences were not just hypothetic. US started military invasion to Afghanistan by means of reprisals of terrorist “act of war”, as well as promised that “the war will not end until every terrorist group of global reach has been found, stopped and defeated” [12]. Such position still excuses all target killings of terrorists on the territory of different states.

The international public law examines “war” from two points of view: *ius ad bellum* (that prohibits and exceptionally authorizes the use of force) and *ius in bello* (the use of force within the armed conflict, regardless the cause of this conflict) [17]. No matter the legitimacy of the use of force (e.g. as legal act of self-defense according to article 51 of United Nations Charter), the laws on how force may be used apply equally to all parties of the conflict. All in all, we cannot ignore the fact that the war is declared but no one knows who the parties are, where the battlefield is and what we are fighting for. To answer these questions we need to study the nexus of “terrorism” with *ius in bello*, in other words with international humanitarian law (IHL).

IHL substitutes the vernacular “war” to legal “armed conflict”. While Geneva Conventions of 1949 and Additional Protocols of 1977 abstain from the description of “armed conflict”, International Criminal Tribunal for the Former Yugoslavia in Tadic case defined it as “situation of the resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state” [14].

The author joins Gabor Rona [4], Marco Sassòli [17], Hans-Peter Gasser [5] and other western IHL experts in the opinion that if “War against terror” is a legal concept, it should fit to one of the types of armed conflicts: international or non-international.

However, the majority of articles, dedicated to this topic came out after the terrorist attack to the World Trade Center, but we cannot ignore the fact of evolution of the concept “War against terror” from Al Qaeda to Islamic State of Iraq and Syria (ISIS): in 2001 only USA was on the war-path against terrorists, but now, in 2016, all international community is involved in fight against terrorism and modern terrorist organizations performs a real part of the conflict.

We will first analyze the classic situations when the “War against terrorism” is manifested in armed conflicts and is governed by the norms of the Geneva Conventions of 1949 and the Additional Protocols of 1977 that classifies two types of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC) [4]. After that the author will show a fresh approach to armed conflicts applied to terrorism.

INTERNATIONAL ARMED CONFLICT AND “WAR AGAINST TERRORISM”

The rules of international law applicable to IAC are contained in Four Geneva Conventions of 1949 and First Additional Protocol of 1977. The scope of application of IAC is limited by article 2 common to Four Geneva Conventions stipulating that IHL “applies to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them” [6]. It means that IAC can exist only when two or more states are parties of this conflict. When we talk about terrorism we definitely define some terroristic group that is surely not a state.

Nevertheless we cannot blink the fact that sometimes the actions of terroristic group can be attributed to a state. Attribution to a state may occur either because the force is used by its own armed

forces or when terroristic group acts under effective or global control of a state [3], which means that when the state controls or directs terrorists who attack another state, therefore commits armed attack and is automatically in IAC [17]. Such groups must comply with four minimum cumulative conditions of combatants, such as be under responsible command, have recognizable distinctive sign, carry arms openly and conduct operations according to IHL [18]. This could be the case of Afghanistan when many politicians and lawyers assign Al Qaeda's terroristic attack to Taliban regime [17]. However while autonomous terroristic groups do not belong to any state it means that there are no identifiable parties and there cannot be an IAC according to IHL.

NON-INTERNATIONAL ARMED CONFLICT AND "WAR AGAINST TERRORISM"

Hostilities that do not qualify as IAC may be qualified as NIAC that raises two issues: 1) when the situation meets the criteria in order to amount to an armed conflict of non-international character and 2) when every conflict not classified as IAC is perforce a NIAC [17].

The rules applicable to NIAC can be found in common article 3 to Four Geneva Conventions of 1949 and in Second Additional Protocol of 1977 [4]. The main criteria, indicated in Protocol, are the following: a) territory of one state b) between its armed forces and dissident armed forces or other organized armed groups c) which are under responsible command and d) exercise control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. Third article to Four Geneva Conventions of 1949 establishes smaller requirements to call conflict "non-international" (e.g. article 3 takes away territorial control as criteria) and generalize the minimum level of humanity within the armed conflict. While hypothetically there can be the situation when transnational terroristic group acts on the territory of one state, controls territory and shows violence towards the official government of the state, can we call it "War against terrorism"? In the opinion of the author it will be just a NIAC under Second Additional Protocol and no matter who is the non-governmental force: guerrillas or terrorists, like it was between Russia and Chechen groups, Turkey and Kurdish groups, Somalia and Al Shabaab and like it is now between ISIL and Syria and ISIL and Iraq [18].

Another abovementioned situation is when every armed conflict not classified as international is perforce a non-international. Such issue was analyzed in the Hamdan v. Rumsfeld case in US Supreme Court. It concurred with the US government view that the conflict with Al Qaeda was not an IAC [13, p. 283]. In particular, Court stated that the procedure of establishment of military commissions (that are responsible for terrorist's sentences) violates common article 3. Court also stipulates that the term "conflict

not of an international character" can be used and used in this case in contradistinction to a "conflict between nations" that is IAC [7]. Moreover the International Court of Justice in Nicaragua case also confirms such opinion and fixes common article 3 as "mini convention" applicable in all situations of armed conflict [4] and according to the decision of Special Court for Sierra Leone "non-state parties to an armed conflict are also bounded by the norms of IHL as well as state parties" [8]. It means that when the state fights a non-state armed group abroad, this state is still bound by Article 3 common to Four Geneva Conventions of 1949, and in some particular cases we can qualify the conflict between the state and non-international armed group as NIAC.

OTHER ISSUES RELATED TO THE LEGAL CONCEPT OF "WAR AGAINST TERRORISM"

Although in some cases the concept of "War against terrorism" can be interpreted in the context of international and non-international armed conflicts there are still different issues and difficulties.

We already mentioned that there can be the legal notion of "War against terrorism" under the qualification of the conflict that helps us to define party of the conflict and applicable legislation, but we didn't examine the question of "acts of terror" that are committed during the recognized armed conflicts and the existing legal instruments that criminalize such activities that arise from Geneva Conventions of 1949 and First Additional Protocol of 1977 [19]. IHL does not define "acts of terror" and only prohibits to "spread terror or commit acts of terror against all persons who do not take a direct part in hostilities" (art. 33 of 4 GC, art. 51 (2) of IAP, art. 13(2) and 4(2) of 2AP). Such activities are prohibited as for combatants in IAC and for parties of NIAC [11, p. 865]. Moreover international law also criminalizes terrorism in armed conflict. For example, in Galic case International Criminal Tribunal for the Former Yugoslavia called "terrorizing the civilian population" a war crime [15]. Nevertheless, Rome Statute of International Criminal Tribunal does not list "act of terror" as war crime or crime against humanity [2].

It cannot go unnoticed that there is some confusion between the concepts like "act of terror", "terrorism" and "war against terrorism" that leads to other difficulties in the legal qualification. To the present time there is an absence of a comprehensive legal definition of terrorism in spite of 13 international conventions concerning this social problem. These treaties define nearly fifty offences, including ten crimes against civil aviation, sixteen crimes against shipping or continental platforms, a dozen crimes against the person, seven crimes involving the use, possession or threatened use of "bombs" or nuclear materials, and two crimes concerning the financing of terrorism. There is a tendency to consider these treaties as establishing a sort of evolving code of

terrorist offences [11, p. 855]. Beyond that, in 1996 UN General Assembly established an Ad Hoc Committee charged with negotiating a draft UN Comprehensive Convention on International Terrorism [20]. The Convention proposes the definition of terrorism as “an offence when person, by any means, unlawfully and intentionally, causes (a) death or serious bodily injury to any person; or (b) serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or (c) damage to property, places, facilities, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act”. But unfortunately it also excludes the terroristic activities of the parties during an armed conflict from the scope of application of the Convention and then does not give any chance to “War against terror” as legal notion and only defines the situations that are happened outside the armed conflict [16].

FRESH APPROACHES RELATED TO THE LEGAL CONCEPT OF “WAR AGAINST TERRORISM”

Apart from the qualification of the conflict and absence of legal definitions, there are some more issues and difficulties related to the global “War against terrorism”, such as the question of adequacy of IHL norms to the phenomenon of terrorism. We would like to present some new points of view related to the concept of “War against terrorism” and armed conflicts.

First, author beliefs that “War against terrorism” is measured as asymmetric warfare because of unbalanced parties, methods and victims. It is impossible to say, that such kind of warfare is new and is specific only for terroristic attacks, it is common feature of the majority of contemporary conflicts [20]. Nevertheless, the issues of asymmetric, hybrid or proxy warfare are still in “grey zone” of international law and demand further examination.

Second, some states (like USA) call period post 9/11 is a “new kind of war” – global war against terrorism that can be fought on “different battlefields” and because of the fact that IHL does not correspond to the contemporary types of conflicts it can be solved by the will of states [12]. Such position can also justify target killings of believed terrorists anywhere – e.g. it should be lawful to kill an ISIS suspect on the streets of a peaceful city like Hamburg or Sidney [9].

Third, some international lawyers suggest that “War against terrorism” cannot be neither in the scope of application of international armed conflicts, not in the scope of application of non-international armed conflicts and creates a new situation of “transnational conflicts” against terroristic groups such as Al Qaeda and ISIL that are presented as a global network active

in numerous states with a highly effective recruiting system. It is more significant especially for the situations when NIAC extends into neighboring states or when terroristic group is separately engaged in the situation of NIAC in other states, some third state starts military operations against this group, and then the same group commits act of terror on the territory of some other state [18].

Despite the fairness of some of the abovementioned points of view the author cannot be fully agreed with them. There is a variety of legal instruments, including within the IHL that can classify the terroristic act as act of war or as act of violation of national legislation in peacetime. Moreover new legal regimes could not only stir a lot of existing problems in this sphere, but also should have the legal base that is not the case as we can see from the variety of conventions on terrorism.

In conclusion we should stress the most essential points of this article, concerning the legal notion of “War against terrorism”.

1. The concept “War against terrorism” can be considered from legal, as well as from social, criminal and political point of view and is evolving nowadays.

2. There cannot be “armed conflict against terrorism” – under IHL it can only be the conflict between states (IAC), when the behavior of terroristic group can be attributed to the state, and conflict between state and non-state armed group on the territory of one state (NIAC).

3. In some cases common Article 3 for Four Geneva Conventions of 1949 can be applicable for the situations of armed conflict between one state and non-state armed group of other state (e.g. USA, Russia and ISIS).

4. IHL in its turn prohibits “acts of terror” that are committed during the armed conflict and criminalizes such actions.

5. There is no unified legal definition of terrorism, which is caused many confusions and difficulties of interpretations.

6. Some countries believe that contemporary IHL is not applicable for the “War against terror” and then create some new legal orders with their own rules (such as target killings of terrorists).

At long last, ex’s terrorist groups are qualitatively different from the kind of “modern” terrorist networks like Al Qaeda and ISIS, first of all because before now such groups took actions within the border of one state, but today this is not the case and it concerns all states and then requires long-delayed response from international law.

Particularly, IHL should more actively address up-to-date challenges. Even if there is no need to change Geneva Conventions, there is still a necessity to cover “white spots”, like the dogmatic concepts of asymmetric, hybrid and proxy warfare that are partly applicable for “War against terror”. There is no doubt that the adoption of new Additional Protocol, explaining above-mentioned issues, will take a lot of time and coordination between states; for now it can

be developed within the International Committee of Red Cross mandate that have a good history of non-mandatory documents that after years become a base for new obligatory Conventions and Resolutions, like “The Arms Trade Treaty” or “The Montreux

Document” on Private Military Companies. We believe that “War against terrorism” is the right possibility to cover all rents and gaps in IHL and get along with contemporary needs of international community.

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