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THE CHALLENGES OF THE “GLOBAL WAR ON TERRORISM” IN RELATION TO INTERNATIONAL LAW COMMITMENTS OF STATES

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The core challenging areas in the implementation of the states' commitments in connection with the “global war on terrorism” are considered: legal, operational and humanitarian. The legal qualification of the “global war on terrorism” and its regulation in international are studied. The key trends of modern counter-terrorism policies and practices of their realization are analyzed. The issues of the influence of the “war on terrorism” on the activities of the humanitarian sector are investigated. The main challenges of the “global war on terrorism” in relation to international humanitarian law and international human rights law commitments are formulated and ways of their solution are proposed. Of particular interest is the study of the impact of the “global war on terrorism” on the implementation of humanitarian operations, since such studies have never been published in the post-Soviet academia.

Key words: global war on terrorism; humanitarianism; armed conflict; international law commitments.

ПРОБЛЕМНЫЕ АСПЕКТЫ «ГЛОБАЛЬНОЙ ВОЙНЫ С ТЕРРОРИЗМОМ» В СВЯЗИ С МЕЖДУНАРОДНО-ПРАВОВЫМИ ОБЯЗАТЕЛЬСТВАМИ ГОСУДАРСТВ

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Рассмотрены основные проблемные сферы реализации обязательств государств в связи с «глобальной войной с терроризмом»: правовая, операционная и

гуманитарная. Изучены правовая квалификация «глобальной войны с терроризмом», ее регулирование в международном праве. Проанализированы ключевые тенденции современных контртеррористических политик и практик их реализации. Исследованы вопросы влияния «войны с терроризмом» на деятельность гуманитарного сектора. Сформулированы основные проблемные аспекты «глобальной войны с терроризмом» в связи с обязательствами в сфере международного гуманитарного права и права прав человека, и предложены пути их решения. Особый интерес представляет изучение влияния «глобальной войны с терроризмом» на осуществление гуманитарных операций, т.к. подобные исследования не публиковались ранее в постсоветском пространстве.

Ключевые слова: война с терроризмом; гуманитаризм; вооруженный конфликт; международно-правовые обязательства.

Regular terroristic attacks force the international community revert to the consequences of 9/11 act and address the concept of the “Global war on terror” (hereinafter – GWOT). While the international leaders use this term in the same breath as ‘war against AIDS’ and ‘war against poverty’ [1, p. 550], the fact is that the social, economic and security view of the problem should be considered along with the legal framework.

The first time when the world faced the GWOT was the declaration of war by the USA President George Bush to the social phenomenon – terrorism, as an outcome of the attacks on September 11, 2001. The legal consequences were more than down-to-earth: the 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’ [2]. Such quasi-legal position still leads to the ongoing counterterrorism (hereinafter – CT) measures, which, among others, include humanitarian interventions, ‘target killings’ of people suspected in terrorist attacks, as well as the changing environment and securitization of the whole humanitarian sector.

Contemporary wars are significantly different from those a century ago. The composition of the participants in the hostilities expanded, concepts such as ‘asymmetric wars’ and ‘proxy wars’ appeared, and the qualification of the conflict was complicated by the participation of armed non-state actors. In addition, a few governments after 9/11 are in a state of the GWOT, which also needs a separate assessment from legal and humanitarian points of view.

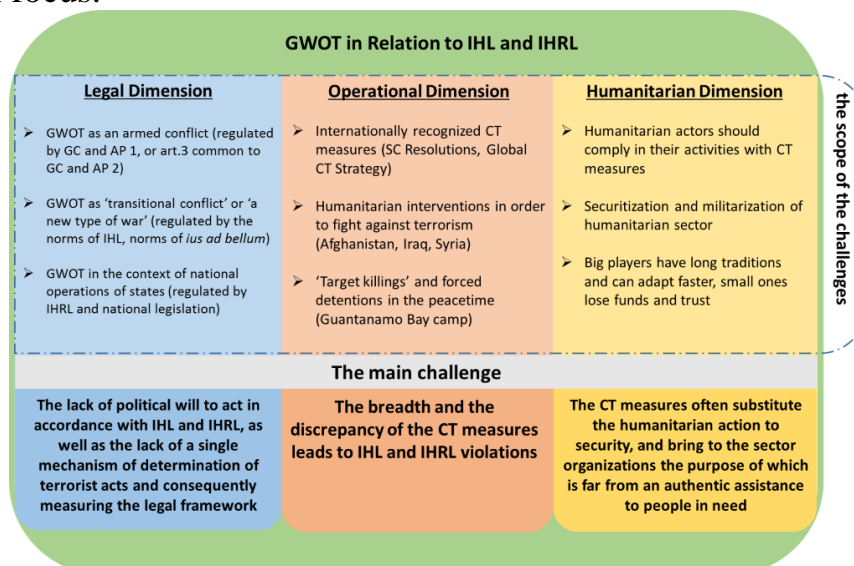
Despite the long history, there is no internationally accepted definition of terrorism. There are 19 universal conventions on terrorism, but only certain of them determine specific responsibilities for States in confronting terrorism, and the relevant SC resolutions refer to it [3]. The lack of a common definition, as well as the various counterterrorist strategies of States determine the breadth, and often impunity of actions in this area. Thus, measures

directed against persons suspected of terrorism often serve as a justification for humanitarian interventions, ‘targeted killings’, forced detentions.

For humanitarian assistance, the CT strategies also have several qualitative and quantitative consequences. The traditional humanitarian principles of universality, impartiality and neutrality face numerous constraints to the relief operations, that, among others include militarization and securitization of humanitarian relief, gaps between small and big humanitarian actors and safety of aid workers.

Analysis of Challenges

The GWOT raises the number of issues that the international community and certain States are trying to address through the CT measures, taken on international, regional and national level. Such measures should be questioned on the compliance with international law, in particular international humanitarian law (hereinafter – IHL) and international human rights law (hereinafter – IHRL) commitments, as well as must reflect humanitarian focus.



Legal Perspective

The international public law considered the ‘war’ from two angles: as *ius ad bellum*, that prohibits and exceptionally authorizes the use of force, and as *ius in bello*, that stipulates the use of force within the armed conflict, regardless the cause of this conflict [4]. The norms of *ius in bello* i.e. IHL equally apply to all parties of the conflict regardless of the legitimacy of the use of force, even in the case of a legal act of self-defense according to article 51 of the UN Charter, or the use of force with the consent of the State according to the Draft articles on Responsibility of States for Internationally Wrongful Acts.

Core IHL conventions substitute ‘war’ to ‘armed conflict’. At the same time GC and AP abstain from the description of ‘armed conflict’ and the

concept gained further interpretation in the practice of courts and tribunals. Notably, the International Criminal Tribunal for the Former Yugoslavia in 1999 in Prosecutor v. Dusko 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’.

The approach of Gabor Rona, Marco Sassòli, Hans-Peter Gasser and other western IHL experts confirms that if the GWOT is a legal concept, it should fit to one of the types of armed conflicts. *International armed conflict* may happen between the state and the terrorist group, whose behavior is assigned to the oppositional government and is regulated by all four Geneva Conventions, Additional Protocol 1 and customary IHL norms. *Non-international armed conflict* occurs on the territory of one state between the government or/and supporting the government States and the terrorist group, exercising effective control over part of the territory, and is regulated by common article 3 to GC, AP 2 and customary IHL norms. The practice of international tribunals, as well as national ones, e.g. Hamdan v. Rumsfeld case in US Supreme Court, confirms the doctrinal approach and argues that IHL norms are applicable to the fight against terrorist groups and causes legal consequences relevant to the type of conflict.

In the meantime the recent studies illustrate the evolution of the GWOT concept from Al Qaeda to ISIS: in 2001 only USA was on the war-path against terrorists, but now, in 2020, a lot of countries are involved in the fight against terrorism, and ISIS is recognized by some States as a party to the conflict. Consequently, certain international lawyers suggest that the GWOT can be neither in the scope of application of international armed conflicts, nor in the scope of application of non-international armed conflicts and creates a new type of ‘transnational conflicts’ against terroristic groups such as ISIS that are presented as a global network active in numerous States with a highly effective recruiting system [5].

From the IHRL perspective, the international community has committed to adopting measures that ensure respect for human rights and the rule of law as the fundamental basis of the fight against terrorism, through the adoption of the United Nations Global Counter-Terrorism Strategy by the General Assembly in its resolution 60/288 [6]. This and other international documents, like, e.g. Security Council Resolutions S/RES/1456 (2003), S/RES/1624 (2005) require States to take the measures to combat terrorism that are following all their obligations under international law. Accordingly, the fundamental rights and freedoms, many of which are non-derogable, like right to life, right to a fair trial, freedom from torture and other cruel, inhuman or degrading treatment or punishment, stipulated in the Universal Declaration

on Human Rights and International Convention on Civil and Political Rights, and other core human rights conventions, are applicable to any individual – whether a victim or a perpetrator – in need of protection.

Operational Perspective

Since 1963, the international community, leading by the UN, created a CT framework that is comprised of 19 universal legal instruments that deal with certain types of terrorism [7], and provide for States the grounds to establish the relevant CT jurisdiction, and create the basis for legal cooperation and assistance. CT approaches were strengthened after 9/11 by the numerous SC resolutions, that expand the capacities of States in the fields of prosecution and punishment of the financing of acts of terrorism (S/RES/1373(2001)); criminalize the travel, attempted travel, funding and other facilitation of such ‘travel for terrorist purposes’ (S/RES/2178(2014)), etc. Beyond that, the UN Global CT Strategy was adopted in 2006 and represents a joint strategic and operational approach to enhance national, regional and international efforts to fighting terrorism [8].

Measures adopted could be divided into the categories, that allow the States and some other international actors to have certain discretion in their CT activities: (1) security measures, (2) legislative measures, (3) preventive measures, including addressing the root causes of radicalization [9 p.122]. The implementation of the third CT strategy (preventive measures) has led to several actual humanitarian interventions or the ongoing intentions to invade the territory of the other state, that are justified by the CT measures: in 2001 the USA intervened Afghanistan to fight Taliban, in 2013 British Parliament was considering the intervention in Syria to fight ISIS, etc.

Such actions create confusion around the legal framework of humanitarian interventions, as well as the consequences of so-called by the US ‘new type of war’. Thus, CT preventive measures undertaken by the United States resulted in the creation in 2002 of the Guantanamo Bay detention camp located in Cuba, that has been criticized more than once by the international community in connection with its own legal status, the legal status of the detainees and human rights violations occurring there. USA bypasses compliance with the GC justifying the detention and further actions by the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities [10]. The international organizations and some States challenge such position and argue that even if the IHL does apply only to the persons who have fallen into the hands of the United States during an armed conflict, the IHRL still applies to other persons detained in Guantanamo under the jurisdiction of the US [11].

One more preventive strategy taken in the context of the response to the GWOT is the ‘target killings’, manifested in shootings of foreign fighters in

the Paris and London streets, or drone attacks on terrorists in Pakistan and Yemen. The question of the compliance of the ‘target killings’ with IHL and IHRL was addressed to the Israeli Supreme Court with the conclusion that members of Al Qaeda could be targeted only because they lost civilian status through their membership in a terrorist organization, meaning that they are performing the function of combatants and shall be considered as military objectives [12]. While some have supported this position, many others have criticized it, arguing that the GWOT is beyond the IHL provisions, and ‘target killings’ should be considered under IHRL and only as a proportionate response to the terroristic threat.

Humanitarian Perspective

The GWOT has significantly deepened the links between security and humanitarian aid, leading to some challenges and changes in the humanitarian sector. It is clear from various armed conflicts that CT measures affect the ability of impartial humanitarian organizations to carry out their activities and have even prevented to deliver assistance effectively to beneficiaries, either because of restrictions on contacts with certain stakeholders on the ground, or because of prohibitions on providing material support to listed groups or individuals [13, p.152]. As an attorney with Save the Children, Ellen Willmott, mentioned: ‘under [...] most recently issued regulations for Somalia [...] you can’t in fact build a well for water for a drought-stricken area because someone from al-Shabab might draw a cup of water from that well’ [14, p.164]. In 2016 in Iraq certain CT provisions prevented humanitarian organizations from implementing any programs in areas controlled by the ISIS. Consequently, humanitarian organizations were under-represented in the areas with the population in need, working only where they were allowed to [15, p.139].

In 2011, the ICRC raised this issue publicly and expressed its opinion that the CT measures should not contradict the humanitarian principles that States have supported politically or endorsed through IHL and IHRL treaties, and should not hinder impartial humanitarian organizations from carrying out their activities in a principled manner to respond to affected people in proportion to their need [16].

CT measures further contribute to the securitization of the humanitarian sector, that brought actors such as the military and private corporations into the humanitarian sphere. Moreover, it argues that although aid is not wholly subordinated to security objectives, such security interests lead to prioritization of service delivery over the needs of beneficiaries [17, p.718]. As a result of the securitization of relief, the distinction between humanitarian organizations and military-aiming companies has become more blurred, and the principles of humanitarian aid are heavily compromised. It put at risk not

only the safety of aid workers, but also their relationship with local governments, communities and people in need.

One more concern of CT measures is related to the quantity of non-governmental organizations (hereinafter – NGOs) working in the field. Certain security and preventive CT activities bring about the reduction of humanitarian assistance by small organizations, usually local ones, that are not able to follow all the restrictions due to the limited resources. Moreover, big NGOs impose their approaches in work to which local NGOs cannot always adapt. Thus, different traditions of humanitarian action within the NGO community, like the ‘Dunantist’ and the ‘Wilsonian’ are usually followed by ‘big players’ and the ‘small’ ones are left behind. For example, in Syria, many local NGOs disappeared after the intensification of the crisis, and only big NGOs and international organizations, like CARE, Médecins Sans Frontières, Save the Children and World Vision have been able to provide relevant assistance in this and many other conflict regions [18].

Conclusion

The globalization and changing geopolitical environment have modified the relations between different actors not only at the peaceful time, but also during military and anti-terroristic operations. Despite the wide range of international, regional and bilateral legal instruments, the CT strategies and traditions vary from state to state, moreover some are questioned from human rights perspective.

The international community clearly faces the need to elaborate comprehensive and uniform definition of terrorism with the aim of further implementation in the national legislation of States. Furthermore, significant changes should address operational and humanitarian angles of GWOT, and first of all consider the importance to include into the CT conventions and strategies the provisions on humanitarian principles and relief to provide an opportunity of impartial implementation of humanitarian tasks. The GWOT has additionally highlighted the difficulties humanitarian organizations face in positioning themselves within a changing framework. The humanitarian actors should now carefully assess their donors, as well as of who the recipients are and what political actors they support [19].

Thus, the lack of a comprehensive and unified vision of the international community on CT issues is affecting emerging challenges and threats. It is crucial to involve various actors, like international organizations, regional interparliamentary organizations, governmental bodies, security organizations, and humanitarian sector, in order to adequately and properly respond to emerging challenges, as well as to guarantee their compliance with international law standards.

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ПРАКТИКА КОМИТЕТА ПО ПРАВАМ ЧЕЛОВЕКА В ОТНОШЕНИИ РЕСПУБЛИКИ БЕЛАРУСЬ ПО СВОБОДЕ МНЕНИЙ И СВОБОДЕ МИРНЫХ СОБРАНИЙ

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В статье рассматриваются некоторые решения (соображения) Комитета по правам человека по индивидуальным сообщениям против Республики Беларусь, затрагивающие свободу мнений и свободу мирных собраний. Решения Комитета свидетельствуют о том, что привлечение лиц к ответственности за несоблюдение Закона о массовых мероприятиях при распространении листовок, развешивании плакатов или проведении митинга признавалось нарушением данных свобод, поскольку не соблюдался критерий достижения законной цели. Абсолютное