

Report

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Establishing a Common Position on the Anti-Terrorism Legislation of the Member States of TURKPA

*Prepared by Special Rapporteur Mr. Nizami Safarov

Report on Establishing a Common Position on the Anti-Terrorism Legislation of the Member States of TURKPA*

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I. Preamble

1. At the previous meeting of TURKPA Permanent Commission on Legal Affairs and International Relations held in Ankara on 16-19 May 2016, the decision was taken to address the issue of ‘Establishing a Common Position on the Anti-Terrorism Legislation of the Member States of TURKPA’ at the next meeting and Mr. Nizami Safarov, representative of the Republic of Azerbaijan was appointed to prepare a report on the subject.
2. This report has been prepared by the expert by providing detailed analysis of the legal regulations of TURKPA Member States, the UN Global Anti-Terrorism Strategy, the European Union's Anti-Terrorism Strategy, the other sectoral conventions of the UN and legislation of other international organizations (Council of Europe, Organization of Islamic Cooperation, The Cooperation Unit The Organization of States, Organization of African Unity, Arab League) on combatting terrorism and the protection of human rights and fundamental rights. In addition, the report also benefited from important decisions of international courts and other scientific publications on the issues related to the development of a common position of TURKPA.

II. Introduction

Terrorism, which is an important part of transnational crimes, appears as a global threat and a modern problem that worries the international community as a whole. The definition of the concept of an 'international society as a whole' comes from international law. This concept is used in Article 53 of the Vienna Convention on the Law of Treaties. According to this article: 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'¹ A similar statement takes place in Article 10 of the preamble of the International Convention for the Suppression of Terrorist Bombings of 16 December 1997. According to this article, acts such as terrorist bombing are the events that concern the international community as a whole. In this context, it is important to ensure that those accused of terrorism will be subject to criminal prosecution by the countries as a whole, in order to protect the fundamental values of international society.

The complex nature of terrorism is not only explained by the complexity of its objective and subjective components, but also by the fact that it affects a significant part of the relevant areas of legal protection, particularly international peace and security, the country's national security issues, human rights and fundamental freedoms. In this sense, terrorism is defined as a transboundary crime because it threatens the values that constitute the basis of the international society.

In today's world, the increasing tendency of terrorism is largely due to the continuous and numerous terrorist acts of criminal organizations such as Al-Qaeda, the Islamic State of Iraq and Syria (ISIS) as well as the people, groups, institutions and organizations associated with them. They do all these actions to kill innocent people, to cause suffering to others, to harm property and most importantly to destabilize the order.²

The widespread use of new information and communication technologies increases the extent of terrorism and causes serious losses. In particular, the internet is frequently used by terrorist organizations to recruit militants and personnel, to carry out terrorist acts and to finance, plan and prepare these actions. In addition, the use of new technological developments as a tool in committing crime has led to the emergence of the new concept of 'cyber terrorism', which constitutes the dangerous convergence of cyber space and terror. Cyber terrorism can be described as actions taken by using computer networks to damage the infrastructure of the state, security, energy, transport, life support systems and other important areas.

Although terrorism is not listed among 'the most serious crimes' in international criminal law the such as genocide, crimes against humanity, war crimes and assault crimes enshrined in Article 5 of the Statute of the International Criminal Court; the first step that should be taken is to ensure that terrorist acts shall not be unpunished and effective prosecution of the terrorist offenses will

¹ http://www.un.org/ru/documents/decl_conv/conventions/law_treaties.shtml

² See: UN Security Council Resolution No. 2253 dated 17 December 2015 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/437/48/PDF/N1543748.pdf?OpenElement>

only be possible through measures to be taken at national and international level and activities to be carried out in close international cooperation.

As is the case with terrorism, the history of combatting terrorism at the international level also dates back to far past. In this respect, we can express the attempts by the League of Nations in the 1930s in making the definition of terrorism and establishing institutions equipped with the authority to punish terrorists at the international level for the prosecution of terrorists. In this context, the League of Nations adopted two conventions: ‘Convention on the Prevention and Punishment of Terrorism’ and ‘Convention on the Establishment of the International Criminal Court’, which is equipped with the necessary powers for the prosecution of the perpetrators of the crimes defined by this Convention. However, these two contracts did not enter into force since sufficient signatures could not be collected.

There is an extraordinary diversity of anti-terrorism mechanisms at the national level and it varies from country to country. However, considerable differences on national anti-terrorism legislation, various approaches at the national level in the interpretation of international anti-terrorism norms, lack of consensus on finding the best way to balance the interests by protecting fundamental rights and freedoms in the fight against transboundary crimes are factors that prevent the co-ordinated elimination of terrorist acts. In this respect, the preparation and adoption of the common position to the anti-terrorism legislation of the TURKPA Member States on the basis of the most current experience in the fight against terrorism and generally accepted international norms will be an important step in the development of mechanisms to prevent terrorist acts. Moreover, the common position can be used as a model for the development of national laws.

III. Definition of Terror

Comments:

Building consensus on the definition of terrorism is one of the most important and at the same time the most difficult problems of contemporary international criminal law. The concept of ‘terror’ was first used at the Third International Conference on Unification of Penal Law held in Brussels in 1930 and ‘the use of any vehicle capable of creating a common hazard’ was defined as a terrorist act.

Although there are a couple of conventions adopted at the highest levels of the United Nations, and other regional and international organizations (the European Union, the Council of Europe, the Organization of Islamic Cooperation, the Organization of the Islamic Cooperation, the Organization of American States, the Organization of African Unity, Arab League) in order to undertake combatting terrorism in various fields, there has not yet been a common definition of terrorism generally accepted by the international community as a whole. However, the creation and adoption of a common definition of terror, including the generally accepted actus reus and mens rea, allows it to be used as an effective model that can be adapted to national criminal law. Thus, a standard (common) or close approach to the legal definition of terror, which is different in various legal systems, can be established. This also significantly facilitates international cooperation in the fight against terrorism, particularly in the area of extradition and mutual legal assistance.

First of all, it is necessary to take into account that terrorism is considered as transnational crime and is in the same category as the crimes known as ‘core crimes’ i.e. genocide, crimes against humanity, war crimes and crime of aggression. The International Criminal Court (ICC) was established at the Rome Diplomatic Conference held on June 16-17, 1998 in order to prosecute the perpetrators of these four offenses and to ensure accountability and has begun its operations by 1 June 2002 following the official adoption of its statute.³ With regard to the Rome Statute, there are generally accepted definitions of crimes of genocide, crimes against humanity, war crimes, and crimes of aggression, rather than international terrorism, and these definitions are adapted to the national laws of ICC member states.⁴

Apart from the international ‘core crimes’, there has not been a consensus on the definition of terrorism yet. However, there have also been attempts by the international community to establish the definition of terrorism in relation to individual criminal liability in the past to strengthen the fight against transnational crime. The first attempt to formulate a legal definition of terror was made in Geneva in 1937 after the Assassination of Marseille (the killing of King Aleksander of Yugoslavia and the French Foreign Minister Barthou) on 26 October 1934 and the Convention on the Prevention and Punishment of Terrorism was adopted by the League of Nations. This Convention is signed by 24 countries.⁵ However, only India ratified this document and did not enter into force since the required number of approvals could not be found in the ensuing process. However, it should be underlined that this Convention is the first multilateral legal instrument in the fight against terrorism. More than fifty years later, in 1996, India proposed a Comprehensive Draft Convention on International Terrorism to the United Nations, and an attempt was made to define the crime of terrorism for the purpose of individual criminal responsibility.⁶ The work on this Convention project was revived after the 2001 terrorist attack in US and is currently under consideration at the UN relevant bodies. Pursuant to Article 2 of The Comprehensive Convention on International Terrorism, in terms of the contents of this Convention, ‘any person commits an offence within the meaning of this Convention if that 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, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss’.

³ 124 countries are State Parties to Rome Statute of International Criminal Court as of 1 September 2016.

⁴ See Law on human crimes and crimes against humanity (Canada, 2000), Law on international crimes and criminal court (New Zealand, 2000), Law on international criminal court (United Kingdom, 2001), Law on crimes against international law (Germany, 2002), International Criminal Court Act (Australia, 2002), International Criminal Court Act (Republic of South Africa, 2002), International Crimes (Transnational) Act (Netherlands, 2003 r.) and others

⁵ European countries that have adopted the Convention: Albania, Belgium, Bulgaria, Greece, Czech Rep. Slovakia, France, Monaco, the Netherlands, Norway, the USSR, Romania, Spain, Yugoslavia, Estonia. Other countries that have adopted the Convention: Argentina, Cuba, Dominican Republic, Ecuador, Haiti, Peru, Venezuela, Turkey, India and Egypt.

⁶ Measures to Eliminate International Terrorism. Report of the Working Group. UN Doc. A/C6/55. L2. 19 October 2000. Annex II.

The absence of a generally accepted definition of terrorism is one of the main reasons why the crime of terrorism is outside the jurisdiction of the International Criminal Court. Especially Turkey, India, Russia, Kyrgyzstan, Algeria, Tajikistan, Macedonia, Sri Lanka made efforts at the Diplomatic Conference in Rome in order to ensure that terrorism be taken to the list of crimes prosecuted by the International Criminal Court. However, the proposal was not accepted, because the lack of a generally accepted definition of terrorism and the multilevel approach of countries to the problem of terrorism would further increase the debate on the powers of the newly established international court. However, a proposal was made by Turkey, India and Sri Lanka concerning the assessment and prosecution of terrorism within the scope of crimes against humanity but was not accepted by the other delegates.⁷ Furthermore, in the Resolution E of the Reconciliation package put to voting and adopted at the Rome Conference, there is a proposal for the the examination and establishment of an acceptable definition of terrorism and drug trafficking and include at the list of crimes of the International Criminal Court at the Conference of the Parties to the Rome Statute.⁸ However, the addition of terrorism to the Rome Statute was not taken into the agenda of the First Review Conference of Rome Statute held in Kampala (Uganda) in June 2010 despite the request of Netherlands.⁹ As a supplementary comment on the subject, although the general definition of the crime of offense has not been made, by-law prepared pursuant to Articles 121 and 123 of the Statute, includes the definition of the crime of offense and the conditions of use of the powers of the Court related to this offense on the condition of acceptance by the International Criminal Court. This regulation is in accordance with the relevant regulations of the UN Charter. Such a method was actually applicable to terrorism but this issue was not supported by the countries of the Rome Statute.

Thus, even though the universal definition of terrorism has not yet been made, there are various definitions of this crime in local legal systems. For example, there is such a definition at the Anti-Terrorism Convention of the Arab League (1998), the Convention on the Prevention of Terrorism and the Fight against Terrorism of African Union (1999), the Convention on the Cooperation of the Commonwealth of Independent States dated 4 June 1999 on Combating Terrorism, The Convention of Organization of Islamic Cooperation dated 1 July 1999, Shangai Convention on Combating Separatism and Extremism (2001), Council of Europe's Anti-Terrorism Convention of 13 July 2002, Convention on the Fight against Terrorism of the Organization of American States (2002) and Convention on Combatting Terrorism of Gulf Cooperation Council (2004).

Many definitions of terrorist acts have been used in certain international legal documents in a number of sectoral conventions adopted by the UN. In particular, 'Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents' dated 14 December 1973, 'International Convention Against the Taking of Hostages' dated 17 December 1979, The International Convention on the Prevention of Terrorist Bombings dated 15

⁷ 'India, Sri Lanka and Turkey proposal regarding article 5', UN Doc. A/CONF.183/ C. 1/L.27/Rev.1

⁸ UN Doc. A/CONF. 183/10.

⁹ Assembly of State Parties to the Rome Statute of the International Criminal Court, 8th Sess. at Annex II, 40-51, I.C.C. Doc. ICC-ASP/8/20 (Nov. 18-26, 2009)

December 1997 and International Convention on the Prevention of Nuclear Terrorism adopted on 13 April 2005 and the relevant concepts in other texts can be given as examples.

In addition, we can see the attempts to define terrorism from the opinions of international courts. For example, on July 18, 2012, the Appeals Chamber of the Lebanese Special Court dismissed the petition of the Court of Appeals for its appeal of 16 February 2011 and, for the first time, issued a statement on the definition of the crime of terrorism in international law. The court interpreted the crime of terrorism according to the national laws of Lebanon and stated that the usual norms of international law were formed for peace time. The elements of this offense are: a) criminal action (eg manslaughter, kidnapping, hostage and so on); b) the purpose of creating fear and panic among the general public, or by forcing, directly or indirectly, to force national or international organizations to carry out certain actions or not to do so; c) transnational crime.¹⁰

Definition of terrorism, for the purpose of criminal liability, exist in national criminal laws of Azerbaijan¹¹, Kazakhstan¹², Kyrgyzstan¹³ and Turkey¹⁴, as well as in special anti-terrorism laws of these countries.

In many international regional conventions, as a result of the analysis of various definitions of terrorism in the UN sectoral conventions, national legislation and case-law, it is concluded that the general definition of terrorism must include the basic objective and subjective components of this crime, which may lead to the least level of discussion. Today, there is a consensus on the use of the legal concept of "terrorism" in terms of the relations of these two components in the international community.

The objective side of terrorism emerges with various facts and includes various criminal acts that cause destruction or damage to natural objects and cultural heritage, including violence, causing death or serious damage to health, or damaging various infrastructure systems. As a result of such actions, the activities of the management systems can get severely out of control, the activities of life support systems can be terminated and man-made disasters and similar events can occur. In all cases, the most important aspect of the offense, which reflects the objective side of the crime, reflects the behavior that coincides with it, and acts as a criminal offense under national law, such as deliberate serious bodily harm, kidnapping, hostage, abduction of air and sea vehicles. The most controversial component of the objective side of terrorism is the use of violence in order to carry out the act of terrorism. In this context, the concept of violence appears in various forms as the material elements of the crime (actus reus) in the definitions of terrorism, which are included in both international legal instruments and national legislation.

The subjective side of terrorism is a bit different because of its complexity, and it includes deliberateness as general subjective component as well as special intention such as the intention

¹⁰ UN Special Tribunal for Lebanon (Appeals Chamber). Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/1, 16 February 2011. Para. 85// <http://www.stl-tsl.org>

¹¹ "Anti-Terrorism Law" (18.07.1999, Article 1)

¹² "Law on the Prevention of Terrorism" (13.07.1999, Article 1)

¹³ "Law on the Prevention of Terrorism" (08.11.2006, Article 1)

¹⁴ "Anti-Terrorism Law" no. 3713 (12.04.1991, Article 1)

to intimidate the public, create fear and panic among the general public, to force public institutions or international organizations to do certain actions, or to refrain from doing so directly or indirectly.

The definition of the crime of terrorism is proposed as follows in order to create a common position taking into account the above mentioned:

Article... Definition of terrorist act

1. Terrorist act is an act committed intentionally in order to create fear and panic among the public or compel a government or an international organization to do or to abstain from doing any act and a criminal act that harms or constitutes in its nature a serious threat to harm the maintenance and security of human life, health, community security, private, public and community property or public institutions, transportation, communication and communication infrastructure systems.
2. Any person who performs above-mentioned acts in whole or in part is deemed to commit an offense or punished as an accomplice.

IV. Combatting Financing of Terrorism

Comments:

1. The fight against financing of terrorism is the main component of the coordinated countermeasure mechanism for terrorism, which is defined as a transnational crime working at the regional and international level. It is emphasized that the fight against the financing of terrorism and comprehensive preventive measures on the basis of international standards of the parties are critically important in the UN Anti-Terrorism Global Strategy (UNSCRC 60/288), which was adopted unanimously in September 2008. However, recommendations were made concerning the use of comprehensive international standards based on 40 recommendations of the Financial Working Group on Prevention of Money Laundering (FATF) on combating money laundering and 9 special recommendations introduced for combating terrorism financing, money laundering and the dissemination of weapons of mass destruction.¹⁵
2. FATF Recommendations were first prepared in 1990 in order to combat abuse of the financial system by people who launder money from drugs. Recommendations were revised in 1996 for the first time considering the developments on money laundering

¹⁵ FATF (Financial Action Task Force-) - is an international organization established by the G-7 countries (USA, Japan, Germany, France, England, Italy and Canada) in 1989 to fight money laundering and terrorism financing, determine the principles of multilateral struggle against other threatening actions as well as the integrity of the international financial system, to organize these principles, to develop standards on this issue and to establish cooperation between countries. In the annual economic summit meeting held in Paris, it was decided to establish a Financial Action Task Force (FATF) with a scale of laundering which could not be prevented only by the struggle of a country and which would function at the global level due to its function. FATF has a total of 37 members, 35 states and 2 institutions. In addition, there are 21 observers, 20 of which are organizations and one country. (See.: Consolidated FATF Strategy on Combating Terrorism Financing// <http://www.fatf-gafi.org/media/fatf/documents/reports/FATF-Terrorist-Financing-Strategy.pdf>)

mechanisms and typologies. In 2001, the FATF's powers to deal with the financing of terrorism were expanded and eight Special Recommendations were formulated on combating terrorism financing and the ninth in 2004. These Recommendations have been recognized and adopted as the international standard in 180 countries to combat money laundering and the financing of terrorism.

The FATF's 40 Recommendations on combating money laundering and 9 Special Recommendations on combating terrorism financing have been recognized as key components of the UN Security Council's 1627 (2005) resolution and the Anti-Terrorism Action Plan of the UN General Assembly 60/288 (2006). 40 + 9 Recommendations are comprehensive measures proposed for effective fight against money laundering and terrorist financing at the national level.¹⁶

3. The FATF Recommendations establish a comprehensive and consistent set of measures that countries must use to combat money laundering and terrorist financing, as well as the fight against the proliferation of weapons of mass destruction. Countries have different judicial, administrative and functional structures and financial systems, so they cannot use similar measures to combat these crimes. Therefore, countries need to adapt the FATF Recommendations, which constitute international standards, to specific conditions and situations. Recommendations must be taken within the country: identifying risks, establishing policies and providing coordination; monitoring money laundering, financing terrorism and the proliferation of weapons of mass destruction; implementation of preventive measures related to finance and other specified sectors; regulating the powers and responsibilities of the relevant authorities (for example, the police and the prosecution) and other institutional measures; increasing transparency and timely information on the bank records¹⁷ of legal entities and organizations; measures for international cooperation.¹⁸
4. International Convention for the Suppression of the Financing of Terrorism, adopted by the United Nations in 1999 and signed by 187 countries, constitutes the basis of the universal international-legal obligations related to the fight against terrorism.¹⁹

The other basis of international obligations for the Council of Europe member states on combating money laundering and terrorist financing is the 'Council of Europe Convention

¹⁶ Tackling of the Financing of Terrorism: The UN Counter-Terrorism Implementation Task Force (CTITF) Working Group Report. New York, 2009. p.5

¹⁷ See Guidance on Transparency and Beneficial Ownership (Recommendations: 24 ve 25). FATF Recommendations // http://www.eurasiangroup.org/files/FATF_docs/Rukovodstvo_FATF_Prozrachnost_i_BS.pdf

¹⁸ International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation (The FATF Recommendation) http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf

¹⁹ The Convention was ratified by Azerbaijan on 26 October 2001; by Kazakhstan on 24 February 2004; by Kyrgyzstan on 2 October 2003; by Turkey on June 28, 2002. (Source: United Nations Treaty Collections https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsq_no=XVIII-11&chapter=18&lang=en)

on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism' of 16 May 2005.²⁰

The other text related to the fight against money laundering is the 'United Nations Convention Against Transnational Organized Crime' adopted in 2000.²¹ In the Preamble to this Convention, it is underlined that transnational organized crime and terrorism are undoubtedly related to each other undertaking the laundering of proceeds from large-scale crime at the international level, 'the broadening relationship between transnational organized crime and terrorism' is also emphasized.²² In its decision dated 28 September 2001, the UN Security Council (UNSC) noting the close relations between international terrorism and international organized crime, illegal drugs, money laundering, arms smuggling and illegal transmission of nuclear, chemical, biological and fatal hazards with deep concern, thus it stressed the need for strengthening cooperation in efforts to strengthen the operation against this grave problem and to prevent the serious threat it brings to international security.²³

UNSC, with its decision number 2195 dated 19 December 2014, stressed that he was deeply concerned that the terrorists are benefitting from such crimes including the trafficking of weapons and drugs, illegal trafficking and trafficking of art, illegal natural resources trade, including gold, other precious metals and stones, minerals, natural resources, coal and oil trade, transnational criminal activities, including rape and other crimes, extortion and bank robbery, for ransom purposes. However, it was highlighted that the establishment and continuation of fair and effective criminal justice systems should be one of the main strategies for combating terrorism and transnational crime.²⁴

The UNSC, with its decision number 2253 dated 22 December 2015, underlined the need to take measures to prevent and suppress the financing of terrorism, terrorist organizations, and individual terrorists even in the absence of a link to a specific terrorist act, including from the proceeds of organized crime, inter alia, the illicit production and trafficking of drugs and their chemical precursors.²⁵ We can understand such statements in the important UN documents as pointing to potential serious threats that may arise from criminal acts of terrorist groups and general criminal organizations.

²⁰ The Convention was ratified by Turkey on May 2, 2016. (Source: Council of Europe Treaties Bureau// http://www.coe.int/ru/web/conventions/home/-/conventions/treaty/198/signatures?p_auth=pzZI6qnY)

²¹ The Convention was ratified by Azerbaijan on 30 October 2003; by Kazakhstan on 31 July 2008; by Kyrgyzstan on 2 October 2003; by Turkey on 25 March 2003 (Source: United Nations Treaty Collections // https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en)

²² United Nations Convention Against Transnational Organized Crime, 2000 <https://www.unodc.org/documents/russia/Reports/TOCebook-r.pdf>

²³ UN Security Council Resolution No. 4385 dated 28 September 2001// <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/557/45/PDF/N0155745.pdf?OpenElement>

²⁴ UN Security Council Resolution No. 7351 dated 19 December 2014 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/708/78/PDF/N1470878.pdf?OpenElement>

²⁵ UN Security Council Resolution No. 7587 dated 17 December 2015 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/437/48/PDF/N1543748.pdf?OpenElement>

There are at least two ways in which terrorists are indirectly involved in ordinary general offenses. In the first case, in the absence of other financial resources, terrorists are involved in a variety of profitable crimes in order to gain personal gain and thus provide financing for themselves and their real activities. In the latter case, in the absence of legal access routes to some of the substances and resources necessary to carry out terrorist acts, terrorists commit various offenses to provide them. Various forms of exploitation of people and general offenses, especially access to and utilization of illegal markets, are often seen as preconditions for undertaking successful terrorist acts.²⁶

It is estimated that a significant amount of financial resources have been used to stage terrorist activities, making propaganda and recruiting personnel, training and raising terrorists and providing material payments and social support.

The instruments of national law in the international legal mechanism of the fight against financing of terrorism are as follows: 1) Law of the Republic of Azerbaijan dated 10 February 2009 on 'Fighting Against Money Laundering and Financing of Terrorism'; 2) Law of the Republic of Kazakhstan of 28 August 2009 on 'Fighting Against Laundering of Illegal Revenues and the Financing of Terrorism'; 3) The Law of the Kyrgyz Republic dated July 31, 2006 on 'Laundering of Proceeds Derived from Crime and Combating the Financing of Terrorism and Extremist Activities'; Law of the Republic of Turkey dated February 7, 2013 on 'The Prevention of Financing of Terrorism'.²⁷

It should also be noted that the fight against the financing of terrorism is defined as transnational crime at the International Convention for the Prevention of Financing of Terrorism. On the other hand it is stated that 'this Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.'

By taking into account the above mentioned, the common position concerning the fight against financing of terrorism is proposed as follows:

Article ... Combatting financing of terrorism

1. The funds²⁸ or other assets of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons and utilized in financing of terrorism shall be frozen

²⁶ Handbook on Criminal Justice Responses to Terrorism. United Nations, New York, 2009. p. 29.

²⁷ Azerbaijan Criminal Code, Article 214, paragraph 1, Kazakhstan Criminal Code, article 258, Kyrgyz Criminal Code, Article 226, paragraph 1, Criminal Code of Turkey.

²⁸ Funds means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit. (International Convention for the Suppression of the Financing of Terrorism, Article 1, Paragraph 1)

2. If any person, under any circumstances, in whole or in part, provide or collect funds illegally and intentionally knowing that it will be used or intended to be used in the conduct of terrorist acts directly or indirectly commits an offense. If a person in accordance with the principles of domestic law, responsible for the management or control of a legal entity established in his country and established in accordance with his own law, in this capacity, ensures the financing of terrorism, the criminal responsibility of that legal entity continues as well. This responsibility may be criminal, legal or administrative.

V. The obligation of ‘extradition or prosecution’ (*aut dedere aut judicare*)

Comments:

The obligation to extradite criminals or to perform criminal proceedings (*aut dedere aut judicare*—either extradite or prosecute) aims to punish terrorists by making criminal liability unavoidable, and has become one of the main components of the anti-terrorism mechanism that attracts the attention of international community as a whole.

At the decision of judges (R. Higgins, P. Kooijmans and T. Buergenthal) of the *Democratic Republic of Congo v. Belgium*²⁹ case, the consensus regarding the idea of ‘perpetrators of serious crimes cannot remain unpunished’ has become flexible and the newly established international military criminal courts, contracted sanctions and the national courts continue their activities within this framework.³⁰ Among other similar obligations, ‘*aut dedere aut judicare*’ is important because it is about transnational and the most severe international crimes.

The main purpose of the *aut dedere aut judicare* obligation is to ensure that the offender does not remain unpunished in cases where the perpetrator is not returned by the country where the perpetrator is or criminal proceeding has not been initiated. In this connection, if the offender is not returned, it shall ensure that the matter is forwarded to the relevant authorities for the initiation of legal proceedings. However, this obligation does not specify what kind of criminal proceedings should be exercised or should be ahead of preference. In this context, *aut dedere aut judicare* is not

²⁹ See for details of this case: *Henzelin M.* La Compétence Pénale Universelle : Une Question Non Résolue Par L’Arret Yerodia// *Universelle Revue Générale de Droit International Public.* 2002. N 4. P. 819-854; *Boister N.* The ICJ in the Belgian *Arrest Warrant Case*: Arresting the Development of International Criminal Law// *Journal of Conflict and Security Law.* 2002. Vol. 7. N. 2. P. 293-314; *Zuppi A-L.* Immunity v. Universal Jurisdiction: The Yerodia Ndombasi Decision of the International Court of Justice// *Louisiana Law Review.* 2003. Vol. 63. P. 309-320; Wickremasinghe C. Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), Preliminary Objections and Merits, Judgment of 14 February 2002// *International and Comparative Law Quarterly.* 2003. Vol. 52. N. 3. P. 775-781; *Nelson A.* Democratic Republic of Congo v. Belgium: The International Court's Consideration of Immunity of Foreign Ministers from Criminal Prosecution in Foreign States// *New York Law School Journal of Human Rights.* 2003. Vol. 19. N 3. P. 859-868; *Winants A.* The Yerodia Ruling of the International Court of Justice and the 1993/1999 Belgian Law on Universal Jurisdiction// *Leiden Journal of International Law.* 2003. Vol. 16. N 3. P. 491-509; *Meziyayev A. B.* The case concerning the arrest warrant (the case between the Democratic Republic of Congo (hereafter Congo) and Belgium) // *Russian International Law Review.* Sankt-Petersburg, 2003. U.S. Pat. Rabinovitch R. Universal Jurisdiction in Absentia // *Fordham International Law Journal.* 2004. Vol. 28. P. 500-520; Safarov N. Prosecution of transnational crimes: universal jurisdiction against diplomatic immunity // *State and law.* 2011. N 9. C. 81-92.

³⁰ Case concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*) Judgment of 14 February 2002. ICJ (Arrest Warrant Case) Para. 51.

a judicial category. If the judicial process has started in the country of the perpetrator, this obligation is deemed to have been fulfilled. *Aut dedere aut judicare* obligation should not be considered equal to *universal jurisdiction*.

It is necessary to underline the fact that *aut dedere aut judicare* and *universal jurisdiction* are close to each other, but they do not completely overlap. Universal jurisdiction is a category of transnational judicial authority.

As noted by the UN Special Rapporteur on International Law, the universality of the prevention measure cannot be equated with universal jurisdiction or the universal competence of the courts; the universality of the measure in this context, with the fulfillment of the obligation i.e. extradition between the countries or initiation of legal proceedings, it is ensured that the offender does not go unpunished and the place called 'safe haven'³¹ is found. Thus, the dominant position at the international law, *aut dedere aut judicare* obligation, and universal jurisdiction are similar, but are literally different and non-overlapping meanings.

Another point to be looked at is that; the UN sectoral conventions in fulfillment of *aut dedere aut judicare* obligation do not regard the extradition of the own nationals of a country as an exception if it does not contradict national legislation. According to Article 11 (2) of the International Convention for the Suppression of Acts of Nuclear Terrorism, 'whenever a State Party is permitted under its national law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1 of the present article'. In general, it is important to note that the general rule of legislation of the majority of countries is in line with non-extradition of their citizens. However, there are some exceptions to this rule. The exceptions, which are encountered in the mechanisms of mutual cooperation in criminal cases, especially within the framework of the European Union, can be given as an example.

With regard to the Framework Decision of the European Council on the European arrest warrant and the surrender procedures in the Member States dated June 2002, the member states of a country, may be surrendered on condition that the conditions laid down in Article 5 of this Convention are met. For the purposes of the proceedings, in accordance with the purpose of the prosecution, where a person in a European arrest warrant is a citizen or a resident of a Member State which is undertaking the execution, the person shall be deprived of his liberty after the statement of the person has been taken, in the territory of the Member State issuing the order and it may be conditional on the extradition to the Member State which is undertaking the execution in order to carry out a binding penalty or an arrest warrant.

In particular, the widespread use of the aforementioned obligation in the contractual-legal mechanisms of the fight against international terrorism can be seen as evidence of its importance. For example, according to the UN Convention on the Suppression of the Financing of Terrorism

³¹ <http://untreaty.un.org/ilc/reports/2004/russian/annex.pdf>

(Article 10), ‘if the State Party in the territory of which the alleged offender is present does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution’.

A similar example exists in the International Convention for the Suppression of Acts of Nuclear Terrorism, dated 13 April 2005. On the basis of the requirements of Article 10, paragraph 2 of the Convention, ‘upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its national law so as to ensure that person’s presence for the purpose of prosecution or extradition’. However, pursuant to Article 11, ‘if the State Party in the territory of which the alleged offender is present does not extradite that person, then it be obliged, without exception whatsoever and, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State’.

According to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation dated 10 September 2010, ‘if the State Party in the territory of which the alleged offender is present does not extradite that person, then it be obliged, without exception whatsoever and, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State’. Similar norms exist in other conventions on counter-terrorism.

In addition to putting the obligation under the universal contracted-law level, *aut dedere aut judicare* is also implemented within the framework of regional Conventions. This is in particular related to the contracted instruments of the Council of Europe. For example, according to the Council of Europe Convention on the Prevention of Terrorism, adopted in Warsaw on May 16, 2006, if the State Party in the territory of which the alleged offender is present does not extradite that person, then regardless of whether or not the offence was committed in its territory is obliged to refer to the competent authorities to ensure that they initiate criminal proceedings within the framework of the process prescribed by their legislation. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Another regional instrument can be mentioned is the Convention on Extradition and Mutual Legal Assistance in Counter-Terrorism adopted at the Fifth Conference of the Ministers of Justice of French-Speaking African Countries (May 16, 2008, Rabat). According to this Convention, if the State Party in the territory of which the alleged offender is present does not extradite that person, then it be obliged, without exception whatsoever and, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.

This issue was also addressed atn the Draft Report of the International Law Commission (UHK) within the UN, which contains rules on acts that threaten the peace and security of humanity. In

particular, in accordance with Article 9 of the Draft Report, ‘without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17,18,19 or 20 (genocide, crimes against humanity, offenses committed against the UN staff and staff equivalent to them, military offenses) is found shall extradite or prosecute that individual’.

The UN International Law Commission stated in its Final Report on the issue of *aut dedere aut judicare* that the priority between ‘extradition’ and ‘prosecution’ will vary according to the legislation used and nature of the offense for each case.

While many regional conventions and agreements related to extradition of criminals include, in terms of content, both extradition and prosecution, more emphasis is often placed on the obligation to return (by regulating in detail) and prosecution is accepted as an alternative for preventing impunity with regard to judicial assistance. According to this model, the extradition of criminals is one of the guarantees that enable criminal competence to be effective. If the request is not covered by special circumstances or exceptions, the member state is obliged to extradite it in general, including the mandatory and discretionary grounds for refusing the request.

By taking into account the above-mentioned the common position is proposed as follows:

Article... Obligation with regard to the extradition or prosecution of terrorists

In case of the capture of a terror offender or suspect within a state territory, if the State Party in the territory of which the alleged offender is present does not extradite that person, then it be obliged, without exception whatsoever and, whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

VI. Withdrawal of Refugee Status

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Comments:

If individuals are involved in terrorist acts, they will be deprived of their right to be protected by justice mechanisms as a consequence of this situation as foreseen by international law. The deprivation of such rights also takes place at the requests of refugees involved in terrorist acts to obtain their asylum status.

This is stated in Article 1 Paragraph F of the Convention Relating to the Status of Refugees dated 28 July 1951 as follows: “The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

In line with the deprivation of certain rights stipulated at this Article, those who have the specified conditions cannot receive refugee status at the first instance during the examination of the request; and interpreted as refugee status can be revoked at the second. It is necessary not to confuse the deprivation of the right with the revocation of refugee status (in cases where the conditions required for the continuation of the status no more exist or does not deserve the status).³²

The aim of this provision is to protect the people of the receiving country from the danger of entry into the country of the refugee who has committed a serious crime (non-political crime). This also aims at providing justice to a refugee who commits a political offense or a criminal offense that is less serious. In order to apply the provisions that exclude persons from refugee status, it is required that the acts that constitute offenses should be processed while they are "outside the country of asylum" and prior to their admission to this country as a refugee. Although the outside country is usually the original country of the refugee, it is also possible for it to be any country other than the country in which it applies for as a refugee.³³

In the analysis of the 'b' and 'c' clauses of the Article 1-F of the Convention Relating to the Status of Refugees, it is seen that the terrorist acts are evaluated in the crime category they are associated with. According to the concept of *Travaux préparatoires* (Preparatory Works), exceptions set out in Article 1-F of the Convention Relating to the Status of Refugees aim at two important objectives: The first is to recognize that for those who misused the legal status given for social assistance refugee status can not be used as a protection instrument. Acts committed by the perpetrator prior to the entrance to the territory of the receiving state and those with serious criminal penalties, deprive him of international legal protection. Second, those who prepared the Convention Relating to the Status of Refugees aimed to prevent the perpetrators of acts of serious crime during the Second World War or non-political perpetrators or acts contrary to the principles and purposes of the UN from evading criminal liability.

The exceptional circumstances provided for in accordance with 'b' clause of the Article 1-F of the Convention Relating to the Status of Refugees, are based on the law on extradition and include non-political crimes only. However, it should be taken into account that the contemporary treaty law does not include the definition of political crimes. The point in determining whether an action constitutes a political or non-political crime is to determine the nature and purpose of the action in question, i.e to determine whether it is committed to with political motives or only for personal reasons or for gaining profit. At the same time, there must be a close and direct causal link between

32 According to Article 1-C of the Convention Relating to the Status of Refugees, 'this Convention shall cease to apply to any person if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; (6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence'.

33 Handbook on Procedures and Criteria for Determining Refugee Status (under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees). — K. : BAITE, 2013. C. 38.

the crime committed and the political objective whose existence is claimed. In order to be considered a political crime, the political nature of the actions must be more pronounced than its ordinary qualities. For the purpose of the nature of the actions to be consistent with the aim, for example, for the political purpose of an action, the political elements of this action should be greater in proportion to the other elements. The acceptance of political character becomes extremely difficult if the committed crime reaches the level of atrocity³⁴. In general, in all cases, the requirements of Article 1-F severely restrict asylum, which is a significant social humanitarian need, and should be used with caution, avoiding the broad interpretation of this article.

On the basis of the provision for the abolition of the status, a balance must be established between the nature of the illegal act which is assumed to have been committed by the perpetrator and the fear of possible persecution. In this context, if the person's fears about the severe persecution are not unfounded, that is, his life and his freedom are under threat, then in order to be able to apply the regulation concerning the withdrawal of his status, the crime committed must be very heavy. If the fear of persecution is less scaled, the nature of the crime or the crime committed should be examined to see if the asylum seeker has escaped the punishment of the crime he has committed and whether his tendency to commit a crime outweighs the well-intentioned refugee character.³⁵

Furthermore, in accordance with Article 33 of the Convention Relating to the Status of Refugees, 'no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'. According to the non-refoulement principle, no asylum seeker can be deported from the country of asylum to the territory where life, liberty or physical security may be in danger (expressing responsibility for danger). This principle has jus cogens status and is binding on everyone including those states who are not a party to this Convention. The principle of non-refoulement is a compulsory protection measure against forced repatriation and constitutes the heart of refugee law and perhaps the most important of the legal norms in this area. There are a number of conventions in international law that include provisions to support and strengthen the principle of renunciation of forced extradition. For example, Pursuant to Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment dated 10 December 1984, 'no State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'. However, paragraph 1 of Article 33 of the Convention Relating to the Status of Refugees cannot be applied for 'whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'. Here, the principle of non-refoulement prohibits the return or repatriation of the refugee and does not relate to removal of refugee status, as different from Article 1-F.

The two legal concepts (article 1-F regarding the withdrawal of refugee status and the non-refoulement) have two different legal consequences. Article 1-F reflects the requirements for obtaining refugee status and for possible criminal responsibility for non-political offenses.

³⁴ Ibid.

³⁵ Ibid.

Paragraph 2 of Article 33 on the other hand concerns those received refugee status and reflects the impact of the refugee on the country and community of that country. On the basis of the principle of non-refoulement, the latter prohibits refugee protection in terms of implementing measures to be taken in terms of the security of the receiving country.³⁶

In line with the clause 'b' of the Article 1-F of the Convention Relating to the Status of Refugees, in almost all national legislation, acts of terrorism are seen as serious crimes. Specifically, Azerbaijan Criminal Code, by taking into account Articles 15.4³⁷ and 15.5³⁸, defines terrorism as the most severe and very serious crimes with the lengthiest prison sentences (Article 214).

According to the Criminal Code of the Republic of Kazakhstan (Article 11, paragraph 5), the maximum length of imprisonment of 20 years and the deliberate criminal acts are serious offenses. According to the same law, the criminal offenses with the minimum duration of imprisonment for 20 years, with life imprisonment or capital punishment (Article 11, paragraph 1) are very serious (delinquent) crimes. Considering the length of imprisonment in article 225 of the Criminal Code of the Republic of Kazakhstan, the acts of terrorism are defined as severe or very serious crimes.

According to the Criminal Code of Kyrgyzstan (Article 12), the deliberate criminal offenses with the duration of imprisonment of at least 5 years and up to 10 years are serious crimes. According to the same law (Article 13), criminal offenses with 10 years of imprisonment, with life imprisonment or capital punishment, are the most serious crimes. Terrorist acts are defined as severe or very serious offenses, given the length of imprisonment terms referred to in Article 226. Crimes in this category include the financing of terrorism (Article 226 paragraph 1 of Criminal Code of Kyrgyzstan).

On the other hand, in the case of mutual legal assistance and extradition for criminal liability, acts of terrorism are not considered within the scope of political crime and the involvement of persons in such acts excludes them from the 1951 Convention.

In line with the clause 'c' of the Article 1-F of the Convention Relating to the Status of Refugees, it is clear that terrorism constitutes an 'act against the purposes and principles of the United Nations'. In accordance with Article 1 of the UN Charter, 'the purposes of the United Nations are to maintain international peace and security, to develop friendly relations among nations, to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. According to Article 2 of the Charter, 'the UN is based on the principle of the sovereign equality of all its Members. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with

³⁶ Position on Exclusion from Refugee Status by The European Council on Refugees and Exiles// <http://www.refworld.org/docid/4158291a4.html>

³⁷ Pursuant to the aforementioned article, an action undertaken deliberately with a maximum prison sentence of 12 years, is a serious offense.

³⁸ Pursuant to the aforementioned article, an action undertaken deliberately with a minimum prison sentence of 12 years, is a very serious offense.

the present Charter. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action'. Performing acts of terrorism is an act that is extremely contrary to the aims and principles of the United Nations, which is specified in paragraph 1-F of the Convention Relating to the Status of Refugees. Many clear statements that support this situation are also present in a number of international conventions. For instance, UNSC Resolution 1624 dated 14 September 2005, states that acts of terrorism, their realization and methods, the financing of terrorism, the planning of terrorist acts and the assertion of terror are against the purposes and principles of the UN.

UNSC Resolution 1377 dated 12 November 2001 states that the acts of international terrorism including providing financial resources to terrorist acts, planning and preparing actions or supporting such acts are contrary to the aims and principles of the United Nations.

In the Preamble of the International Convention on the Suppression of Nuclear Terrorism, it has been noted that, the acts of nuclear terrorism will have grave consequences and threaten international peace and security. There is a violation of one of the most fundamental aims of the UN in this regard. Pursuant to paragraph 2 of the Preamble of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, crimes committed against diplomatic agents and other internationally protected persons that violates their security poses a serious threat to the continuation of normal international relations necessary for international cooperation.

It should be noted, however, that the Convention on the Status of Refugees is not the only document regulating the refugee status and bringing serious restrictions on the acquisition and use of this status. Similar restrictions are set out in Article 1, paragraph 5 of the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (also called the OAU Refugee Conventions)³⁹, which regulates the specific aspects of the refugee problems in Africa. In accordance with the Article, 'the provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity; (d) he has been guilty of acts contrary to the purposes and principles of the United Nations'.

Furthermore, as stated in the Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 'the rationale for the

³⁹ Entered into force on 20 June 1974

exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts'.⁴⁰

Whoever is involved in terrorism offenses, and falls into the situation foreseen at 'b' clause of Article 1-F of the 1951 Convention, it is automatically deprived of the rights provided by the 1951 Convention. Article 1-F of the Convention on the Status of Refugees is in line with Article 14 (2) of the Universal Declaration of Human Rights and, in accordance with this paragraph, this right cannot be exercised in the case of prosecutions for crimes which do not really have political characteristics. Here, a distinction must be made between the political offender and the criminal offense and it is possible to see it clearly in the relevant paragraph of Article 1-F of the Convention from the original French text as 'serious non-political crime' (...*un crime grave de droit commun*). In accordance with the 1994 Declaration on Suppression of International Terrorism and Article 3 of the Complementary Declaration of 17 December 1996, countries requested asylum in line international law, in particular the UN Charter and the relevant international conventions and protocols, before providing asylum for them investigates the situation of the person and takes the necessary measures to determine that they did not participate in terrorist acts, in particular by respecting human rights. In this context, it is investigated whether the person demanding asylum has an ongoing legal proceeding with the offense of terrorism, whether the defendant committed a terrorist offense, whether there is a final decision on the terrorist offense. After the asylum is provided, it is investigated whether the status granted to it is used in the preparation or organization of the act of terrorism against other countries or against its people.

Similar recommendations are included in Article 7 (Prevent and Combat Terrorism) of the UN Global Counter-Terrorism Strategy and, accordingly, advise parties to 'take appropriate measures, before granting asylum, for the purpose of ensuring that the asylum seeker has not engaged in terrorist activities' and, after granting asylum, for the purpose of ensuring that the refugee status is not used in organizing, instigating, facilitating, participating in, financing, encouraging or tolerating terrorist activities.

Common position with regard to the refugee status of the asylum-seekers alleged to get involved in terror crimes is proposed as follows

Article.. Combatting terrorism and refugee status

1. A person cannot benefit from the protection provided by the 1951 Convention on the Status of Refugees, if there are serious indications that he or she has carried out terrorist acts and organized terrorist acts or that they supported or financed terrorist activities.
 2. In order to prevent the asylum seeker to abuse his or her refugee status and the receiving party should take preventive measures within the framework of international law and national legislation with a view to clarify whether the person has a relationship with terror offenses,.
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⁴⁰ Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees <<http://www.refworld.org.ru/docid/51f8f6a85.html>>

VII. Exemptions for political offences

Comments:

In the law of international cooperation in the fight against terrorism and the case law, the ‘political offence exception’ has become the basic norm of international law.

As a general rule, international cooperation in the fight against terrorism does not foresee an exception. On the contrary it necessitates the fulfillment of international standards with regard to the protection of human rights. In particular, none of the matters referred to in the Convention on the Suppression of Terrorism has been made to the point that the requesting State party has made the request for extradition or legal aid for the purpose of prosecution or punishment of a person for race, religion, nationality, ethnic origin or political opinion, or in cases where there are reasonable grounds for believing that they will cause harm, they cannot be interpreted as bringing an obligation to extradite and legal assistance. This kind of legal approach does not coincide with the misuse of the protection of human rights in order to avoid criminal responsibility and punishment. In this context, international criminal law establishes an important rule and, according to this rule, none of the offenses of terrorism can be considered as a crime committed by a criminal offense or with political motives in connection with a criminal offense or political crime, for the purposes of extradition or legal aid. In this context, the request for extradition or legal assistance for a criminal offense cannot be reversed on the grounds that it is only about a political crime or an offense committed on political grounds. This rule is included in the relevant sectoral conventions of the UN as a norm (see Article 11 of the Convention on the Physical Protection of Nuclear Substances, Article 15 of the International Covenant on the Prevention of Nuclear Terrorism, Article 11, International Convention on the Prevention of Terrorist Bombings, Article 11, International Convention on the Prevention of Terrorism Financing Article 14).

The concept of the exception of political crimes has been adopted in 1977 by the Council of Europe in the Council of Europe Convention on the Prevention of Terrorism and is implemented in the framework of the mutual assistance mechanisms of Europe in the fight against terrorism. This Convention is also the most comprehensive text concerning the separation of political offenses from terrorist offenses. The legal framework of the Convention was significantly enlarged with the Additional Protocol⁴¹ adopted on 15 May 2003 which includes the definition of new acts of terrorism. In the first edition of the current Convention, there were only six acts that could not be regarded as a political crime in Article 1, while the number of actions that did not fall under that category in the new version of the Convention was raised to ten, including attempts to commit crimes. Moreover, in the new version, instead of paragraphs ‘c’, ‘d’ and ‘e’, which contains a general explanation, certain international conventions are listed in Article 1 and each of these

⁴¹ Protocol Amending the European Convention on the Suppression of Terrorism // <<http://www.conventions.coe.int/>>.

Conventions includes the classification of separate non-political crimes used in the extradition of offenders.⁴²

In the new text, a separate section has been opened for the act of attempting to commit a crime which is not mentioned as a political crime. In Article 1 of the new article, the second clause is added. Pursuant to this provision, in the context of the purposes of extradition between the Contracting States, in the case of attempting to commit one of the above-mentioned offenses or to participate in the act of committing an offense or attempting to commit such an offense or organizing to commit an offence or instigating an individual to commit such an offense or attempt to do so, it is not considered as a political crime. Thus, as set out in the Annotated report of the Additional Protocol⁴³, Article 1 in the new version of the Convention covers two groups of criminal acts: first, the actions included in all international conventions in general; the second is the actions in Article 2 which are related to the crimes in Article 1. Since the criminal acts in the second category were very grave, they were ordered to be included in the article in question. The provisions on the exclusion of the political exception clause are also included in Article 20 of the Council of Europe Convention on the Prevention of Terrorism of 16 May 2005.⁴⁴

In the national legislation of the countries, it is envisaged to distinguish terrorist acts from political crimes. For example, in Article 3, Paragraph 13 of the Spanish Constitution, it is stated that the perpetrators of political offenses which are not in the category of terrorist acts shall not be extradited. As another example, an explanation of Article 3 of the Law on Extradition of Criminals of the Republic of Azerbaijan may be cited and the offenses for which no extradition procedure shall be imposed are determined as follows: a) genocide b) offenses as foreseen by the Geneva Convention of 1949; a grave offense against life, health, safety or human liberty attempting to commit such an offense or to participate in the offense committed by a person c) Other acts of criminal responsibility foreseen by the international conventions to which the Republic of Azerbaijan is a party.

In this respect, it should be emphasized that the legal arrangement and implementation of the extradition of criminals is made on the basis of the universally accepted concept of the exception

⁴² Pursuant to Article 1 of the Council of Europe Convention on the Prevention of Terrorism (renewed, 2005), the offenses defined under the following Conventions between the States which are Contracting for the purpose of extradition of offenders cannot be regarded as a political crime: Convention on Prevention and Punishment; The International Convention on the Taking of Hostages, adopted in New York on 17 December 1979; The Convention on the Physical Protection of Nuclear Substances, adopted in Vienna on 3 March 1980; Protocol on the Prevention of Acts of Unlawful Violence at Airports Providing Services to International Civil Aviation, signed on 24 February 1988 in Montreal; The Convention on the Prevention of Illicit Actions Against Maritime Navigation Safety, signed in Rome on 10 March 1988; Protocol on the Prevention of Illegal Actions Against the Safety of Fixed Platforms on the Continental Shelf, signed in Rome on 10 March 1988; The International Convention on the Prevention of Terrorist Bombings, adopted in New York on 15 December 1997; International Convention on the Prevention of Financing of Terrorism, adopted in New York on 9 December 1999.

⁴³ Protocol Amending the European Convention on the Suppression of Terrorism. Explanatory Report // <<http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>>.

⁴⁴ As stated by Lord Diplock concerning the R. o. Governor of Pentonville Prison *ex parte* Cheng case «the purpose of this restriction is twofold. First, to prevent the United Kingdom from interfering in the internal political conflicts of foreign countries, - secondly to alert the social cause, i.e, to hand over the offender to the jurisdiction that risks exposing it to unfair trial or punishment for political reasons.». [1973] AC 931 at 946.

of political crimes and accordingly, the extraditions are limited only to the general criminal offenses. Second, the purpose of such restriction is on the one hand preserving fundamental human rights and preventing the intervention of the requesting state on domestic political conflicts in the other country on the other hand. Thirdly, in order to ensure the inevitability and punishment of criminal responsibility for the perpetrators of the grave criminal offenses and the acts of terrorism, the mentioned acts are sequentially excluded from the realm of 'protected political crimes'.

Considering the important rule regarding the 'exemption of political crimes' in the field of mutual cooperation in the fight against terrorism, it is recommended to make a special emphasis on the subject by adding the specific article given below to the common position text:

Article... Exclusion of political offenses in criminal cases and in the extradition of criminals

None of the offenses of terrorism shall not be regarded as political offences nor as offences connected with political offences nor as offences inspired by political motives for the purpose of personal criminal responsibility, extradition or judicial assistance. In this context, the request for extradition or judicial assistance for a criminal offense cannot be reversed on the grounds that it is only about political offences nor as offences connected with political offences nor as offences inspired by political motives.

VIII. Protection of victims of terrorism

Early warning and the inevitability of criminal responsibility for terrorists regarding the terror acts which worries the international community as a whole in terms of criminalization and ensuring punishment constitute the main elements of the anti-terrorism mechanism. However, the other important component of the anti-terrorism mechanism is the protection of the fundamental rights of victims of terrorist acts, namely a) effective means of access to justice and fair treatment b) the compensation and social assistance that it deserves.

Providing legal safeguards for victims of terrorism is an important component of contemporary criminal law enforcement. The victims of the crime should be provided with effective remedies and their implementation by competent authorities. Victimization occurs in various forms (death of a large number of civilians, physical and mental injury, worsening of long-term living conditions, serious material damage and others). For this reason, the guarantees provided to the victims should be varied and the criminal judicial systems should be established in such a way that they can fight against these forms of victimization.

The general approach to this problem is to use all international standards and norms relating to victims of crime in the same way as the victims of terrorist offenses, taking into account the circumstances arising from the nature of the terrorist offense.

In this respect, providing fair compensation and providing social assistance is another important component of the protection of victims of terrorism. First of all, the necessary compensation must be obtained from the sources obtained from the confiscation of the financial resources of the offender. If this is not possible, a) victims who are severely injured by serious offenses or who have suffered significant damage to physical or mental health; (b) in the event of death of such

dependents, in particular as a result of such victimization, or if it becomes physically or mentally incapacitated, necessary measures shall be taken by the state to provide financial compensation to the family.⁴⁵

In addition, victims should be provided with financial, medical, psychological and social support from public, social, voluntary and other channels.

In general, the protection of victims of terrorist acts includes a number of universal and regional levels.

The issue of securing the status and rights of victims of terrorism at the universal level within the framework of criminal law is recognized by the UN as an essential component of the counter-terrorism mechanism. Approach of United Nations to this problem can be seen at the 'The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', adopted in November 1985 at the UN General Assembly, UN Global Counter-Terrorism Strategy, UN Security Council and UN General Assembly resolutions and sectoral conventions of UN with regard to combatting terrorism.

The issue of safeguarding the rights of victims of terrorism at the regional level is present at the 'European Convention on the Compensation of Victims of Violent Crime Victims' of 24 November 1983⁴⁶, 'Principles on Combating Terrorism and Human Rights' adopted by the Committee of Ministers of the Council of Europe on 11 July 2002, 'Council of Europe Convention on the Elimination of Terrorism' dated 16 May 2005 and 'Principles on the Protection of Victims of Terrorism' adopted in March 2005 by the Committee of Ministers of the Council of Europe.

Some documents relating to the protection of victims of crime, including victims of terrorism at the European Union level, have been adopted: Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims and others are examples.

Considering the role of the protection of victims of terrorism in the mechanism of intervention in the crime, it is recommended that the subject mentioned in the common position text be included in the form of a separate article as follows:

Article... Protection of Victims of Terrorism

1. Victims of terrorism should be entitled to access to justice in accordance with international human rights law and national legislation, and fair treatment should be conducted at all stages of prosecution. They must receive compensation and social assistance as required by domestic law.
2. Compensation should be paid to the victims of terrorist acts to compensate for the damage caused by the action, in particular through the seizure of the assets of the perpetrators, regulators or financial supporters of the terrorist act. In cases where compensation cannot be fully met from

⁴⁵ See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985. Article 12.

⁴⁶ The Convention was approved by the Republic of Azerbaijan on 28 March 2000. It has been signed by the Republic of Turkey on 24 April 1984.

such sources, the victims of the attacks on the territory of the state must contribute to the compensation of the damage they suffered personally or in terms of their physical health.

IX. Prevention of the activities of foreign terrorist fighters

One of the most recent and most dangerous threats is foreign terrorist fighters, that is, who are engaged in terrorist activities, planning, preparing or traveling for participation or those involved in or giving terror training, including those associated with armed conflict in a state other than a state of which they are a resident or a citizen.

On September 24, 2014, the UNSC by decision 2178 declared that it was deeply concerned about those who were traveling to become a foreign terrorist fighter. In this context, foreign terrorist fighters, as stated in the Resolution, ‘foreign terrorist fighters increase the intensity, duration and intractability of conflicts, and also may pose a serious threat to their States of origin, the States they transit and the States to which they travel, as well as States neighbouring zones of armed conflict in which foreign terrorist fighters are active and that are affected by serious security burdens’⁴⁷. As determined by the Committee established by the decisions 1260 (1999) and 1989 (2011) inclusion of Foreign Terrorist Warriors to Iraqi Islamic State and Levant (ISIL), Al-Nusra Front (ANF) and other cells, branches, separatist groups or derivatives of al-Qaeda and their involvement in these organizations raises a serious concern. The Security Council, stating that effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents prevent the movement of terrorists or terrorist groups; underlined the need for comprehensive measures to be taken concerning combatting the threat posed by foreign terrorist fighters. The Decision also pointed out that strategies should be developed and implemented to bring to justice all those involved in or support the financing, planning, preparation or realization of the actions of foreign terrorist fighters, and to ensure the rehabilitation and rehabilitation of returnees.

As stated at the report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, the term foreign fighter does not have an international legal definition, and none of the Member States consulted by the Group has defined the term in its national legislation.⁴⁸ The term ‘foreign terrorist

⁴⁷ UN Security Council Resolution No. 2178 dated 24 September 2014 URL: http://www.un.org/en/sc/ctc/docs/2015/N1454801_RU.pdf (07.05. 2015).

⁴⁸ Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination URL: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/260/16/PDF/N1526016.pdf?OpenElement> (26.03.2016).

fighter' was first introduced by the Global Forum on the Fight Against Terrorism⁴⁹, later reflected in the UN Security Council's decisions 2170 (2014), 2178 (2014) and other decisions⁵⁰.

The increase in the threat of terrorism and the possibility of revitalization of the illegal activities of foreign terrorist fighters in European countries has forced various institutional organizations to change their approaches to the fight against terrorism.

'*European Agenda on Security*' defines terrorism, along with transnational organized crime and cyber-crime, as one of the three pioneering issues in the area of security. As stated in the text, 'terrorist attacks in Europe – most recently in Paris, Copenhagen, Brussels – have highlighted the need for a strong EU response to terrorism and foreign terrorist fighters. European citizens continue to join terrorist groups in conflict zones, acquiring training and posing a potential threat to European internal security on their return. While this issue is not new, the scale and the flow of fighters to ongoing conflicts, in particular in Syria, Iraq and Libya, as well as the networked nature of these conflicts, are unprecedented'⁵¹.

The European Commission in 2016 announced the need for a new legislative initiative to organize the fight against terrorism, taking into account contemporary calls and their development⁵². The aforementioned initiative resulted in the adoption of the European Commission on 2 December 2015 the proposal of the European Parliament and of the Council's Directive on the fight against terrorism and of the amendment to the 2002/475 / JHA Framework for the fight against terrorism⁵³. The document stated that the threat posed by foreign terrorist fighters is the most important concern of the European Union.

In order to be able to fight effectively with foreign terrorist fighters, terrorism activities such as terrorism, open propaganda, recruitment, training of terrorists, participation in the activities of terrorist groups in the form of an accomplice and attempting to be committed should be defined as a serious criminal offense. As envisaged in Article 6 of Resolution 2178 of the UN Security Council dated 24 September 2014, 'States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in

⁴⁹ See: 'Foreign Terrorist Fighters' (FTF) Initiative, The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon [elektronik kaynak]// URL: https://www.thegctf.org/documents/10162/140201/14Sept19_The+Hague-Marrakech+FTF+Memorandum.pdf (09.03.2016)

⁵⁰ See: *Heinsch R.* Foreign Fighters and International Criminal Law// Foreign Fighters under International Law and Beyond/ Ed. by A. de Guttry, F. Capone, C. Paulussen. Heidelberg: Springer, 2016. P. 161-186

⁵¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - The European Agenda on Security // URL: <https://www.cepol.europa.eu/sites/default/files/european-agenda-security.pdf> (28.10. 2015).

⁵² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Commission Work Programme 2016. Strasbourg, 27.10.2015 // URL: http://ec.europa.eu/atwork/pdf/cwp_2016_en.pdf (yayınlama tarihi: 12.12. 2015).

⁵³ Proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA on Combating Terrorism URL: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-security/legislative-documents/docs/20151202_directive_on_combating_terrorism_en.pdf (yayınlama tarihi: 29.03.2016)

a manner duly reflecting the seriousness of the offense: (a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training; (b) the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to finance the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training; and, (c) the wilful organization, or other facilitation, including acts of recruitment, by their nationals or in their territories, of the travel of individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training’.

In accordance with UN Security Council Resolution 2199 of 12 February 2015, all States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that such terrorist acts are established as serious criminal offenses in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts, and emphasizes that S/RES/2199 (2015) 15-01924 5/7 such support may be provided through trade in oil and refined oil products, modular refineries and related material with ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida⁵⁴.

After the UN Security Council adopted relevant decisions, the Council of Europe's response was not delayed and the Council of Europe adopted the Additional Protocol to the Convention on the Prevention of Terrorism on 22 October 2015. Pursuant to the protocol, acts of terrorism, such as joining a group for terrorism, receiving terrorism training, going abroad for terrorism and providing financial resources for travel abroad for terrorism, have been considered as criminal offenses⁵⁵. In this context, taking into account the serious threat posed by the activities of foreign terrorist fighters, it is recommended to include the following in the common position text:

Article... Prevention of the activities of foreign terrorist fighters

For the purpose of strengthening the fight against foreign terrorist fighters, the Parliaments of TURKPA Member States shall take the necessary measures with respect to the acknowledgement of the actions of their nationals who travel or attempt to travel to a state other than their states of residence or nationality, and other individuals who travel or attempt to travel from their territories to a state other than their states of residence or nationality, for the purpose of the perpetration,

⁵⁴ UN Security Council Resolution No. 2199 dated 12 February 2015 URL: http://www.un.org/en/sc/ctc/docs/2015/N1504031_RU.pdf (07.05. 2015).

⁵⁵ Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism dated 22 October 2015 // URL: <http://www.coe.int/ru/web/conventions/search-on-090000168047c5eatreaties/-/conventions/rms/> (23.06.2016). См.: *Bartholin K.* Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism// EUCRIM. 2015. № 3. P. 124-128.

planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training as a criminal act.

X. Terrorism and human rights

Comments:

Ensuring the protection of human rights and fundamental freedoms in the fight against terrorism is an important aspect of the functioning of national and international mechanisms. In the use of coercive measures to prevent terrorist activities, all standards for the protection of human rights must be observed. The principles on human rights and the fight against terrorism should be in line with the decision of the OSCE Committee of Ministers of 11 July 2002 which states that ‘all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision’.

Pursuant to Article 7 of the OSCE Charter on Preventing and Combating Terrorism, adopted by the OSCE on 7 February 2002, ‘the OSCE participating States shall undertake to implement effective and resolute measures against terrorism and to conduct all counter-terrorism measures and co-operation in accordance with the rule of law, the United Nations Charter and the relevant provisions of international law, international standards of human rights and, where applicable, international humanitarian law’.

The The United Nations Global Counter-Terrorism Strategy once again stressed the need for international co-operation and measures to be taken in the fight against terrorism and the measures to be taken, based on international law, UN Charter and relevant international law regulations, international standards on human rights and international humanitarian law and refugee rights.

The United Nations appointed Special Rapporteur on the protection and promotion of human rights and fundamental freedoms under anti-terrorism conditions for a period of three years under the 2005/80 decision adopted by the Human Rights Commission in recognition of the importance of human rights protection. With the decision of the UN General Assembly No. 60/251, the Human Rights Council undertook the fulfillment of this task and other procedures. The Council with its decision no. 15/15 dated 30 September 2010, extended the term of office of the Special Rapporteur on the protection and promotion of human rights and fundamental freedoms (hereinafter the Special Rapporteur) in the fight against terrorism for three years. Then, with the decision no. 22/8 dated 21 March 2013, it extended once again for three years⁵⁶.

ECHR, in its ruling on *Tomasi v. France* case, stated that demands of the prosecution and the difficulty of the fight against crime, in particular the fight against terrorism, could not restrain the protection of the physical status of individuals.⁵⁷ In the case of *Fox, Campbell and Hartley v. U.K.*,

⁵⁶ <http://www.ohchr.org/EN/Issues/Terrorism/Pages/SRTerrorismIndex.aspx>

⁵⁷ *Tomasi v. France*, Series A, No 241-A. P. 39—42, Paras. 104—116.

the Court stated that the general purpose was to establish a balance between the protection of democratic institutions and the protection of individual rights.⁵⁸

International legal instruments for the protection of human rights as the most important principle of the mechanism of organized counteraction against terrorism.

Furthermore, in accordance with Article 9 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents of 14 December 1974, everyone who is prosecuted in respect of any of the offenses referred to in Article 2 of the Convention is guaranteed to be treated fairly at every stage of the proceedings. Later, in the conventions accepted the rights of those who were tried were expanded. For example, in accordance with Article 17 of the International Convention for the Suppression of the Financing of Terrorism, dated 9 December 1999, ‘any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.’ Furthermore, pursuant to Article 15 of the same Convention, ‘nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person’s race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person’s position for any of these reasons’. Articles 12 and 16 of the International Convention on the Prevention of Nuclear Terrorism contain similar rules.

Ensuring the protection of personal rights is an important element of the international anti-terrorism mechanism, and its violation raises doubts about the legality of the anti-terrorism process.

Importantly, the protection of individual rights is an indicator of the fight against terrorism, as well as whether the fight against general offenses is legal. Advocate General of the ECHR (Poiares Maduro) in his opinion on the case of *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, emphasized that: “the claim that a measure is necessary for the maintenance of international peace and security cannot operate so as to silence the general principles of Community law and deprive individuals of their fundamental rights”⁵⁹.

The Court further held that the plaintiff’s property rights had been violated by the application of general measures concerning the freezing and continuity of its shares⁶⁰. Thus, decisions of the first-instance court and the European court regarding the *T-306/01 Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission* and *T-315/01 Yassin Abdullah Kadi v.*

⁵⁸ Case of *Fox, Campbell and Hartley v. United Kingdom* (1990). No 182.13 E.H.R.R.

⁵⁹ Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-50>

⁶⁰ *Ibid.*

Council and Commission dated 21 September 2005 and *C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission* made a significant contribution to understanding the concept of complex issues in European law, in particular on the protection of fundamental human rights in the fight against terrorism.⁶¹ In view of all the circumstances in which the Court has been concerned, ECHR has made it clear that, within the framework of the relevant measures to be applied by the European Union, respect for fundamental human rights and the right to a fair trial should be ensured, regardless of international obligations (the relevant decisions of the UN Security Council).

The fight against international crime, especially fight against international terrorism, which is its segment, has become the most important issue of the system of mutual assistance in the field of criminal law. This is not a coincidence, because if the size of the acts of terrorism is assessed in terms of the number of victims and material damage it caused it is at the same level as regional armed conflicts. In this context, it is not a coincidence that the struggle against terrorism itself is determined by the term ‘war’. However, the use of such terms does not in any way diminish the importance of carrying out this ‘war’ on the legal basis foreseen for the fight against terrorism. The basic international standards of such human rights: the prohibition of torture and the prohibition of the retroactive implementation of criminal law are absolute and cannot have exceptions. For example, in accordance with Article 15 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, ‘in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law’. However, in accordance with paragraph 2 of this article, ‘no derogation from Article 2⁶², except in respect of deaths resulting from lawful acts of war, or from Articles 3⁶³, 4⁶⁴ (paragraph 1) and 7 shall be made under this provision’⁶⁵. Such a provision is set out in Article 4, paragraph 2 of the International Covenant on Civil and Political Rights, and in the case of a general threat that threatens the existence of the nation ‘no derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision’. As stated at the General Comment No. 29 of the UN Human Rights Committee regarding Article 4 of the International Covenant on Civil and Political Rights (Article 4: Derogations during a State of Emergency), ‘Article 4, paragraph 2, of the Covenant explicitly prescribes that no derogation from the following articles may be made: article 6 (right to life), article 7 (prohibition of torture or cruel, inhuman or degrading punishment, or of medical or scientific experimentation without consent), article 8, paragraphs 1 and 2 (prohibition of slavery, slave-trade and servitude), article 11 (prohibition of imprisonment because of inability to fulfil a contractual obligation), article 15 (the principle of legality in the field of criminal law, i.e. the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or

⁶¹ See: *Herik van den L.* The Security Council’s Targeted Sanctions Regimes: In Need of Better Protection of the Individual// LJIL. 2007. Vol. 20. № 4. P. 797-807.

⁶² Article 2 – Right to Life

⁶³ Article 3 – Prohibition of Torture

⁶⁴ Article 4 – Slavery and Forced Labour

⁶⁵ Article 7 – Principle of Legality in crime and punishment

omission took place, except in cases where a later law imposes a lighter penalty), article 16 (the recognition of everyone as a person before the law), and article 18 (freedom of thought, conscience and religion). The rights enshrined in these provisions are non-derogable by the very fact that they are listed in article 4, paragraph 2.' 'It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights. Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights. Thus, for example, as article 6 8 See article 7 (1) (d) and 7 (2) (d) of the Rome Statute. of the Covenant is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 and 15'⁶⁶.

Taking into account the fact that the process of combating terrorism must comply with the law and the generally accepted standards of protection of fundamental human rights and freedoms should be observed, the common position is proposed as follows:

Article... Protection of human rights in the fight against terrorism

Everyone who has been arrested or taken into custody for any offense of terrorism or who has been filed a lawsuit has the right to the enjoyment of any fundamental rights and guarantees enshrined in the legislation of the State in which it is located, and the right to fair treatment, foreseen by international human rights law including international human rights law.

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⁶⁶ CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency // <http://www.refworld.org/docid/453883fd1f.html>. См.: Desierto D. Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation. Martinus Nijhoff Publishers, 2012. P. 267-268.

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