

FACING TERRORIST THREATS IN PEACE OPERATIONS THROUGH THE PRISM OF INTERNATIONAL LAW

*Hasan Oktay, **Vesna Poposka, p. 61-71

September, 2017; 2 (2)

ABSTRACT

During the long period of self-determination of the peoples and decolonization struggles, terrorism was perceived as a tactic of the weaker side. Nowadays, it is the tactic of asymmetric warfare, recognized as a key security priority to be addressed by both EU and NATO. Peace operations are conducted in different context and with different mandate. Mandate gives the legal base for enacting, especially for those situations that are not completely legally clear, or urge case by case approach. Peace operations can be divided into two main clusters: peace enforcement missions and peace keeping missions. This qualification gives the predominant notion upon the use of force allowed and the applicable law, but it does not provide answers by itself, especially for dealing with counterterrorist threats that pretty often occur within peace operations.

One of the key anchors are the rules for the use of force, since peace operations have pretty often transitional role, and using extra force on micro level can lead to endangering the whole mission on macro level, but there is still lack of comprehensive legal approach. This paper aims to respond the challenge.

Key words: law, terrorism, lethal force, peace operations

;



***Assoc. Prof. Hasan Oktay PhD**

International Vision University,
Faculty of Law, Macedonia

e-mail:

hasan.oktay@vizyon.edu.mk

****Vesna Poposka, PhD**

Candidate

International Vision University,
Faculty of Law, Macedonia

e-mail:

vesna.poposka@vizyon.edu.mk

Article type:

1.02 General scientific articles

UDK: 325.86:341.785

Date of received:

July 01, 2017

Date of acceptance:

August 05, 2017

Declaration of interest:

H.O., V.P., the authors reported no conflict of interest related to this article..

1. INTRODUCTION

“Terrorism has been described variously as both a tactic and strategy; a crime and a holy duty; a justified reaction to oppression and an inexcusable abomination. Obviously, a lot depends on whose point of view is being represented. Terrorism has often been an effective tactic for the weaker side in a conflict. As an asymmetric form of conflict, it confers coercive power with many of the advantages of military force at a fraction of the cost. Due to the secretive nature and small size of terrorist organizations, they often offer opponents no clear organization to defend against or to deter” (Terrorism-research.com, 2017). This means that different legal approach has to be applied.

On the other hand, terrorists- both individuals or organizations have not been recognized as subjects of international law. Transnational terrorist activities led to the opening of additional questions, such as the questions of jurisdiction and attribution when considered for criminal and prevention matters. The accurate inclusive environment in which counterterrorist operations are conducted is tough to be simplified to a unique solution and a framework that “fits them all”. In the most cases, counterterrorist operations include an allowance for a use of lethal force, that gives utmost sensitivity of the problem and the need for special knowledge and skills of the people that should operationalize orders. After the 9/11 events, the approach to terrorism has changed rapidly. For a first time, terrorist attacks were approached as an act of war.(Cassese, 2005). During the long period of self-determination of the peoples and decolonization struggles, terrorism was perceived as a tactic of the weaker side. Nowadays, it is the tactic of asymmetric warfare, recognized as a key security priority to be addressed by both EU and NATO. Not any country in the world remained immune from this developing security threat. No matter if the basics were religious fundamentalism or ideas of separatism, acts of terrorism are reported on daily bases around the world, all of them bringing different challenges to be faced by the authorities.

2. METHODOLOGY AND SCOPE

The social sciences research spectrum and the legal methods have been applied. The study does not include any empirical research methods. The examination of the treaties is limited to the International Covenant on Civil, Political and Rights (ICCPR), and European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), American convention on human rights, African Charter on Human and Peoples' Rights, as well as the UN Charter and ICJ statute. Other treaties related to the topic arise from the international humanitarian law as separate legal branch.

The state practices will focus on a restricted number of cases in the peace operations on the Middle East, conducted generally by European states and the USA, within the NATO/UN framework.

3. ANALYSIS OF LEGAL DOCUMENTS

There are many different legal documents that address specific forms of terrorism, but not a single comprehensive understanding of the issue. From the state practice, a few approaches can be extracted:

1. Dealing up with terrorism as a crime
2. Dealing up with terrorism in the context of internal armed conflict
3. Dealing up with terrorism as an act of war

For peace operations, counter terrorist operations and the use of force allowed is usually prescribed by the mandate. However, on a micro level, strict Rules of engagement shall be defined in order the whole mission not to be endangered.

Mandate for peace mission is settled by the UN Charter:

The Charter gives the UN Security Council primary responsibility for the maintenance of international peace and security. In fulfilling this responsibility, the Council may adopt a range of measures, including the establishment of a UN peacekeeping operation (UN,1945).

- Chapter VI deals with the “Pacific Settlement of Disputes
- Chapter VII contains provisions related to “Action with Respect to

the Peace, Breaches of the Peace and Acts of Aggression’.

- Chapter VIII of the Charter provides for the involvement of regional arrangements and agencies in the maintenance of international peace and security provided such activities are consistent with the purposes and principles outlined in Chapter I of the Charter.

That’s why, a few concepts must be taken into consideration before acting:

- Sources of law
- International public law scheme
- The content of IHL and IHRL
- Main documents, applicability and scope
- IHRL limitations and derogations
- Applicability of international human rights law to armed conflicts
- Extraterritorial application of international human rights law
- The relationship between international humanitarian law and international human rights law
- Human rights and peace operations
- Human rights and serious security situations

This text aims to approach the key founding elements of all the concepts mentioned above.

4. SOURCES OF INTERNATIONAL LAW AND LAW MAKING

Article 38, from the ICJ (International Court of Justice) statute, defines the sources of international law as following (Charter of the United Nations and statute of the International Court of Justice, 2015):

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;

- c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

This is the general starting point of every legal analysis in the context of international law (Shaw, 2008).

5. INTERANTIONAL HUMAN RIGHST LAW V.S. INTERNATIONAL HUMANITARIAN LAW

International public law shall be divided in two general regimes: Law applicable in peace (IHRL) and Law applicable in war or its equivalent (LOAC/ IHL). LOAC referees to *ius ad bellum* aspect- the right to “go to war”, and IHL refers to *ius in bello* aspect- the law to be used in war, although they are often used as synonyms. The mutual content of the both regimes, is the concept of protection. The main content of IHL is protection of

1) Combatants:

Soldiers/officers

Others (participants in hostilities)

2) Non-combatants:

Soldiers hors de combat (Sick, wounded, surrendered, POWs)

3) Civilians

- The 4 principles must be taken into consideration: humanity, distinction, military necessity and proportionality

In IHRL (International Human Rights Law), protection means a guarantee for all persons within the jurisdiction of a State (regardless of citizenship) against abuse of power of State authorities, or failure by State authorities to ensure human rights (mainly speaking about civil and political rights) as well as granting *ius standi in iudicio* for the individuals against the states, in order the universality that is achieved as a common value to be maintained.

The main source of IHRL are the main IHRL documents, such as, for example:

The General Treatie (Bair, 2005):

- International Covenant on Civil and Political Rights (UN,1966)
- International Covenant on Economic, Social and Cultural Rights (UN,1966)

The Regional Treaties

- European Convention on Human Rights and Fundamental Freedoms (CoE,1950)
- American convention on human rights (OAS,1969)
- African Charter on Human and Peoples' Rights (OAU,1981)

The Special Treaties, such as for example:

- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- United Nations Convention against Torture (1984)

The starting point for IHRL regime is the idea to prevent states from arbitrary actions against individuals, under the notion that rights that arise from IHRL instruments, are always in power, since IHRL is considered to be *lex generalis*.

- Art.1, ECHR: The High Contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.
- Art. 2, ICCPR: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant...

There are two types of restriction: Limitations and Derogations. Usually their regime shall be defined by the instrument itself. The European Convention on Human Rights provides the most detailed regime above this issue.

Limitations are defined as:

- Prescribed by law
- Necessary in a democratic society
- In the interests of national security, territorial integrity or public safety
- For the protection of public order, health or morals
- For the protection of the rights and freedoms of others
- Ex: Right to respect for privacy and family life, Right to assembly

Article 15 labeled as “Derogation in time of emergency” states that

“...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. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision...”.

In this manner, convention clearly states that no derogation is applicable on the peremptory norms of the international law, such as the right to life.

On the other hand, main IHL documents are the Geneva Conventions and Additional Protocols, but also specific conventions related to:

- Victims of Armed Conflicts
- Methods and Means of Warfare
- Naval and Air warfare
- Cultural Property

However, LOAC/ IHL are designed to deal up with acting of states, or in such cases when attribution is possible. The international law is missing a coherent legal framework for dealing up with modern terrorism.

Pretty often, there are situations in which both regimes apply, or protect the same type of rights.

This has implications on the allowance of the use of deadly force, especially in counterterrorist operations, and implications for the interpretation of the principles of necessity and proportionality.

Such situations are most typical for peace enforcing and peace keeping missions. In such situations, which legal regime will prevail in which moment, is determinate on case by case analysis.

6. THE EFFECTIVE CONTROL TEST

Generally speaking, the effective control over territory is the preliminary concept to be taken into consideration, speaking about applicable legal regime.

The International Court of Justice first affirmed the applicability of international human rights law during armed conflicts in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons:

“The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.” (ICJ, Reports 1996)

In the 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the 2004 Wall Advisory Opinion), the Court confirmed the applicability of international human rights law to situations of military occupation (ICJ, 2004). A year later, the Court delivered a binding judgment in the case Democratic Republic of the Congo v. Uganda where it applied international human rights law to an occupation citing the findings from its 2004 Wall Advisory Opinion.

“The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory... It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’, particularly in occupied territories” (ICJ, 2000).

The European Court of Human Rights also refers to the effective control of a territory for the application of the European Convention, although does not

speak in one voice- the Bankovic case as an exception.

The Inter American Commission of Human Rights has taken the following position:

“In principle, the inquiry turns not on the presumed victim’s nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.”

The relationship between international humanitarian law and international human rights law can be considered through three prisms:

- The *lex specialis* approach
- The Complementary and Harmonious approach
- The interpretive approach

The three approaches are taking into consideration the combination of IHL/ IHRL.

(See further: on Human rights and peace operations- the Al Skeini case against the UK in front of the ECHR; On human rights and serious security situations -Case of Finogenov and others v.s Russia).

7. CONCLUSION

The complexity of the modern society has to be understood. The effects of globalization are yet to arrive, although they have changed the world as it has been known so far. The law and legal order have to adapt quickly to the changes that arrive, so they can anticipate positive changes instead of trying to deal up with dangerous precedents. In the meanwhile, the current legal knowledge shall be applied in the most appropriate way, in order negative precedents not to be formed.

The role of the media and influence of the public opinion in the decision making processes should not be underestimated. However, for the purpose of the protection of the right to life, it can be used as an advantage, if both journalist and non-governmental organization keep to urge for transparency, democratization and due process of law.

Holistic approach in peace operations is the only way to make the efforts effective. That’ s why, for the challenge of dealing with counterterrorist threats in peace operations, two general notions must be kept in mind:

- Case by case approach is needed for dealing with the complex security environment.
- A balance between security needs and human rights needs is essential, but though to be reached.

8. BIBLIOGRAPHY

1. *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, available at: <http://www.refworld.org/cases,ICJ,414ad9a719.html>
2. Bair, J. (2005). *The International Covenant on Civil and Political Rights and its (first) optional protocol*. Frankfurt am Main: P. Lang.
3. *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda); Request for the Indication of Provisional Measures*, International Court of Justice (ICJ), 1 July 2000, available at: <http://www.refworld.org/cases,ICJ,3ae6b6e14.html>
4. Cassese, A. (2005). *International law*. Oxford: Oxford University Press.
5. *Charter of the United Nations and statute of the International Court of Justice*. (2015). New York, NY: United Nations Publications
6. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>

7. International Court of Justice Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, available at: <http://www.refworld.org/cases,ICJ,4b2913d62.html>
8. Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html>
9. Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.htm>
10. Shaw, M. (2008). *International law*. Cambridge: Cambridge University Press.
11. Terrorism-research.com. (2017). *Terrorism Research - What is Terrorism?*. [online] Available at: <http://www.terrorism-research.com/>
12. UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>
13. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>
14. UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html>
15. UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html>