The Dangers Faced in Fighting Against Terrorism and Organized Crime

Marcel Lemonde

Honorary President of a Chamber

in Paris Court of Appeal

Former international judge in the ECCC

I wouldn't want to minimize the importance of fighting organized crime. But I would feel uncomfortable, should this assembly turn a blind eye to a certain number of worrying excesses in terms of how to fight against these forms of crime.

In his introduction paper, Mgr Sanchez Sorondo wrote : "The great prophet Isaiah had already recognised that the final goal of the act of passing judgment was social peace rather than safety or security". This must be kept in mind and I must say I am a bit concerned that our final declaration remains silent concerning some dangers that, to me, are very present in our current society, particularly in fighting against a specific form of organized crime, I mean terror crimes.

That's why I chose to focus on this aspect.

Criminal procedure is constantly seeking a balance between the effectiveness of trials and their fairness.

From this point of view, as regards the fight against organized crime in general and terrorism in particular, the requirements are simple, clear, and combine two aspects:

- First of all, all governments have the duty to effectively combat the scourge of organized crime and protect the population from terrorist acts (in this respect, no one disputes that, everywhere, the situation is most serious). As stated by the European Court of Human Rights (ECtHR), terrorist activities « *are in clear disregard of human rights*[1] ».

- But, secondly, it is also clear that the combat against organized crime and terrorism is likely to erode a significant number of individual rights and freedoms.[2] Thus, the ECtHR considers that States are confronted with a *dual responsibility*: on the one hand, they are under the obligation to combat terrorism effectively; yet on the other hand, they are under the obligation to respect human rights in so doing. In other words, while the obligation to fight against organized crime and terrorism may justify or require special preventive and prosecutorial measures, it is essential that such action be implemented in a manner that is entirely consistent with the Rule of Law.

Unfortunately, in this respect, there is a significant discrepancy between the stated objectives and the actual situation. In particular, the combat against terrorism raises great concern and, from this point of view, the example of the September 11 attacks is illuminating.

Legally speaking, these attacks were certainly a "*widespread or systematic attack directed against a civilian population*[3]". This attack was launched "*pursuant to or in furtherance of an (...) organizational policy to commit such attack*"[4]. Therefore, it was a crime against humanity, to which it was possible to react in a judicial, international manner. But the United States preferred a warlike and purely national approach: following the Patriot Act of October 25, 2001, a presidential order dated November 13 set up special military courts. The rest is history: after making the idea of "war on terror" a legal concept in the United States, the government sanctioned the notion of "unlawful enemy combatants", i.e. people who are entitled neither to the guarantees of criminal law, because they are enemies, nor to the protection of the Geneva conventions, because they are not prisoners of war but unlawful combatants. Thus, the September 11 attacks have somehow freed lawmakers from the obligation to respect the limits of the Rule of law. As a result, among other things, the Guantanamo detention center was created and the ban on torture was lifted, in violation of two principles which are supposed to be absolute since no derogation is admitted, even in exceptional circumstances:

- First, the "legality principle" that involves the accuracy of charges and non-retrospectiveness ("*no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed*"[5]). On the contrary, the criterion of terrorist involvement is broad and vague and its application is retrospective.

- Second, the “dignity principle”, according to which “*no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*”[6].

With such an evolution, there is a risk that the war against crime turns into a war against human rights[7].

Furthermore, in the following years, other countries that had to face the same problems as the United States adopted a similar attitude.

Only the German Constitutional Court has expressed concern in a decision dated 20 April 2016, partly rescinding the law on fighting terrorism because it undermined individual freedom in a disproportionate way. But how long will this analysis prevail ?

All over the World, a kind of derogatory criminal procedure developed, which gradually invaded the entire field of action.

In France, for example (where 16 anti-terrorist laws have been adopted over 30 years), a study concludes that exceptional procedures were set up in a piecemeal way concerning terrorism, drug trafficking and procuring, always through the same legislative techniques. In 2004, this legislation was extended to organized crime, before being explicitly or implicitly included in ordinary criminal law. After that, with the growing importance given to the concept of “dangerousness”, the focus switched imperceptibly from “prevention” to “prediction”. For instance, the 25 February 2008 Act on “rétention de sûreté” (secure detention) allows the continued detention of a convicted person *after* he has served his sentence, for a period of one year, renewable indefinitely, on the sole criteria of dangerousness. Thus, the judge is no longer involved in the determination of guilt but acts upon a likelihood which, by definition, precludes any counter evidence.

This trend has been accentuated in the wake of the Paris attacks in 2015: first, emergency legislation was passed with the proclamation of a State of Emergency, allowing the State to avoid judicial review by transferring the judge’s powers to the executive and the police; then this exceptional situation was extended for a few more months; and finally, a new law on criminal procedure plans to make measures that were solely a matter for the State of Emergency permanent.

And this takes place in a democratic State, not to mention what happens in many other countries, where the definition of “terrorism” is so broad it allows the State to combat all forms of opposition and restrict freedoms, including freedom of expression.

Contemporary criminal lawyers are facing an increasing number of laws against human rights that hark back to pre-modern criminal legislation, where repression extends to the “preparation of the preparation” of an offence[8], where judicial review is erased, where some evidence is kept secret from the defense, where mere reports by the intelligence services are granted probative value, where individualized sentencing recedes, and so on.

In view of this evolution, it can be said that the doctrine of “criminal law of the enemy” (Feindstrafrecht) is gradually being implemented.

What is it about ?

According to the German jurist Günther Jakobs, there is a criminal law for the citizen on the one hand and, in contrast, a criminal law for the enemy on the other hand, both from a procedural and substantive point of view. In this doctrine, the right to a fair trial is given to the citizen, not to the enemy. If the choice is between killing or dying, nothing should hinder State power: it must be absolute and any obstacle is a capitulation, or a betrayal of the cause of saving humanity (or saving the nation, society, race, lifestyle, etc.).

Now, as Eugenio Zaffaroni explains[9]: “There is no possible conciliation between the rule of law and the theory of criminal law of the enemy. And article N°1 of the Universal Declaration of Human Rights allows no exceptions”: «*All human beings are born free and equal in dignity and rights* ».

So, in these difficult times, what are we going to do ?

Must we resign ourselves to moving towards a society of fear, a society which built walls instead of bridges, to quote Pope Francis ?

We are living in a time when one of the founding countries of human rights, the United Kingdom, very seriously considers quitting the mechanism of protection established by the European Convention on human rights. A time when the governments of various countries, member States of this Convention, don’t hesitate to renounce the fundamental values of democracy. A time when only a minority of individuals care about the infringement of individual liberties.

Everyone is scared, starting with the rulers who always do more, for fear of being accused of not having done enough, in search of an inaccessible zero risk option. After each attack, doing nothing is politically impossible. Reassuring the population by adopting immediate and visible action is compulsory. But this is illusory. Zero risk does not exist. If someone has decided to take his own life and to send, at the same time, a maximum of people to their death, it is simply impossible to prevent it. What is effective (for instance, in a long term perspective, fighting against radicalization) is not spectacular, therefore not popular politically speaking. Thus, security delusions are set up: while the measures adopted do not protect society, the violations of freedoms are real.

It is sometimes said, “Let us not disarm justice in the name of human rights”.

More militarist language ...

If, to defend democracy, we must abandon the values of the rule of law (precisely the values that Al Qaeda, Daesh and others are fighting), if those values are weakened, we give victory to these terrorists who attack primarily the weak: it is he who is frightened of the dog that gets bitten.

As noted by a French lawyer in a trial of terrorists, “Democracy is less threatened by those who assault it, than by those who corrupt it on the pretext of defending it”.[10]

We must keep in mind the solemn reminder of the Preamble to the Universal Declaration of Human Rights, adopted immediately after the horrors of World War II: “*The disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind*”. And we must not forget that these barbarous acts were committed by so-called civilized nations. As Mireille Delmas-Marty stated, it took centuries to “transform the dualistic view contrasting the civilized (us) with the barbarians (them) in a universalizable vision (replacing the barbarians by any barbarity, including our own)”[11]. Unfortunately, it does not take centuries to regress at any time to the dualistic vision.

Thank you for your attention.

[1] ECtHR, *Ireland v. the United Kingdom*, N° 5310/71, 18 January 1978, § 149.

[2] ECtHR (GC), *Saadi v. Italy,* N° 37201/06, 28 February 2008.

[3] Art. 7(1) of the 1998 Rome Statute of the International Criminal Court.

[4] Art. 7(2) Rome statute.

[5] Art.15 UN Covenant on civil and political rights, ratified by the USA in 1992.

[6] Art. 7 UNCPR and 1984 Convention against torture, ratified by the USA in 1994.

[7] D. Rose *Guantanamo: America’s war on human rights,* Faber & Faber, 2004.

[8] In the words of the *Commission Nationale Consultative des Droits de l’Homme*, in its opinion on the draft law on fight against terrorism (25 September 2014)

[9] *Dans un Etat de droit, il n’y a que des délinquants*, E. Zaffaroni, Revue de Science Criminelle 2009 p.43

[10] J-D Bredin, in the *Action Directe* trial.

[11] M. Delmas-Marty, *Les forces imaginantes du droit (IV), Vers une communauté de valeurs ?* Seuil 2011, p.238