Defining Terrorism within International Law and Legislation of the Republic of Azerbaijan

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Almost 70 years have passed since the adoption of the Convention for the Pre-vention and Punishment of Terrorism of 1937 (Geneva Convention of 1937)— the first international treaty against terrorism (see United Nations, 1972, pp. 1-9). In 2003, the last—up to now— international legal instrument in this field was adopted under the auspices of the Council of Europe, namely, the European Convention on the Suppression of Terrorism of 1977, as amended by its Proto-col of May 15, 2003 (see also United Nations, 2004a, pp. 139-152). These two conventions may be treated as the milestones on the road of long-lasting efforts of the international community of states to create an effective legal response to one of the most disastrous and horrifying phenomena of our times: international terrorism. Although the Geneva Convention of 1937 (see United Nations, 1972), unfor-tunately, has never entered into force, one cannot overestimate its importance as the first comprehensive and multilateral antiterrorist convention. Furthermore, it was accompanied by another international treaty providing for the establish-ment of the first international criminal court for the punishment of terrorists, a precursor of postwar international criminal tribunals. Also for the first time, the Geneva Convention of 1937 formulated a definition of acts of terrorism, described therein as “criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons, or the general public” (Article 1, para. 1; see United Nations, 1972). (1)

As already mentioned, the first international attempt to define acts of terror-ism was undertaken by the Geneva Convention of 1937 (see United Nations, 1972). Since then, the question of defining international terrorism remains the most difficult and unsatisfactorily solved for all engaged in the process of elabo-ration of antiterrorist treaties, either universal or regional.

Conventional practice shows that so-called sectoral conventions have had a relatively easier job in this field because their substantial scope of operation is limited to specific kinds and forms of terrorist activities. The first of such sec-toral definitions was contained in the Convention for the Suppression of Unlaw-ful Seizure of Aircraft of 1970, which defines the offense of unlawful seizure of aircraft as committed by

any person who on board an aircraft in flight: (a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act. (Article 1)

All contracting states to this convention have been obliged to make the said offense “punishable by severe penalties” (Article 2).

This definition later served as a model for subsequent definitions included in other sectoral international legal instruments. In consequence, we have a series of universal sectoral definitions of terrorist acts, including such offenses as “unlawful acts against safety of civil aviation” (in 1971), “crimes against inter-nationally protected persons, including diplomatic agents” (in 1973), “taking hostages” (in 1979), “theft, robbery or any other unlawful taking of nuclear material or of credible threat thereof” (in 1979), “unlawful acts of violence at airports serving international civil aviation” (in 1988), “unlawful acts against the safety of fixed platforms located on the continental shelf” (in 1988), “terror-ist bombings” (in 1997), and “financing of terrorism” (in 1999). (2)
In the case of the last definition, contained in the International Convention for the Suppression of the Financing of Terrorism of 1999, it may be said that its sectoral character has been doubled. First of all, this convention recognizes that an offense is committed if a person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out . . . an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex. (Article 2, para. 1)

And subsequently, in the annex accompanying the convention, one finds a list of nine universal sectoral conventions, starting with the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 and ending with the Internationally Convention for the Suppression of Terrorist Bombings of 1997. Article 23 of the International Convention for the Suppression of the Financing of Terror-ism of 1999 also provides that the said list may be extended in the future—through a relatively easier procedure—by the addition of other relevant antiterorist treaties. This approach, allowing one to avoid searching for a substantial and exhaus-tive comprehensive definition of international terrorism, also has been applied by other regional conventions and drafts aiming to elaborate such a comprehen-sive definition. (3)

There is also a specific sectoral definition of regional nature contained in the above-mentioned Organization of American States Convention of 1971 that deals with “acts of terrorism taking the form of crimes against persons and related extortion that are of international significance” (Article 2).

All sectoral conventions provide for the obligation of their states’ parties to criminalize acts described by these treaties as offenses. It is the obligation either to “make the offence punishable by severe penalties” (e.g., the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, Article 2) or to make these crimes “punishable by appropriate penalties which take into account the grave nature of the offences” (e.g., the International Convention for the Suppression of the Financing of Terrorism of 1999, Article 4b). The first internationally adopted comprehensive definition of acts of terror-ism was elaborated, as observed above, within the framework of the Geneva Convention of 1937 (see United Nations, 1972); such acts are defined as “criminal acts directed against a State or intended to create a state of terror in the minds of particular persons, or a group of persons or the general public” (Article 1, para. 2). In addition, this convention’s definition is accompanied by more detailed provisions, saying that these acts would include “any willful act causing death or grievous bodily harm or loss of liberty to public officials in general (Article 2, paras. 1a, 1b, 1c), “any willful act calculated to endanger the lives of members of the public” (Article 2, para. 3), “willful destruction of or damage to public property” (Article 2, para. 2), and “manufacture, obtaining, possession or supplying of arms or ammunition, explosives or harmful substances with a view to the commission in any country whatsoever” of one of the offenses mentioned (Article 2, para. 5). This convention also covers attempts; conspiracy; incite-ment, if successful, to all offenses; direct public incitement to certain acts even if unsuccessful; willful participation; and assistance knowingly given. Although there were numerous attempts toward this end, together with the establishment in 1972 of the UN Ad Hoc Committee on terrorism as well as appropriate drafts presented by individual states, it was impossible—because of political differences—to reach a final consensus concerning a generally accept-able, comprehensive definition of international terrorism together with the con-clusion of an appropriate universal comprehensive convention (Franck & Lock-wood, 1974). A revival of the United Nations’s efforts in this field brought to life a new body, that is, the Ad Hoc Committee on terrorism (United Nations, 1996). (4)

Suffering the lack of a legally binding universal comprehensive definition of international terrorism, we have to stress that such definitions have been elabo-rated by some
regional conventions already. Some of them adopted an easier method, establishing their scope of application by including in their texts the list of universal sectoral conventions or offenses established in these conventions, for example, the European Convention on the Suppression of Terrorism of 1977, as amended by its Protocol of 2003, Article 1 (see also United Nations, 2004a, pp. 139-152), and the Inter-American Convention Against Terrorism of 2002, Article 2 (see United Nations, 2004a, pp. 239-250). Another group of regional conventions—the Organization of African Unity Convention on the Prevention and Combating of Terrorism of 1999, Article 1, paragraph 3 (see United Nations, 2004a, pp. 210-225) and the Treaty on Cooperation Among the States Members of the Commonwealth of Independent States in Combating Terrorism of 1999, Article 1 (see United Nations, 2004a, pp. 175-187)—tries to elaborate a substantial comprehensive definition of terrorism or of terrorist acts, describing them with subjective and objective characteristics of criminal acts. Finally, there are regional conventions of comprehensive character that try to combine the methods of defining terrorism applied by two previous categories: the Arab Convention on the Suppression of Terrorism of 1998, Article 1 (see United Nations, 2004a, pp. 158-174); the Convention of the Organization of the Islamic Conference on Combating International Terrorism of 1999, Article 1 (see United Nations, 2004a, pp. 188-209); the original version of the European Convention on the Suppression of Terrorism of 1977, Article 1 (United Nations, 2001, pp. 139-146); and the South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism of 1987, Article 1 (see United Nations, 2004a, pp. 153-157). (5)

Prosecution of delicta juris gentium and terrorism

The outrage felt in the aftermath of the Second World War, whilst leading to the Nuremberg and Tokyo trials and the adoption of the Genocide Convention in 1948, did not translate immediately into the creation of a new order of international criminal justice. The International Law Commission, a United Nations body comprised of prominent legal experts and devoted to the progressive development of international law, was tasked with drafting a statute for an international criminal court. But the process lacked momentum and did not yield tangible results. This changed in the post-Cold War period. In 1993, the Security Council, faced with wars in the former Yugoslavia, set up the International Criminal Tribunal for Yugoslavia (the ICTY) and, a year later, established the International Criminal Tribunal for Rwanda (the ICTR) in response to the Rwandan genocide. In 1998, the Statute of the International Criminal Court was adopted in Rome, leading to the establishment of the International Criminal Court (the ICC). The ICC and the two ad hoc tribunals through their jurisprudence, including their interpretation of their respective statutes and the development of rules of procedure, gave and are still giving rise to important growth and progress of the field of international criminal law relating to delicta juris gentium. In particular, the body of law related to the individual accountability for genocide, crimes against humanity and war crimes was further developed.

Who can be prosecuted for delicta juris gentium?

As explained above, the term delicta juris gentium refers to crimes that shock the conscience of nations and address the criminal responsibility of individuals. Those individuals may be acting on behalf of a State or may be non-State actors.

Where can delicta juris gentium be prosecuted?

Delicta juris gentium can be prosecuted either at the national or international level. Despite the development of international criminal tribunals, including the ICTY and the ICTR, and the establishment of the International Criminal Court, national courts remain the predominant forum for prosecuting serious crimes of international concern. Cases brought before national courts are often only known in the country or region where the trial occurred. In some cases the accused persons are prosecuted for international crimes which have been incorporated into domestic law. In other cases the accused are prosecuted for regular domestic offenses, such
as murder, because the country has failed to adequately incorporate international crimes into domestic law. (6)

**Is there a sui generis crime of “terrorism” in international criminal law?**

There is no international crime of “terrorism” in the sense of a delicta juris gentium and terrorism as such is neither a war crime nor a crime against humanity. One reason for this is the fact that there is, as yet, no general international agreement on a definition of terrorism. Furthermore, the statutes of the various tribunals do not include terrorism as a crime sui generis. As discussed above, while it had been discussed to include “terrorism” in the Rome Statute as a category of crime over which the ICC would have jurisdiction, there had been no consensus at the time of the adoption of the statute and further discussions will only take place in 2009. The Rome Conference on the International Criminal Court regretted that “no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion, within the jurisdiction of the Court”. (7)

**Law on the use of force (jus ad bellum)**

**Can terrorism justify the use of force?**

The current laws relating to the use of force are contained in the United Nations Charter and in customary international law. The general prohibition on the use of force is one of the fundamental principles of the United Nations and is set down in article 2 of the Charter: *Charter, article 2:* (3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice, shall not be compromised. (4) 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. The importance of the prohibition of the use of force against another State is shown by the fact that it is considered to be one of very few peremptory norms of customary international law or *jus cogens.* (8)

There are only two exceptions to the general prohibition: the use of force in self-defence, and a Security Council authorization of force, which applies when the Council determines the use of force necessary for the maintenance or restoration of international peace and security. The use of force in response to acts of terrorism will only be legitimate if justified in accordance with one of these two exceptions. (9)

Immediately after the terrorist attacks of 11 September 2001, the Republic of Azerbaijan, without hesitation, joined the international fight against terrorism and has since contributed to combating international terrorism through the implementation of a national programme of legislative, organisational and practical actions. On 12 September 2001, the President signed a Declaration announcing Azerbaijan's joining the global anti-terrorist coalition, after which the country offered its full assistance to the antiterrorist operations carried out by the coalition forces in Afghanistan by sending a military peacekeeping contingent and declaring its airspace and airports open for that purpose, and by arresting dozens of terrorists in the country and extraditing them to the relevant states. On 11 May 2002, the President signed Decree No. 920 approving the "Plan of action for the implementation of UN Security Council resolutions 1368 of 12 September 2001, 1373 of 28 September 2001, and 1377 of 12 November 2001". The Decree contains instructions to the relevant bodies of the executive power to take action for the suppression of terrorism and the financing of terrorism, as well as for the freezing of assets and other financial activities or economic resources of legal and physical entities which have perpetrated or are planning to commit acts of terrorism. The Decree was followed by the adoption of Law No. 712-IIQ "On National Security" of 29 June 2004, which establishes the legal basis for the national security strategy and policy with a view to the development of the Republic of Azerbaijan as an independent, sovereign, democratic state. It includes conceptual articles concerning terrorist threats and the carrying out of effective antiterrorist activities. This law regards international terrorism as a major threat to the national security of the Republic of Azerbaijan; multilateral co-operation in combating international terrorism and transnational organised crime is regarded as one of the main methods for ensuring national security. (10)
The law contains and interprets definitions of "terrorism", "terrorist", "terrorist group", "terrorist organisation", "terrorist activity", "international terrorist activity", "financing of terrorism", "fight against terrorism", "operations against terrorism" etc. This law defines "terrorism" as the "perpetration of explosions or fires or commission of other acts which threaten to endanger the lives of people, injure their health, cause substantial damage to property or give rise to other socially dangerous consequences with the aim of disturbing public order, sowing panic among the population or influencing the adoption of decisions by the organs of State power or international organisations, and also the threat of committing such acts with the same aim". (11)

According to the law, the fight against terrorism in the Republic of Azerbaijan is carried out for the following purposes:

1) to ensure human rights and liberties, the security of society and the state;
2) to discover and prevent terrorism and minimize possible harmful consequences of terrorism;

to disclose and eliminate the reasons and conditions for the emergence and existence of terrorism, as well as the financing and provision of other support to terrorism. (12)

The appropriate amendments to the law "On Fight Against Terrorism" and the Criminal Code, introduced in accordance with Law No. 332-IIQD "On Amendment of Some Legislative Acts of the Republic of Azerbaijan following the enforcement of law of the Republic of Azerbaijan "On Accession of the Republic of Azerbaijan to the International Convention for the Suppression of the Financing of Terrorism"" of 17 May 2002, made the punishment for terrorist activity and for deliberate disinformation about terrorism more severe and prescribed the inclusion of a new article introducing criminal liability for the financing of terrorism. Due to their character and the level of danger to society they represent, the above-mentioned crimes have been classified, in accordance with the definitions set forth in Article 15 of the Criminal Code, as serious and particularly serious crimes. Article 20 of the Criminal Code determining the age limits for criminal liability establishes that any mentally sound person at least 14 years old can be liable for a terrorist crime, and must reach the age of 16 before the date of the commission of the offence to be liable for the crimes of financing terrorism and deliberate disinformation about terrorism. Terrorism, as defined by Articles 1 and 214.1, is punished by eight to twelve years’ imprisonment with confiscation of property. The punishment can be increased to life imprisonment where aggravating circumstances are involved, namely if terrorism is committed: by an organised group or criminal organisation; repeatedly; with use of firearms or items used as weapon; and/or results in the accidental death of humans or other serious consequences. The financing of terrorism is defined in Article 215 as the “Deliberate transfer of money or any other property, completely or partially, directly or indirectly to perpetration of terrorism, as well as deliberate rising of money or any other property for the same purpose” and it is punished by eight to twelve years’ imprisonment with confiscation of property. The Law also makes deliberate disinformation about terrorism an offence, which is punished by five to eight years’ imprisonment. The Law provides for the possibility of dropping charges against any person who has participated in the preparation of an act of terrorism who assists in the prevention of such crime through giving a timely warning to the authorities or in any other way and there is no other corpus delicti in his/her actions. (13)

The criminal legislation of the Republic of Azerbaijan determines that any crime perpetrated by a previously arranged group of people, organised gang or criminal community (organisation), using firearms, explosive devices or other generally dangerous means and technical devices, as an act aggravating criminal liability. At the same time, Articles 75.5 and 80.4 of the Criminal Code forbid the application of the statute of limitations, the dismissal of criminal charges and the implementation of legally-empowered court sentences against persons who perpetrate attacks on persons and organisations enjoying international protection, acts of terrorism or financing of terrorism. (14)

In accordance with the international agreements it has signed, the Republic of Azerbaijan co-operates in combating terrorism with foreign countries, their law-enforcement agencies and
relevant international organisations. To strengthen co-operation against terrorism in the framework of both regional and universal organisations, Azerbaijan has acceded to international and regional antiterrorist conventions, concluded 13 bilateral agreements, 15 protocols and 2 memorandums for co-operation in the fight against terrorism. The Constitution of the Republic of Azerbaijan has determined international agreements concluded by the Republic of Azerbaijan as an integral part of its national legal system. In the case of contradictions between domestic legislative documents and international agreements to which the Republic of Azerbaijan is a signatory, the latter shall prevail. (15)


**Organization for Security and Cooperation in Europe**

As a member of the Organization for Security and Cooperation in Europe, the Republic of Azerbaijan has acceded to instruments containing the fundamental principles of that organisation, including the Final Act of Helsinki, the Paris Charter for New Europe, the OSCE Charter for the European Security and other important documents reflecting the principles of the fight against terrorism.

**European Union**

To intensify the relations of the Republic of Azerbaijan with the European Union and to ensure effective and coordinated work for the development of the Plan of Action for Azerbaijan in line with the EU's policy of New Neighbourhood, the President issued a Decree of 1 June 2005 on the establishment of a State Commission for integration with Europe. The above-mentioned Plan of Action is expected to contribute significantly to co-operation in combating terrorism and transnational organised crime.

**Council of Europe**

Since its admission to the Council of Europe (25.01.2001), the Republic of Azerbaijan has accomplished its obligations undertaken before the Council of Europe, in accordance with PACE Resolution 222 (2000). The Republic of Azerbaijan has acceded to the majority of the European conventions and protocols on fight against terrorism and organised crime (see the table of ratified instruments below). The Republic of Azerbaijan took part in the activities of the Council of Europe Multidisciplinary Group on International Action against Terrorism (GMT), and now participates in the work of the Council of Europe's Committee of Experts on Terrorism. (16)

**Commonwealth of Independent States (CIS)**

The Republic of Azerbaijan is a signatory to the following CIS documents on co-operation in the fight against terrorism and organised crime:

- Agreement of the Commonwealth of Independent States member states on co-operation in the fight against crime (25.11.1998);
- Agreement of the Commonwealth of Independent States member states on co-operation in the fight against terrorism (04.06.1999);
- Agreement of the Commonwealth of Independent States member states on co-operation in the fight against crimes related to computer information (01.06.2001);
- The Protocol approving the Charter of Guidelines for organisation and execution of joint antiterrorist actions on territories of the CIS member states (07.10.2002).

**GUAM Organization for Democracy and Economic Development**

On 23 May 2006, in Kiev (Ukraine), the heads of state of Azerbaijan, Georgia, Moldova and Ukraine signed the Charter of the GUAM Organization, thus establishing its legal and organisational principles, which completed its transformation from a regional consultative conference of multilateral diplomacy into a regional intergovernmental organisation. In its present form, the GUAM fully meets the requirements concerning regional organisations set forth in the Section VIII of the UN Charter. Co-operation in the fight against international terrorism, extremism, separatism, various forms of transnational organised crime and other serious crimes is one of the top purposes of the GUAM Organization for Democracy and
Economic Development. The Republic of Azerbaijan is party to the following GUAM documents on the fight against terrorism: Agreement "Between Governments of the GUAM member states on co-operation in the fight against terrorism, organised crime and other dangerous crimes" signed at the GUAM Summit in Yalta, 20 July 2002; Agreement "On establishment of the GUAM Virtual Centre and the GUAM Intergovernmental Information-Analysis System for combating terrorism, organised crime, proliferation of drugs and other dangerous crimes" signed in Yalta, Ukraine, on 4 July 2003. (17)

Conclusions

Terrorism has been a menace to mankind for two millennia, but in recent decades it has become a pressing domestic and international security problem. The Security Council as a guardian of world order has the authority to take both non-military and military measures in order to maintain or restore international peace and security, provided that it has first determined a threat to peace, a breach of the peace, or an act of aggression to exist. Since 1992, it has gradually acknowledged that different manifestations of terrorism constitute a threat to peace and therefore justify the use of enforcement measures. A determination that certain manifestations of terrorism constitute a threat to peace is essentially a political decision, even more so because there is no generic definition of terrorism or guidelines for identifying threats to peace. The Security Council has repeatedly determined that providing sanctuary and training for terrorists and their organisations, and refusing extradition or to co-operate with efforts to bring indicted terrorists to justice, are a threat to peace. After the events of 11 September 2001, the Security Council embarked on a somewhat troublesome path, as it has classified all terrorist acts as a threat to international peace and security without any further qualification or ascribing these acts of terrorism to a particular state. Instead, the Security Council should describe its understanding of terrorism more specifically and preferably in a resolution adopted under Chapter VII in order to avoid a disagreement as to whether that description is legally binding. Additionally, it should be more cautious with portraying every act of international terrorism as a threat to international peace and security, because not every terrorist act has such potential. Overly frequent referrals to minor terrorist acts may also downgrade the momentum of major terrorist acts. While it is politically convenient not to assess individually every terrorist act brought to the Security Council’s attention but to instead label all as a threat to peace, such an approach endangers numerous fundamental rules and inter-state relations as well as eventually international peace and security.

Literature

3. See, for instance, a list of 10 sectoral conventions contained in the Inter-American Convention Against Terrorism of 2002, Article 2 (see United Nations, 2004a, pp. 239-250) or the analogous list of the same treaties included in the European Convention on the Suppression of Terrorism of 1977, as amended by its Protocol of 2003, Article 1, paragraph 1 (see also United Nations, 2004a, pp. 139-152).
American Society of International Law, American Journal of International Law, 67(5), p.94-100.

6. see www.preventgenocide.org/punish/


10. Law No. 712-IIQ of the Republic of Azerbaijan “On National Security” of 29 June 2004: Articles 6.2.6, 7.5.8, 7.5.12, 16.2.13, 16.2.16.


