Lois antiterroristes en Europe et aux USA, Guerre contre le terrorisme: conséquences sur les droits de l'homme

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Repressive anti- terrorist Legislation: the United States Case

Texte de présentation de **Mme Karen PARKER**, Représentante de l'International Educational Development / Humanitarian Project.

This paper presents a bref overview of United States anti-terrorist legislation in light of existing United States Constitutional provisions and judicial standards, and international human rights and humanitarian (armed conflict) law.

As a result of the September 11 attacks on the World Trade Center in New York City and the Pentagon the President of the United States sought to strengthen the existing « anti-terrorist » legislation in the United States. The new law, called the « *Patriot Act* », was promulgated within several weeks of the attacks[1]. This act is so vague in its language and so sweeping in its « *definition* » of terrorism that the famous « *Boston Tea Party* »of America's Crue patriots would be a terrorist act.

The then-existing law provided special criminal proceedings for acts terrorism or for acts in support of terrorism or terrorist groups. Specifically, the law crimmalized membership in or support for terrorist groups. Support could include training, recruitment, education and material support. Under provision of this law, the State Department issued a list of organizations that it viewed as terrorist groups. Included in this list were the PKK (Kurdish resistance army), the opposition forces of the National Council of Resistance in Iran and the Liberation Tigers of Tamil Eelam (LTTE) and several groups involved in the Kashmir struggle. The law makes no useful provisions for groups to challenge inclusion on this list.

This law was itself considered overbroad and in serious conflict with the American Bill of Rights by most prominent Constitutional law legal scholars. it was challenged in court by my non-governmental organization, International Educational Development/Humanitarian Law Project (IED/HLP) because we vehemently disagreed with the inclusion of the above listed groups as « *terrorist* » groups. Rather, we viewed these groups as involved in armed conflicts clearly governed by the Geneva Conventions and all of the laws and customs of war. We also viewed it as constitutionally vague and threatening to us because it unduly encroached on activities we engage in: training programmes on humanitarian law, urging compliance with humanitarian law in armed conflict situations and in providing or encouraging others to provide aid for victims of armed conflict. These rights, we argued, are protected by, inter alia, the Geneva Conventions and other armed conflict and human rights laws[2].

The LTTE and the National Council of Resistance filed legal actions separately after it became clear that the Court would not allow IED/HLP to challenge the « *lists* ». These actions were at first dismissed because the Courts rules that as foreign entities, they did not have a right to sue in United States courts for acts of the United States[3]. The IED/HLP case partially failed and partially succeeded. It failed because we were not able to challenge the lists and the Court did not seem to accept any argument about encroachment into protected rights under humanitarian law. It succeeded because the Court found significant portions of this anti-terrorism legislation unduly vague, including the sections addressing « *training* », education and free speech rights[4].

The Patriot Act is much much more overbroad and vague than the earlier law. In particular, it seems to take any requirement of terror-creating out of the definition of terrorism, and includes acts such as destruction of commercial property that under normal criminal law would be considered « malicious mischief' - a misdemeanor. This law leans dangerously into encroachment of the right to petition, right to dissent, freedom of opinion and into areas such as « *symbolic* » speech and civil disobedience. The Boston Tea Party was an act of symbolic speech and civil disobedience (malicious mischief) - hence my contention that it would be found a terrorist act under this legislation. Included in the new list of « terrorist » organizations are United States environmental groups and animal rights groups advocating against use of animal experimentation. Among a listing of the « *terrorist acts* » committed by one animal rights group are the following acts: release (1) of 465 chickens from a research laboratory; (2) release of about 200 rabbits from a research laboratory; and (3) painting antianimal experimentation slogans on the side of a building. Other acts of these groups and some of the activist environmental groups that could be classihed as arson or other criminal acts are clearly covered by existing criminal laws which have not been shown to be inadequate to either charge (under existing requirements of « probable cause ») or to convict (under existing requirements of « *beyond a reasonable doubt* »). Further, existing rights to appeal have not been shown to be defective.

While the « *terrorization* » of dissent, petty mischief and symbolic civil disobedience (and even some of the more serious acts committed by certain individuals or groups) could be viewed as somewhat humourous[5], the legal consequences under this new law are so grave as to knock out any humour. This is because to the serious abrogation of normal criminal justice norms that this act allows: curtailment of right to counsel, the « *legalization* » of incommunicado detention, the use of « hearsay » evidence, the ability of the authorities to invoke « *State security* » to deny evidence or proof and curtailment of some rights to appeal. « *Probable cause* » is now reduced to « *the authorities say so* » - with no judicial consideration and « beyond a reasonable doubt » is also reduced to « *the authorities say so* » - with a severely curtailed possibility to challenge it in open court[6]. In this light, the Patriot Act is in violation of Articles 9 and 14 of the International Covenant of Civil and Political Rights as well as the US Constitution and leading decisions of the US Supreme Court[7].

Serious as this situation may be in the United States itself, the attempt at extraterritorial reach of United States law and practice is equally serious. Let me give some examples. A certain suspect was detained in Bosnia-Herzegovina (apparently on request of the United States government) on grounds that he may have information regarding terrorist groups or may be part of such a group. He was held the maximum amount possible under the laws of Bosnia-Herzegovina, but the authorities could not make a showing in their courts of probable cause under the law. Accordingly, he was to be released. The United States sought custody of this person, and he was in fact turned over to Untied States authorities and brought to the United States. United States Constitutional provisions regarding probable cause essentially duplicate the standard in Bosnia-Herzegovina. Yet this person is stil« held in the United States under the Patriot Act (without meeting the US standard for detention) where lie finds himself in a Kafkaesque situation: incommunicado detention, severely curtailed right to counsel, no public examination of his case, and other severe abrogation of the international rights of criminal defendants (not to mention the rights under the UN Standard Minimum Rules for the Treatment of Detainees). A second example is the situation of persons over whom the United States gains custody, only to send them to countries with a history of torture in detention. In the other State the person is tortured in custody to obtain « *confessions* » or other evidence of terrorist activities. The person is subsequently sent back to the United States, where the information obtain under torture is deemed admissible in a proceeding under the Patriot Act. So the Patriot Act and United States practice « *legalized* » torture[8].

The Sub-Commission, at the strong urging of the Commission, undertook to address terrorism and human rights by first authorizing Mme K Koufa (alternate expert frorn Greece) to present a working paper and subsequently authorizing her, as Special Rapporteur, to prepare a study of this topic. The Special Rapporteur has presented a preliminary report[9] and a progress report[10] . The Sub-Commission has authorized a second progress report, in part due to the complexity of this issue and in part due to the many sub-issues that the Commission on

Human Rights has urged be addressed. The Special Rapporteur began addressing responses to terrorism that unduly encroach on human rights in her first progress report, and indicated at the Sub-Commission that this topic would receive more attention in the second progress report. 1 urge persons with concerns such as 1 have about repressive « anti-terrorism » legislation to send these concerns to the Special Rapporteur. Never since the promulgation of the Charter of the United Nations and the international human rights and humanitarian law instruments has there been a stronger assault on core values. Never before has the voice of civil society been more needed. Terrorism will never be combated by wholesale abrogation of human rights. Terrorism will only be obsolete when there is universal realization of human rights for all.

NOTES:

1 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, P.L. 107-56 (HR 3162) of October 26, 2001 (the Patriot Act).
2 The IEDIHLP suit, Humanitarian Law Project v, Reno, was represented by the Center for Constitutional Rights.
3 The Court in the LTTE action as well as conceded that the LTTE was legally correct in their assertion that they were a military force in an armed conflict, not a terrorist group.
4 While clearly refusing to comment on the legal status of the « groups » in question and finding the law partially unconstitutional, the press wrote that IED/HLP was found to have a right to support « terrorist » organizations! ! This misconception has seriously damaged us with United States authorities.
5 The author has not found a single person who would be « terrorized » by either chickens or rabbits or slogans on a wall. Even small children would squeal in delight finding little rabbits.
6 Even the concept of « open court » is restricted as certain cases, at the discretion of the authorities, can be undertaken behind closed doors.
7 The time restraints of this presentation do not allow me to give a complete analysis of Articles 9 and 14 of the International Covenant on Civil and Political Rights, but the author invites those interested to review the General Comrnents of the Human Rights Committee in this regard.
8 The author is aware that treatment meeting the international law standard of torture exists in the United States in its Mention facilities. In addition, as a response to the events of September 11, some Constitutional law scholars usually associated with the more human rights oriented scholars actually defended « limited » use of torture in the United States to avert actual terrorist acts. This shocking disposition has been strongly criticized by the international community and other scholars, this author included, in the United States. Because of the heated debate on this issue, at present the United States considers that it does not avant to « dirty » its own hands and would rather that the torture takes place outside its direct jurisdiction.
9 U.N. Doc. E/CN.4/Sub.2/1999/27.
10 U.N. Doc. E/CN.4/Sub.2/2001/31.

Centre Europe-Tiers Monde (CETIM)
Rue Amat 6
1202 Genève
Suisse
www.cetim.ch