



THE GOVERNMENT LIABILITY FOR THIRD ACTORS ON TERRORISM

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Abstract

Terrorism has been present in the world for already fifty years; it has impacted some countries more than others, this is the case of Spain and France. Because of this governments compromised themselves to combat terrorism and eradicate it, and governments realized that eliminating terrorism implies as well preventing it. Prevention of terrorism is an obligation that government have and has many sources, it implies certain actions and it is not an open letter to governments to combat terrorism irrationally. The problem is that governments by assuming obligations that grant so much discretion as the prevention of terrorism; do not want to be controlled on their actions, therefore, they are reluctant to accept that type of obligations. Governments created mechanisms to avoid the assessment of their responsibility combating and preventing terrorism in front of courts. This is not because of the un willingness of governments aiding the victims of terrorism only but as well for their fear to be forced to comply with obligations they do not want to recognize. The Courts of public law can create a difference and evolve in the field of responsibility by recognizing the obligation of prevention and comndening the government for its failure in its accomplishment.

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Introduction

For more than four decades, governments around the globe have been the target of terrorism. Spanish people faced the terror wave of attacks by nationalist separatist armed groups; France suffered the same fate on a lesser scale. After the most violent century of our history governments around the world agreed to build a civilization of peace respecting Human rights; we were witnesses of the blossom of a *pro homine* society.¹ Sadly, this dream is not shared by everybody; radical groups started using more and more terrorism to claim social changes that democratically might not been accepted. From the creation of the United Nations, the number of terrorist acts grows without control; we passed from 1000 terrorist attacks in 1998 to more than 6.000 in 2006.² Terrorism victims passed from being less than 50 in 1969 to more than 3000 in 2.000.³ Nowadays, as a product of globalization and international policies of governments, terrorism has become a more close threat to the peace and security of the nations.

Governments developed a common consciousness about terrorism not only to condemn it, but to unite efforts if not to eliminate it, to limit its impacts. However, governments are reluctant to agree that the fight of terrorism is an obligation since they do not want to be controlled on how they use force. For that reason, governments agreed on mandatory mechanisms that do not imply great efforts on their behalf; nonetheless the

¹ Robert Cario; *Terrorisme et Droits des victims*; in Edit. Calmann-Levy, *Terrorisme, victime et*

² Vanessa Martin; Marc-Olivier Benoit; *La definition du terrorisme: un etat des lieux*; in *Repenser le terrorisme: concept, acteurs et reponses*; Edited by Charles-Philippe David et Benoit Gagnon; Les presses de l'Universite Laval; Quebec; 2007; Pp. 4 -9

³ Francois Heisburg, Jean-Luc Marret; *Le terrorisme en France aujourd'hui*; Editions des equateurs; Paris; 2006; P.19

combat against terrorism is an obligation and governments are supposed to act upon it. The obligation to combat terrorism implies the prevention of future attacks; this is where governments do not agree. Constantly governments fail to prevent terrorism and therefore they want to avoid responsibility by simply agreeing that prevention is important but is not an obligation. Conversely, domestic and international efforts are focus to change that perception and recognize the obligation to prevent terrorism. The governmental response to such a reality has been the agreed compensation to victims of terrorism in order to avoid law suits that compromise their responsibility. Usually when a Terrorist act occurs, a fund to help for the victims is created. But funds are a type of charity with no real possibility of appeal for victims in case they want to seek a higher compensation or simply the recognition of the duties of the government. However, instead of having a system of public charity we have to acknowledge that there are mechanisms in public law that allow us to assess the obligations of the government combating terrorism.

The historical research of the realities in Spain and France is one of the bases for this paper; we have to review the past of terrorism in the mentioned countries and evolution of methods combating it. I will compare the legislation of both jurisdictions and jurisprudential practice with the reigning theories regarding the obligations of terrorism. There are several reasons why study Spain and France: language, constant search for the construction of a secure Europe and common problems dealing with terrorism. Both jurisdictions are worthy of study for their particular actualities; even when terrorism has been a worldwide reality, France and Spain have faced the same enemies and developed parallel innovative methods to combat terrorism. These two countries led the world debate on the obligations of governments on terrorism along with other countries

constantly facing terrorism such as Ireland, United Kingdom or Colombia. It is convenient to compare France and Spain because both jurisdictions are built under the system of civil law, and the system of governmental responsibility is practically the same. They are both members of the same international organizations that seek to secure defense, such as the Schengen space, or the EU.⁴ Spain and France are “part of a homogeneous international system that departs from the same political conceptions.”⁵

We have to acknowledge that victims of terrorism lack efficient remedies when governments fail to prevent these attacks; therefore a system of responsibility should be developed. Since the Government takes care of national security and because of international commitments, it has obligations, even implicit, preventing and controlling terrorism. These obligations should be enforced when a terrorist act is committed. As we deal with Governmental obligations, a solution to those problems should be found within the Administrative Law and International Law of Human Rights.

Through this work I want to participate in the academic debate about the obligations that governments have against terrorism. Much has been written about terrorism and more about its combat; however there is not much literature on the prevention of terrorism as an obligation and its need. With the study of the Spanish and French jurisdictions I aim to show that the obligations of counterterrorism established by international and domestic law are mandatory with special emphasis on prevention. Because of that a system of responsibility should be established for the government to respond to the victims of terrorism for the failure of their obligation to prevent.

⁴ Jerome Montes; *Repenser la securite en France et en Espagne (Du mur de Berlin au World Trade Center)*; Collection THESES DE SCIENCES HUMAINES Nro9; Bruylant-Academia, Louvain-la-neuve. 2003; P. 13

⁵Raymond Aron; *Paix et guerre entre las nations*; Paris; Calmann-Levy, col. Liberte de l’Esprit, 9eme, ed; 2001.; P.794

Nonetheless, there are solutions within the legal systems of Spain and France to guarantee compensation in this type of cases but, they are not enough. But writing about the obligations of governments combating terrorism is important as well because by establishing a system of responsibility, governments will solve many other problems related to terrorism. Terrorism impacts on the economy⁶ and psychological life of all human beings,⁷ it is up to governments to attend to those problems by preventing terrorism.

I propose to divide this work into three chapters, first analyzing the basic obligations of the Government regarding terrorism, the need of a definition, the international demands regarding counter-terrorism and the adoption of most of the international requirements by States for its exigency on modification of legislation. Subsequently, the second chapter will be an analysis of the main obligations of the Government related to the prevention or control of terrorism. In the third chapter I will explore the solutions in the field of responsibility once we have a clear nexus between the Government and its obligations in relation to terrorism.

The first chapter is devoted to studying the general obligation of governments to combat terrorism. There is no need to define terrorism for us, this research is based on the efforts combating terrorism. Because of that, we will study terrorism as a reality, for that we will use the work of authors, such as Oechmichen, using focused examples of terrorist acts committed in France and Spain. Furthermore, we need to study the obligations of the governments combating terrorism by legislation and on practice. The

⁶ Vicente Hueso; *Donde estamos*; in *Modelo Espanol de defense y seguridad*; Centro superior de estudios de la defense nacional; Ministerio de la defensa; Madrid; 2007; P.40

⁷ Enrique Echeburua; Paz de Corral and Pedro Amor; *Terrorismo y trastorno de estres postraumatico: psicopatía y tratamiento*; in *Madrid 11-M: Un analisis del mal y sus consecuencias*; Edited by Amalio Blanco; Rafael del Aguila and Jose Manuel Sabucedo; Editorial Trotta; Madrid; 2005; P.263

already mentioned Oehmichen will provide us the analysis of lawmaking over terrorism and will facilitate some examples of legislation against terrorism, including references to the evolution of anti-terrorist legislation.⁸ Other authors such as Becker⁹ and O'Brien¹⁰ will help us to understand the obligations combating terrorism that imply mostly the adoption of legislative measures to regulate the criminalization of the act, prohibition of financing and protection in specific matters.

Once we are clear on the general obligation of governments combating terrorism, we can pass to the main object of this research in Chapter two, determining whether or not the State has an obligation preventing terrorism. Here I will explain that the obligation to prevent is in fact an obligation with sources in international and domestic law demanding the State use several methods, to effectively prevent terrorism from happening.¹¹

I will try to demonstrate that several sources serve as foundations of the obligation of prevention. We will review authors supporting the existence of the obligation preventing terrorism on the international forum such as Stubbins.¹² For her the obligation to prevent has been already clarified as mandatory in the framework of international organizations, such as the European Union. In this sense authors such as

⁸ See Anna Oehmichen. "Anna Oehmichen; *Terrorism and Anti-terror Legislation: the terrorized legislator?* Intersentia; Amsterdam; 2009.

⁹ See Tal Becker; *Terrorism and the State: Rethinking the Rules of State Responsibility*; Hart Publishing; 2006.

¹⁰ See Kevin O'Brien; "France" in *Europe Confronts Terrorism*, Edited by Karin von Hippel, Palgrave MacMillan; New York; 2005

¹¹ Ludovic Hennebel and Helene Trigroudja; *Le juge, le terroriste et l'Etat de droit*, in *Juger le terrorisme Dans l'Etat de droit*; Edited by Ludovic Hennebel and Damien Vandermeersch; Brylant; Brussels; 2009; P.131

¹² See Elizabeth Stubbins; *Terrorism and International Law: Accountability, remedies and reform*; Oxford University Press; New York; 2011

Baab¹³ explain the way that the European legislation has helped to improve French and Spanish techniques combating terrorism. In the same way, Shwarze present us examples where the national law has been changed or improved because of international governmental compromises on the prevention of terrorism.¹⁴ However, for some other authors such as Brown and Bell, the obligation exists and can be included within the obligation that the administration has granting national security.¹⁵ They concluded that prevention of terrorism is a problem of domestic jurisdiction because the government has the monopoly on the use of force. Authors such as Dycus do not talk precisely about terrorism and prevention of it;¹⁶ however his work reflects clear examples similar to terrorism where the government is compromised to prevent crime and grant national security.¹⁷

After explaining the sources of the obligation of prevention we have to study practically the obligation to prevent. This obligation implies the performance of several methods or actions that governments need to properly comply with it. In this part we will give some concrete examples on the common practices by governments that lead to the good obedience to the obligation. A few examples to examine will be, development of intelligence, use of force, immigration control, protection or vulnerable targets and even negotiation and integration of terrorists into society. For this we will need the specific analysis of authors as such Forst¹⁸ or Cronin¹⁹ who explain these methods in detail.

¹³ See Frederic Baab; *La cooperation judiciaire europeenne dans la lutte contre le terrorisme*; in *Terrorisme, victime et responsabilite penale internationale*; Edited by Calmann-Levy, SOS Attentats; 2003

¹⁴ Jürgen Schwarze. *Administrative law under European influence : on the convergence of the administrative laws of the EU member states*; Nomos; 1996. Pp 697-698

¹⁵ Neville Brown; John Bell; *French Administrative Law – 5th Edition*; Claredon Press; Oxford; 1998; Pp. 253-261

¹⁶ Stephen Dycus; *National security law*; Boston; Little Brown; 1990.

¹⁷ Stephen Dycus. *Idem*

¹⁸ See Brian Forst; *Terrorism, Crime and Public Policy*; Cambridge University Press, New York; 2009

One main point to discuss will be that governments preventing terrorism will need to attend to a criterion of efficacy and due diligence. This will depend in a broad sense on the discretion granted to governments to perform their methods and deliver successful results. Braibant and Stirn studied widely the characteristics that the discretionary power may imply.²⁰ The last two authors even study discretion as an obligation.²¹ It is important to review here as well the how to control power, these notions are useful to describe how the power can be measured in order to understand the concept of its obligations.

Once we are conscious that preventing terrorism is an obligation and it can be achieved, we will pass to analyze in the third chapter the need to establish a system of responsibility for the States, to respond to victims and clarify its obligations. Here we need first to use the work of scholars such as Rudetzki²² to clarify the situation of Spain and France on compensation of victims of terrorism. I tend here to explain the existing mechanisms of compensation to the victims such as funds of compensation. However, it is my purpose to show that these ways in neither funds, nor civil nor criminal jurisdictions are enough. There are two reasons; first the victims are not really entitled to an objective appeal if they want to question the amount of compensation and second there is a need to have access to courts in order to clarify the duties of governments and enforce them. On the failure of terrorism governments have a clear responsibility and they have to act upon it. The French theory on responsibility (that can be understood as

¹⁹ See Audrey Cronin; *How terrorism ends: understanding the decline and demise of terrorist campaigns*; Princeton University Press; New Jersey; 2009

²⁰ Guy Braibant, Benard Stirn; *Le droit administrative Francais*; Dalloz; Presses de Sciences Po; 2005; Pp. 201-208.

²¹ Guy Braibant and Benard Stirn Idem; Pp. 465-476

²² Francoise Rudetzki; *Etat de la legislation en France: le role joue par SOS Attentats*; in *Terrorisme, victime et responsabilite penale internationale*; Edited by Calmann-Levy, SOS Attentats; 2003

general) establishes that when someone in in charge of a duty and fails it, he has to compensate for the damages caused.²³ In the case of terrorism the fault is not only of the terrorists, there is a connection between the victims of terrorism and the government, who should prevent terrorism. The general doctrine establishes that the civil jurisdiction should be entitled to determine the possible compensations²⁴. However, it is important to recognize the obligations of the government in prevention in front of public law courts; this will benefit not only the victims of terrorism but the population in general. Schwarze explains why the recognition of the obligations of government is important beyond the interest of the victims. For him, all the acts enacted by the Administration should be explained to the citizens in order to give them the right to defend themselves in case they want to fight it.²⁵

We have then to understand the theories related to the responsibility of the government on terrorism performed by third actors. Here we study the theories of absolute responsibility²⁶ that establish a general obligation to compensate for any damage in the guard of the government. We will study the ruling theory of the agency that establishes that the link to determine governmental responsibility is if the act was committed by one of the governmental agents.²⁷ To finish, we will study the theory of causality²⁸ which establishes the responsibility of the government for negligence, ineffective prevention and even for causing the conditions for terrorism to happen.

²³ Michel Rougevin-Baville. *La Responsabilite Administrative*. Editions Hachette, Paris; 1993. P.182

²⁴ Michel Rougevin-Baville. Op cit, pp. 149-159

²⁵ Jürgen Schwarze. *European Administrative law*. Sweet and Maxwell, London. 2006. pp 1399 - 1400

²⁶ See Ricardo Rivero Ortega; *El estado vigilante; Consideraciones Jurídicas Sobre la Función Inspectoral de la Administración*; Tecnos; 2000.

²⁷ See Robert Barnidge; *Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle*; Asser Press; 2007.

²⁸ See Tal Becker; *Terrorism and the State: Rethinking the Rules of State Responsibility*; Hart Publishing; 2006.

To finish the chapter I will review the position and practice of international and domestic courts when establishing the responsibility of the government for its failure to prevent terrorism. First we will study the cases of Human rights jurisdictions where the argument of the failure of the protection of the right of life of the victims of terrorism is the key to determining the responsibility of the government. In the domestic forum I will use the argumentation of Rougevin-Baville, who presents a study of the responsibility of governments without fault on the administrative jurisdiction.²⁹ To conclude the chapter I will review critically some strange causes that might excuse the Administration of its responsibility. For that Rougevin-Baville proposes a list of causes including intervention of the victim that will guide this part of the research.³⁰

²⁹Michel Rougevin-Baville; Op cit; Pp.73-104

³⁰Michel Rougevin-Baville; Idem, Pp. 133-138

Chapter 1

To understand further concepts about the duty of governments preventing terrorism, we have to start by studying the general obligations of the States on counter-terrorism. In our days, nobody is clueless of what is to be qualified as terrorism; terrorism is everywhere and everybody knows that governments are doing everything in their hands to eradicate it. However, with a public knowledge of what is terrorism, governments are not capable to agree in a definition. Yet, we know that the fight against terrorism implies actions to be taken rather by law or by using the force against those who are to be qualified as terrorists. What generally people do not know is that the actions of counter-terrorism are not courtesy of governments to its citizens; they are obligations. Governments have clearly accepted some of these obligations publically; however, some other obligations as the prevention of terrorism that implies a harder task for States, is still being ignored.

Through this chapter we will have a chance to review the terrorism as a reality in France and Spain. We will pass to review what terrorism is, if not by the international community consensus by common academic understanding of the term. Once that we are clear on what are we combating we have to study in detail the specific obligations of the State on counterterrorism. As we mentioned there are obligations that States have adopted publically, these obligations are easily accepted because they do not represent a hard effort for governments and normally imply legislative changes. Therefore this chapter will be focused on the review of the legislative efforts of Spain and France combating terrorism.

The reality of terrorism

It may appear that terrorism is a new concept; however, terrorism is the oldest type of irrational political expression. Authors such as Oehmichen or Forst, believe that terrorism has always been present in history. For them the campaigns of Genghis Khan or even the crusades are first sights of terrorism.³¹ A more concrete example by states is the gunpowder plot of 1605 in England was planned on the name of the Catholic persecution of the enemies of the church.³² Other scholars affirm that terrorism appeared the day that was first regulated as a crime, for the first time that terrorism existed was in the 1930's when the crime was being studied by the League of Nations, on the "Convention for the prevention and punishment of terrorism"³³ in 1937.³⁴ A middle position is presented by Martinez who thinks that terrorism appeared the day that a group tried to impose an idea to the society using the intimidation. For that she implies that terrorism was born in France once the Jacobins accessed to power and "*le terreur*" was implemented as policy.³⁵ No matter the position, one thing is implied, terrorism is a reality and it is not a new thing. In France and Spain terrorism has been a constant and painful reality, we pass now to review the experience of these two countries with terrorism.

From 1936 to 1975 Spain was under the authoritarian military regime of Francisco Franco. From that time, Spain has suffered several terrorist attacks performed

³¹ Brian Forst; Op cit; P 43

³² See Anna Oehmichen; Op cit.

³³ Convention for the prevention and punishment of Terrorism, redacted by the Assembly of the League of Nations; Resolution of October 10, 1936; not entered into force; ratified by India on 1 January, 1941; signed by: Albania, Argentina, Belgium, Bulgaria, Cuba, Czechoslovakia, Dominican Republic, Ecuador, Egypt, Estonia, France, Greece, Haiti, India, Monaco, Netherlands, Norway, Peru, Romania, Spain, Turkey, USSR, Venezuela and Yugoslavia.

³⁴ Larry Siegel; *Criminology*; Thomsom/Wadsworth; Belmont; 2009; P.328; Note: the convention never came into force.

³⁵ Lucia Martinez Garay; Javier Mira Benavent; *Audiencia Nacional y Prohibicion penal de reuniones y manifestaciones*; Tirant lo Blanch; Valencia; 2011; P.30

by separatists, communists or anarchists whose goal is to undermine the political system of the country.³⁶ Being a repressive dictator, Franco with its despotic politics justified the creation of the mayor threat for Spain, ETA. As dissidents of the Nationalist Basque Party, a group of young people founded the *Euskadi Ta Askatasuna* (ETA) to claim the total independence of the Basque country. ETA intends to represent, the ethnical, religious and cultural different population of the Basque country.³⁷ ETA was created originally in 1959, and started operating violently that same year, the group aim as well to end the Franco's regime of repression.

In the first attack of ETA 3 bombs exploded with no victims in the Basque country giving birth to the Spanish history of terror.³⁸ In the 70's during the transition regime that came after Franco's death, the activities of ETA increased. Even when an amnesty law granted freedom all the ETA members in prison, the group continued fighting and became more violent.³⁹ Other small separatist groups of the Basque country tried to follow ETA, however they were absorbed by the terrorist organization. Since 1984, ETA has been the only terrorist group operating in the Basque country.⁴⁰ ETA has faced several fractions; there is a terrorist division that claims the total independence of the country,⁴¹ but other sections decided to go on the democratic path and fight with parliamentary efforts to maintain the autonomy of the Basque country.⁴² From 1995 the attacks of ETA were directed not only against the government but at diverse personalities

³⁶ Jose Luis de la Cuesta; *La Legislation antiterroriste en Espagne*; in *Terrorisme, victime et responsabilite penale internationale*; Edit. Calmann-Levy, SOS Attentats; 2004; P.264

³⁷ Brian Forst; P.50

³⁸ Rogelio Alonso; Florencio Dominguez; Maros Garcia Rey; *Vidas Rotas (Historias de hombres, mujeres y niños víctimas de ETA)*; Espasa; Madrid; 2010; P.15

³⁹ Rogelio Alonso; P.84

⁴⁰ Ignacio Sanchez Cuenca; *The persistence of Nationalist Terrorism: the case of ETA*; in *Violent Non-State actors in world politics*; Edited by Klejda Mulaj; Hurst and company; London; 2010; P.76

⁴¹ Ignacio Sanchez Cuenca; P.74

⁴² To see a list of the most remarkable ETA attacks See: Anna Oehmichen; Pp. 104-108

of the Basque country that oppose them.⁴³ ETA is responsible for over 80% of the violent politically-motivated killings in Spain since 1968.⁴⁴ There is no public sector with maybe the exception of the church that has not been affected by ETA.⁴⁵

Another chapter in the history of terror in Spain was written after 9/11⁴⁶ attacks in the USA; once the Bush Administration initiated the “war on terror” Spain agreed to support it. However, in Spain Al-Qaeda was supported by the jihadists; they formed an arm of Al-Qaeda in the country under the name “*Abu Dahdah*.” The group performed the strongest attack in the history of Spanish terrorism on a train of Madrid in rush hour on March 11 of 2004. The terrorist attacks of 2004 in Spain killed 190 people and injured more than 1400 citizens.⁴⁷ However, the group was highly weakened because of the governmental efforts after the attacks of M11.⁴⁸

The French experience is different in magnitude but equal in efforts combating terrorism; more than 1300 acts of terrorism took place in Paris from 1966 to 2005.⁴⁹ France confronts nowadays several types of menaces: mafias dealing with prostitution and drug dealing; separatist groups in Corsica; the Spanish conflict with ETA; and the “Arabic” menace for the policies of France to middle-east countries and Muslim

⁴³ Alain Bauer; Xavier Raufer; *World chaos: Early Detection and Proactive Security: Principles and Practices*; Universite Pantheon-Assas; 2007; P.62

⁴⁴ *Los espanoles y las victimas del terrorismo: 1ra encuesta nacional percepcion ciudadana sobre las victimas del terrorismo en Espana*; Edited by Francisco Llera; Alfredo Retortillo; CIS; Madrid; 2005; P.8

⁴⁵ Francisco Llera and Alfredo Retortillo; P.9

⁴⁶ In reference to the attacks to New York on September 11, 2001.

⁴⁷ *Fusion centers throughout Europe (all-source threat assessments in the fight against terrorism)*; Edited by the Belgian Standing Intelligence Agencies Review Committee; Intersentia; Antwerp; 2010; P.77. Blanca Rodriguez-Ruiz; *Squaring the circle? Fighting terror while consolidating Democracy in Spain*; in *Courts and Terrorism: Nine nations Balance rights and security*; Edited by Mary Volcansek and John Stack; Cambridge University Press; 2011; P.181

⁴⁸ Javier Jordan; *El terrorismo Islamista en Espana*; in *Madrid 11-M: Un analisis del mal y sus consecuencias*; Editorial Trotta; Madrid; 2005; P.101. M11 in reference to the attacks of Madrid on March 11, 2004.

⁴⁹ Francois Heisburg, Jean-Luc Marret; P.49

population in France.⁵⁰ The Basque country has frontiers with France, for that reason before 9/11 the conflict with ETA was one of the biggest threats to France; ETA's cells managed to operate in 3 provinces in the south of France.⁵¹ Paris started to intervene against ETA in 1983 when the governments of France and Spain recognized the threat of the group for both countries.⁵² The administration of Chirac in 1986 in France expelled and prosecuted a large number of ETA members.⁵³

The separatism of ETA in the 70's inspired other groups in France with Marxist ideologies and with independent claims for the Corsica region to create similar terrorist organizations. An example of those groups are *Bande a Baader* and the *Front de Liberation Nationale de Corse* (FLNC).⁵⁴ This last group first appeared in 1976 with more than 20 attacks registered but it was dissolved in 1983; however, it is known that from 1990, the group got together in 3 different cells and continue operating.⁵⁵

France faced as well terrorism performed by Palestinian groups in rejection of International policies of France. The most remarkable acts were leaded by Venezuelan terrorist "Carlos," who between 1973 and 1982 successfully organized more than 4 terrorist attacks.⁵⁶ "Carlos" acted on behalf of the PFLP (Popular Front for the liberation of Palestine) he was involved in many attacks; most significantly the ones at Orly airport in 1975.⁵⁷

⁵⁰ Loup Francart; *Livre gris sur la securite et la defense*; Economica; Paris; 2006; P.49

⁵¹ Blanca Rodriguez-Ruiz; P.181

⁵² Rogelio Alonso; P.424

⁵³ Rogelio Alonso; P.553

⁵⁴ Gregory Gomez del Prado; *L'evolution du terrorisme en Europe*; in Charles-Philippe David et Benoit Gagnon; *Repenser le terrorisme: concept, acteurs et reponses*; Les presses de l'Universite Laval; Quebec; 2007; P.184

⁵⁵ Alain Bauer; Xavier Raufer; P.71

⁵⁶ Alain Bauer; Xavier Raufer; Pp.66-67

⁵⁷ Edward F. Mickolus; *The Terrorist List (The Middle east)*; Praeger Security International; Westport; 2009; P.525

France for its domestic and international policies created the conditions to justify terrorism performed by extremist Arabic groups in its territory. From 1980 to 1986 the groups “*Action Direct*” and “*Hezbollah*” were responsible of several attacks and deaths.⁵⁸ New forms of terrorism continue appearing in France after 9/11, attacks by groups not organized in networks are more common. The attacks of March 2011 in Toulouse by Mohamed Merah showed that France is far from a free terrorist climate.⁵⁹

International terrorism is nowadays a philosophical-political-religious response to the reigning powers. However, terrorism if rarely succeeds in achieving a political objective; it causes instead a fear of governments aggressive responses.⁶⁰ With any act of terrorism, the terrorists expect the government to open the field to policy concessions.⁶¹ The terrorists seek for publicity, the acts committed are of secondary importance, what they need is to demonstrate a political position in a violent way.⁶²

What is terrorism

Before studying the obligations of governments regarding terrorism, it is necessary for us to understand what terrorism is. As we mentioned, everybody knows what terrorism is, and can identify a priori when we are in presence of terrorism. I agree that one person may identify when we are in presence of a terrorist attack, terrorism is quite identifiable. However, as we will study, counter-terrorism methods involve a great discretionary power that allows governments to perform stronger attacks and punishments

⁵⁸Loup Francart; P.36. Note: Le livre gris de la securite is a general guidance on all the issues of security, not the same as the Livre blanc of the defense ministry of France.

⁵⁹<http://french.peopledaily.com.cn/International/7769229.html>

⁶⁰Max Abrahams; *Does Terrorism Ever work? The 2004 Madrid Train Bombings*; in *Contending with Terrorism: Roots, Strategies, and responses*; Edited by Michael E. Brown, Owen R. Cote Jr; Sean M. Lynn-Jones and Steven E. Miller; The mit Press Cambridge; London; 2011; P.163

⁶¹Max Abrahams; P.170

⁶²Mauricio Fernandez Martin; *Terrorismo e informacion (la batalla por la libertad de expression)*; Netbiblo; Madrid; 2011; P.96

to terrorists than to other criminals. That is why governments have abused of the term to abuse of their powers. For some scholars, if we are going to take serious the obligations of governments towards terrorism we need a clear definition of what are we combating. However I do believe that terrorism counter efforts can be developed without a clear definition, it is true that we have to require governments to eradicate terrorism but we cannot allow them to abuse of their functions. What its true as well is that we cannot wait for an international consensus to combat terrorism; nonetheless is worthy to study the efforts to define terrorism, and we pass to it.

Terrorism as a concept was developed after the French revolution; it was defined as: the performance of violent attacks with the aim of destabilizing the political power.⁶³ This concept is generally accepted and is the image that common citizens have at the time to identify when we are in presence of terrorism. If we study terrorism in a comparative way, we may notice that terrorism always implies two elements, a violent material act against persons or goods and the mobile element of causing terror to impact governments or the population in general in order to obtain a change.⁶⁴

However, the French concept was left aside because not many acts with these characteristics occurred that could not be judged as other criminal conducts as assassination or irruption of public peace. But on the XX century, the number of acts that fit on the French concept of terrorism increased and the need to define the conduct recovered importance.

⁶³ Aniceto Masferrer; *Seguridad y derechos fundamentales en la lucha contra el terrorismo: los limites del poder politico en un Estado de Derecho*; in *Estado de Derecho y Derechos Fundamentales en la lucha contra el terrorismo (una aproximacion multidisciplinaria: historica, juridico-comparada, filosofica y economica)*; Edited by Aniceto Masferrer; Thomson reuters; Pamplona; 2011; P.21

⁶⁴ Jean Pradel; *La procedure penale Europeene a l'epreuve du terrorisme*; in *Terrorisme, victime et responsabilite penale internationale*; Edited by Calmann-Levy, SOS Attentats; 2003; P.224

In the decade of the 70's several regional instruments were created to define terrorism in order to create obligations to governments⁶⁵. The clearest definition was achieved in 1977 with the European Convention for the Repression of Terrorism⁶⁶ where several conducts were described as typical acts of terrorism as long as they were committed with the motive to generate chaos.⁶⁷ The problem was that there was no definition; instead there was a series of acts that could be qualified as terrorism. The reason for this was simple, in reality governments are not almighty providers of safety who are saving the citizens from the different evils of humanity. Many governments perform atrocities to ensure their power. Therefore many governments do not want to be compromised by a definition that may include conducts that they normally perform or support.

The solution has been then, to create two sets of definitions where States feel more comfortable to compromise themselves on the fight against terror without fear to be judged by their own actions. There is a restrictive approach who qualifies terrorism only by acts that are agreed on norms and a broad approach that qualifies terrorism only by the aim to generate violence in order to obtain a political result.

The scholars supporting the definition terrorism only by aim, explain the need to qualify as terrorism to any act that is performed to generate terror, even when governments agreed that some conducts are not terrorism. this approach is very dangerous for it will allow governments to qualify almost everything as terrorism and to act upon it.

⁶⁵ See the Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance; Organization of American States; Washington, D.C. February, 2, 1971.

⁶⁶European convention for the repression of terrorism, Council of Europe; Strasbourg, January 27, 1977.

⁶⁷ Lucia Martinez Garay; Javier Mira Benavent; P.28

If we use the restrictive method we will notice that scholars that support this idea identify some regular criminal conducts as murder, robbery, attacks, and say that those crimes turn to terrorism when they are performed with the aim to create chaos. The notion of terrorism involves aggression; the intention to hurt someone or something.⁶⁸ The terrorist acts are based in the principle of aggravation; this means crimes that seek a massive harm.⁶⁹ Terrorists are not going to explode a car randomly, there has to be a political, cultural or religious motivation behind in seek of vindication.⁷⁰ This is the approach used nowadays, international community agreed to define as terrorism some acts and others not for the need to start counter-terror campaigns. In my opinion, this approach is sufficient to create a legitimate frame where terrorism can be qualified without being abused and it incorporates the two elements, aggression and motivation.

It is adequate to review some examples of terrorist aims in our society nowadays. First we can find the separatist terrorism; this is the last solution of radical groups when the political negotiations are over.⁷¹ Secondly there is global terrorism, as practiced by Al-Quaida, it is more dangerous for its fundamentalist nature.⁷² Other examples are the new threats that constantly appear of violent groups requesting for social vindication, the example is Europe that now faces more the threat of xenophobic

⁶⁸ Cameron I. Crouch; *Managing Terrorism and Insurgency: Regeneration, recruitment and attrition*; Routledge; London; 2009; P.3

⁶⁹ Francois Heisburg, Jean-Luc Marret; P.17

⁷⁰ Juan Fernandez Requena; *El delito de terrorismo urbano o de baja intensidad (análisis del artículo 577 C.P.)*; Tirant lo blanch; Valencia; 2009; P.41

⁷¹ Jeanclos Yves; *Terrorisme et securite internationale*; in *Terrorisme et securite internationale*; edited by Stanislav J. Kirschbaum; Bruylant; Brussels; 2004; P.17

⁷² Jeanclos Yves; P.21

groups.⁷³ Terrorism may reach any country whose government may oppose the philosophy of the terrorists groups, that is the reality of the world and the jihads groups

The efforts to define terrorism by universal actors as the UN have not been successful, mainly because terrorism is understood as a political concept as we mentioned before.⁷⁴ National governments started using the term “terrorism” to qualify in a broad sense, the acts that are a breach of peace. By doing this terrorism was applied to policies to target political opponents as terrorists and the concept was corrupted. This does not mean that the UN has not achieved anything in the field of combating terrorism, the redaction of the thirteen specific conventions on the combat of terrorism⁷⁵ and several resolutions of the Security Council and general assembly are fundamental stones of the fight against terror.

Due to the lack of an universal convention that defines terrorism, regional systems have their own instruments directed, if not to define terrorism, to seek for its

⁷³ Miguel Revenga Sanchez; Oscar Jima Jimenez. *Cooperacion European en Inteligencia (nuevas preguntas, nuevas respuestas)*; IUGM; Navarra; 2009; P.43

⁷⁴ Ghislane Doucet; *Terrorisme: definition, juridiction penale internationale et victims; in Revue Internationale de droit Penal 076 annee – 3eme et 4eme trimesters 2005 (Victimes et terrorism)*; Editions Eres, Ramonville-Saint-Agne, 2006; P.253

⁷⁵ Making reference to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999; International Convention for the Suppression of Acts of Nuclear Terrorism New York, adopted by the General Assembly of the United Nations on 13 April 2005; Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed at Tokyo on 14 September 1963; Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971; Convention on the Physical Protection of Nuclear Material, signed at Vienna on 3 March 1980; Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 24 February 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; and the Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed at Montreal on 1 March 1991.

criminalization and prevention. This is the case of the European Convention on the Suppression of Terrorism applicable to Spain and France.⁷⁶

The homogenization of the European system of fight against terrorism came to its strongest point on 11 of July, 2002 when the Member States of the Council of Europe signed the “Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers of the Council of Europe”.⁷⁷ The document is focused not only in the criminalization of terrorism but it tries to encourage the coordination of efforts to combat it. The Guidelines defines terrorist acts as all those with the goal of causing intimidation of the population, and has a broad catalogue of criminal activities going from massive destructions in a country, passing through the kidnap of persons to cause impact to fabrication of massive weapons.⁷⁸ The European Union on the other hand defined terrorism on 2002 by acts (violent shake the politic, constitutional, social or economic structures of a country or organization) in order to implement policies of prevention and counter-terrorism. the Council of Europe added some changes to its definition due the realities of the European countries by the European Convention on the prevention of terrorism in 2005.⁷⁹

As I mentioned, governments do not want to define acts that they may be performing; but governments are conscious about terrorism. That is why governments prefer to agree on coordination efforts that are not binding. That is why Spain and France

⁷⁶ Sambei, Arvinder, Du Plessis, Anton and Polaine, Martin. *Counter-terrorism law and practice: an international handbook*; Oxford University Press; New York; 2009. P.10

⁷⁷ Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers of the Council of Europe adopted by the Committee of Ministers at its 804th meeting (11 July 2002)

⁷⁸ Frederic Baab; P. 83

⁷⁹ Council of Europe Convention on the prevention of terrorism; Warsaw; May, 16, 2005; quoted by Adam Roberts; *Countering terrorism: a historical perspective* in *Counterterrorism: Democracy's challenge*, Edited by A. Bianchi and A.Keller; Oxford, Hart, 2008. Reproduced in *Counter-Terrorism and International Law*; Edited by Katja L.H. Samuel, Nottingham University, UK and Nigel D. White, Nottingham University, UK; 2012; P.9

as part of the international community have accepted the standards of the fight against terrorism proposed by the EU and the UN.

Despite the problems of the nations to agree on a definition of “terrorism”, what has to be emphasized is the international agreement on the actions to combat it. The efforts of the Ad hoc Committee of the General Assembly of the UN to compile the agreements to combat terrorism in thirteen specific areas form the pillars of the international strategy to combat terrorism. These conventions even when do not propose a definition, identify obvious acts that can easily fit in as terrorism.⁸⁰ However, for some scholars as Roberts, to have a nominative list of the acts of terrorism and only regulate a part of they are something unreal, because one of the characteristics of terrorism is its variable and multiple natures.⁸¹ Along with these we mention some other resolutions of the UN not only of the Security Council but as well of the General assembly condemning terrorism and encouraging taking actions against it.⁸² The question is therefore: Why do we need a definition when we already have a commitment to eradicate something that is obvious?⁸³

For some authors the lack of a definition of terrorism causes an obvious prejudice to the victims and the population in general.⁸⁴ However, as mentioned, the lack of definition has not stopped the action of governments on their fight against terrorism. As long as some conducts are qualified as terrorism and governments are able to determine who is the enemy by identifying those who perform those conducts is enough.

⁸⁰ Adam Roberts. P.5

⁸¹ Adam Roberts. P.6

⁸² The United Nations global counter-terrorism strategy; Resolution 60/288 of the General Assembly; September, 20, 2006.

⁸³ Ben Saul; *Terrorism*; Hart Publishing; Portland; 2012; P.Lxxvi

⁸⁴ Ghislane Doucet; P.252; Note: for example; the rejection of the International Criminal Court to add terrorism as a crime of its jurisdiction was not attributed to the difficulties coming to a common concept but to the lack of capacity by the Court to deal with a large number of cases.

The obligation to combat terrorism.

After all the years of fight against terrorism, the world has developed a common feeling to combat it until its eradication. This has not only been on the internal forum, there is an international consensus to prevent States becoming a safe haven for terrorists.⁸⁵ Because of this, States have compromised themselves to combat terrorism, but this compromise has not only been expressed in international conventions.

Before 9/11, the legislation of Spain regarding terrorism was already solid because of its experience with ETA. The same happened in France, during the Algerian war, France enacted several laws regarding national security and they declared a state of emergency to apply exceptional policies to combat terrorism.⁸⁶ For their realities Spain and France are in a group of countries that have special anti-terrorist legislation prior the international pressure to adopt it.⁸⁷

After 9/11 however, more importance was given to the eradication of terrorism as an obligation. This mainly because though it was recognized that even with the existence of several conventions on terrorism the States did not take their duties seriously. For example it was not seriously considered by the European countries that terrorist groups may have access to use missiles against a whole country and still they legislated about nuclear terrorism.⁸⁸

⁸⁵ Sambei, Arvinder, Du Plessis, Anton and Polaine, Martin. P.10

⁸⁶ Anna Oehmichen; P.295

⁸⁷ Kevin O'Brien; "France" in *Europe Confronts Terrorism*, Edited by Karin von Hippel, Palgrave MacMillan; New York; 2005; P.22

⁸⁸ Belen Lara Fernandez; *Redefinicion y respuesta de los europeos frente a las nuevas amenazas: proliferacion de misiles y defensas antimisiles*; in *La seguridad europea y las incertidumbres del 11 de septiembre*; Edited by the Centro Superior de Estudios de la Defensa nacional; Ministerio de la Defensa; Madrid; 2003; P.127

International law then imposed several obligations of general character on States to prevent and abstain of participating in terrorism.⁸⁹ The thirteen UN specific conventions on terrorism, the resolution 1373 of the UN Security Council⁹⁰, and the other international instruments dealing with the topic, imposed the obligation on States to legislate on the specific matters and to take preventive measures.⁹¹ These specific measures of counter-terrorism are, non-participation, the legislation on financing terrorism, the legislation on the eradication of terrorists groups, the criminalization of terrorism and prevention which includes, efforts in intelligence and field action. The first three are of course important, and they have been adopted by the States without any question because they imply simply modification of legislation. Prevention on the other hand has been debated as obligation.

Obligation to prohibit financing terrorism

The first thing that States understood is that terrorism is not a common crime; terrorists need huge economical resources to operate and plan big scale attacks. That is why the obligation of preventing the financing of terrorism was one of the first recognized obligations.⁹²

Even when it may seem possible to control economic resources via executive power, the legislations of France and Spain decided to criminalize the financing of terrorism to make it more serious. The French efforts to prohibit financing of

⁸⁹ Tal Becker; P.333

⁹⁰ UN Security Council, *Security Council resolution 1373 (2001) [on threats to international peace and security caused by terrorist acts]*, 28 September 2001, S/RES/1373 (2001), available at: <http://www.unhcr.org/refworld/docid/3c4e94552a.html> [accessed 19 November 2012]

⁹¹ Sambei, Arvinder, Du Plessis, Anton and Polaine, Martin. P.10

⁹² Maria Victoria Vega Sanchez; *Prevencion del blanqueo de capitales y de la financiacion del terrorismo (nueva ley 10/2010 de 28 de abril)*; Editorial Universitaria Ramon Areces; Madrid; 2011; P.81

terrorism included in the Criminal Code are together with the criminalization of terrorist acts.⁹³ In Spain several laws have been enacted; the main two are the law about the prevention and blockage of the terrorist financing⁹⁴ and the modification of articles 509 and 510 of the Code of Criminal trials⁹⁵ allowing to create a special regime of communication of terrorists.⁹⁶

The Spanish and French laws dealing with the blocking of money for terrorist purposes show the commitment of the governments to finish with terrorism once and for all.⁹⁷ The main element of the new laws is the extension of the crime to those who finance: domestic terrorism from abroad, international terrorism, and terrorism to be performed abroad from Spain and France.⁹⁸

The prohibition of direct funding is a priority both domestically and internationally and it has proven to give good results. For example, In the case of nuclear terrorism, the international efforts to cut the resources of terrorists appear to be a really effective measure.⁹⁹ However, the struggles to eliminate the financing of terrorism include the criminalization of several conducts indirectly related to terrorism. An example

⁹³Code Penal Français - ARTICLE 421-2-2 (Inserted by Act no. 2001-1062 of 15 November 2001 art. 33 Official Journal 16 November 2001) It also constitutes an act of terrorism to finance a terrorist organization by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place.

⁹⁴Ley 12/2003, de 21 de mayo, de prevención y bloqueo de la financiación del terrorismo; Publicada en Boletín Oficial del Estado, núm. 122 de 22 de mayo de 2003, páginas 19490 a 19494. (modificada por la Ley 10/2010, de 28 de abril, de prevención del blanqueo de capitales y de la financiación del terrorismo).

⁹⁵Ley de Enjuiciamiento Criminal Española. Con modificaciones operadas por la Ley 13/2009, de 3 de noviembre De la consolidación, Boletín Oficial del Estado. Madrid, 2010

⁹⁶ Pedro Tenorio Sanchez; *Constitucion, derechos fundamentales y seguridad (Panorama comparativo)*; Thomson reuters; Pamplona; 2010; P.187

⁹⁷ Maria Victoria Vega Sanchez; P.56

⁹⁸ Maria Victoria Vega Sanchez; Pp.58-59

⁹⁹ Georges Le Guelte; *Terrorisme Nuclaire – Risque majeur, fantasme ou epouvantail*; Iris; Paris; 2003, Pp. 88-89

of that is the criminalization of funds obtained by organized crime. Organized crime and terrorism have been differentiated as types of crime, however terrorists normally are connected to organized criminal bands, and the efforts to fight financing fuse.¹⁰⁰ Another effective measure is the higher punishment to regular crimes where criminals obtain money from their victims and extortion. In Spain for example ETA's budget was built mostly as a result of criminal practices. ETA used to impose a so called revolutionary tax on civilians of the Basque country under the threat of injuries in case of lack of contribution to the terrorist organization.¹⁰¹ The money from illegal activities allowed jihadist groups in Spain to form an organized minor crimes agency to finance their attacks along with financing by major terrorist networks.¹⁰²

Of course when blocking the resources of terrorism the governments are conscious that the problems are not going to disappear. The terrorists can use private accounts; do wire transferances to their home countries and use clean money as in 9/11.¹⁰³ However, the efforts of blocking the capital and resources to terrorists are vital to limit terrorist actions.

Obligations to eradicate terrorists groups

The second main obligation of the State is to combat the recruiting, forming and supporting of terrorist organizations. This implies to know who is the enemy, the

¹⁰⁰ Frank Bovenkerk; Bashir Abou Chakra; *Terrorism and organized crime*; in *Terrorism, organized crime and corruption (networks and linkages)*; Edited by Leslie Holmes; Edward Elgar publishing; Massachusetts; 2010; P.29

¹⁰¹ Ignacio Sanchez Cuenca; P.79

¹⁰² Javier Jordan; *Estructura organizativa del terrorismo de inspiracion yidahista en europa: Retos para los servicios de Inteligencia*; in *La inteligencia, factor clave frente al terrorismo internacional*; Edited by the Instituto Espanol de Estudios Estrategicos (Centro Nacional de Inteligencia); Ministerio de defense; Madrid; 2009; P.87

¹⁰³ Remy Davison; *Soft Law Regimes and European Organisations' fight against Terrorist Financing and Money Laundering*, in *Terrorism, Organised Crime and Corruption: Networks and Linkages*, Edited by Leslie T Holmes; Edward Elgar Publishing, Cheltenham; 2007; P.80

answer may be clear as dark, it may be seen at first sight that terrorists are a group with an organization, structure, weapons, and who will do whatever to reach an objective. There are insurgents, non-state actors and even individuals in quest of political or social transformation and come to generate terrorist acts.¹⁰⁴ These groups are not related to the State, contrarily, even when the groups are different, they may get together because the enemy is the same; the government.¹⁰⁵ These subjects normally operate in States facing a crisis in security, even if the country of operation is not object to the attacks, it may happen that the groups use those critical countries as base.¹⁰⁶

Some scholars like Garay, affirm that governments when planning their policies of security have to differentiate between groups who may perform terrorism and those who have other aims. Garay thinks that we have to distinguish between armed bands, organizations or terrorist groups.¹⁰⁷ However, all criminal groups are a collective danger that may challenge the national security, because any criminal group may affiliate with terrorism to achieve a political aim.

The prevention of recruitment and formation of groups is very relative and depends on national realities; each government should know the best policy to deal with this issue. Both, France and Spain agree in the criminalization of terrorism affiliation and organized crime. Spanish and French legislation punishes the mere fact of being affiliated to the terrorist groups. The mentioned jurisdictions agree as well to combat organized crime for terrorists normally operate as organized criminal groups. France includes in the Criminal Code the punishment of organized crime, not only because of the implications

¹⁰⁴ Cameron I. Crouch; P.2

¹⁰⁵ Frank Bovenkerk; Bashir Abou Chakra; P.32

¹⁰⁶ Klejda Mulaj; P.7

¹⁰⁷ Lucia Martinez Garay; Javier Mira Benavent; P.248

of networks of terrorism but because of the potential risk of organized crime being the source of financing of terrorist groups.¹⁰⁸ Authors such as Revenga have affirmed that attacks; using the example of the ones of M11 in Madrid; are the results of the action of terrorist groups financed by networks of organized crime.¹⁰⁹

In Spain, the government understood that in order to eliminate terrorism, its political support has to be neutralized. The use of mechanisms of militant democracy is used in Spain¹¹⁰ to prohibit the political support of terrorism ever since the Law of Political Parties of 2002 was enacted.¹¹¹ The norm establishes that any political organization that collaborates with the terrorist violence or support it shall be declared illegal. The use of violent speech and the non-condemnation of terrorism are considered as support.¹¹² For example, Henri Batasuna was taken to courts for its indirect support of ETA because after the performance of a series of attacks there was no public rejection.¹¹³

I see the Law of Political Parties as a positive mechanism of eradication of undesirable groups that may support terrorism and therefore have a manifesto contrary to democratic values. In Spain the system was built to give preference to protecting democracy against those who accept or encourage terrorism.¹¹⁴ If a political party is declared illegal for supporting terrorism the implications include a prohibition to call for

¹⁰⁸Code Penal Francais - ARTICLE 421-1 (Act no. 96-647 of 22 July 1996 Article 1 Official Journal 23 July 1996; Act no. 98-348 of 11 May 1998 Article 37 Official Journal 12 May 1998)(Act no. 2001-1062 of 15 November 2001 Article 33 Official Journal 16 November 2001) [...] #3 offences committed by combat organisations and disbanded movements [...].

¹⁰⁹ Miguel Revenga Sanchez; P.42

¹¹⁰ Antonio Fernandez Hernandez; *Ley de partidos politicos y derecho penal: Una nueva perspectiva en la lucha contra el terrorismo*; Tirant lo blanch alternativa; Valencia; 2008; P.441

¹¹¹Ley Orgánica 6/2002, de 27 de junio, de Partidos Políticos; Publicada en Boletín Oficial del Estado, núm. 154 de 28 de junio de 2002, páginas 23600 a 23607.

¹¹² Pedro Tenorio Sanchez; P.189

¹¹³ Pedro Tenorio Sanchez; P.190

¹¹⁴ Blanca Rodriguez-Ruiz; P.198

public demonstrations or public acts.¹¹⁵ This a reasonable measure to stop the recruitment of individuals in the terrorist acts. I am not going to talk about the limits to the right of association, however, the limitations of the impact that terrorist supporters may have in society can encourage the disband of terrorist groups itself.

Criminalization of terrorism

Terrorism is in practice recognized as a crime; however it is a “crime” that in the field of practice has many definitions. It is clear that as affirmed by Dotti that “terrorism is with no doubt the most grave and dangerous form of criminality.”¹¹⁶ However, the common principles of criminal law demand a definition of the crimes in order to prosecute them.¹¹⁷ But as I mentioned before the lack of a universal definition is not essential in the case of terrorism; it is proved that identifying acts falling within the notion of terrorism is a more viable solution than coming up with a universally accepted definition.

The efforts to criminalize terrorism are to be domestic, terrorism has many forms and each jurisdiction should know with which conducts are dealing. This is contrary to the position of Antonio Cassese, who undermines the domestic efforts to legislate about terrorism, for him this is an international problem.¹¹⁸

One of the most important thing to do when fighting against terrorism is creating a body of norms that criminalize the actions;¹¹⁹ Spain and France, as

¹¹⁵ Lucia Martinez Garay; Javier Mira Benavent; P.25

¹¹⁶ Francoise Rudetzki; P.231

¹¹⁷ Rene Ariel Dotti; *Terrorism, Due process of law and the protection of victims*; in *Revue Internationale de droit Penal 076 annee – 3eme et 4eme trimesters 2005 (Victimes et terrorism)* Editions Eres, Ramonville-Saint-Agne; 2006; P. 233

¹¹⁸ Adam Roberts. P.46

¹¹⁹ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; *European responses to Terrorism: the cases of Spain and Slovakia*; Ministry of Defense of the Slovak Republic; Bratislava; 2006; P.30

mentioned, base their actions on national legislation and the international agreements in the framework of the UN, the CoE¹²⁰, the EU and other international organizations.¹²¹ In 2001, the European Union recognized the mandate to governments criminalizing terrorism¹²² The Common position of the Council of Ministers of the EU required to include in the type of terrorism the aim to cause harm to a country or international organization; it leave up to governments to decide which acts to consider terrorism.¹²³ However The EU indicated that terrorism involved several crimes as attacks to civilian of population, kidnapping, massive destruction, among others.¹²⁴

It is important to remark once again that Spain as France counted with strong legislation criminalizing terrorism prior international requirements However, both countries certainly improved with the EU regulations on prevention after 9/11 and the attacks of M11.¹²⁵

In Spain one of the first so called pieces of democratic legislation was already directed to criminalize terrorism.¹²⁶ This set of norms about national security created the obligation on the government to be stricter when treating terrorists.¹²⁷ However, in Spain terrorism was criminalized for the first time under the second book of the Criminal Code¹²⁸ and the law of criminal procedures.¹²⁹ The terrorist aims along with the

¹²⁰ In reference to the Council of Europe.

¹²¹ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.24

¹²² European Council Common Position of December, 27, 2000; on the application of specific measures to combat terrorism

¹²³ Lucia Martinez Garay; Javier Mira Benavent; P.29

¹²⁴ Alain Bauer; Xavier Raufer; P.7

¹²⁵ Ana Ramos. *Spain Part I: Conter-terrorism in Spain - An overview*, in *Europe Confronts Terrorism*; Edited by Karin von Hippel; Palgrave MacMillan; New York; 2005. P.125

¹²⁶ Real Decreto-Ley 1/1978, de 4 de enero, por el que se aprueba el régimen preautonómico para el País Vasco. (BOE, núm. 5, de 06 de enero de 1978)

¹²⁷ Anna Oehmichen; P.192

¹²⁸ Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal; Publicado en Boletín Oficial del Estado, núm. 281 de 24 de noviembre de 1995, páginas 33987 a 34058. Article 520.

commission of aggressive acts are the defining character to qualify a conduct as terrorism in Spain and France.

The Spanish legislator included terrorism in the criminal code in order to separate it from common crimes and identify the terrorists as common criminals and not powerful influential leaders of opposition. The criminal code of Spain includes now a series of definitions that contains provisions about the phases of terrorist acts and the actors.¹³⁰ Spanish criminal Code and laws that criminalize terrorism use an implicit language about terrorism as ideology. In the same way the provision 55 of the Spanish constitution¹³¹ allowed to build a concept that includes individual and organized terrorism with the aim to attack the public order and generate a disorder in the constitutional regime¹³²

Spain is legally more advanced in comparison to other countries when criminalizing terrorism. Spain was one of the fastest countries in adopting legislative measures on the direction of international community.¹³³ In general Spain has changed its legislation along with the raising of new forms of terrorism to criminalize them.¹³⁴ New types of terrorism have been considered, for example urban-terrorism or terrorism of low intensity, with this Spain tried to criminalize the acts of those actors involved in terrorism without being part of any organized structure of power.¹³⁵

¹²⁹Real decreto de 14 de septiembre de 1882 por el que se aprueba la Ley de Enjuiciamiento Criminal. With reforms of 01/06/1997; articles 384; 527, 553 and 579.4.

¹³⁰ Jose Luis de la Cuesta; P.270

¹³¹ Constitución Española; Publicada en Boletín Oficial del Estado, núm. 311 de 29 de diciembre de 1978, páginas 29313 a 29424. Article 50.

¹³² Jose Luis de la Cuesta; P.265

¹³³ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.29

¹³⁴ Anna Oehmichen; P.215

¹³⁵ Juan Fernandez Requena; P.46

Because of the instability in the Basque country, Spanish and French legislators criminalized terrorism broadly. The conduct was not punishable only for those who commit act of terrorism but as well to those who cooperate in any form to terrorism, or even those who incite it.¹³⁶

France criminalized terrorism in the 1986¹³⁷ as a crime addressed by the aim to generate terror. The definition of the crime was further developed in the Criminal Code that defines terrorism as acts following the intention to cause intimidation or terror against an individual group or a collective.¹³⁸ The Criminal Code¹³⁹ establishes seven different conducts to be considered as terrorist acts; however, French legislation includes some acts normally not taken as terrorism by other jurisdictions, for example: robbery, use of dangerous weapons and attacks to public transports or utilities. In France the conspiracy is a crime itself, with that the government seeks to stop the recruitment of terrorists for its considered conspiracy the membership to a terrorist cell.¹⁴⁰

¹³⁶ Jose Luis de la Cuesta; P.266

¹³⁷ Loi n° 86-1020 du 9 septembre 1986 relative à la lutte contre le terrorisme. Version consolidée au 19 juin 2008.

¹³⁸ Jean Pradel; P.423

¹³⁹ Code Penal Français - ARTICLE 421-1 (Act no. 96-647 of 22 July 1996 Article 1 Official Journal 23 July 1996; Act no. 98-348 of 11 May 1998 Article 37 Official Journal 12 May 1998) (Act no. 2001-1062 of 15 November 2001 Article 33 Official Journal 16 November 2001) : The following offences constitute acts of terrorism where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb public order through intimidation or terror: 1° wilful attacks on life, wilful attacks on the physical integrity of persons, abduction and unlawful detention and also as the hijacking of planes, vessels or any other means of transport [...]; 2° theft, extortion, destruction, defacement and damage, and also computer offences, [...]; 4° the production or keeping of machines, dangerous or explosive devices [...]; the production, sale, import or export of explosive substances [...] the purchase, keeping, transport or unlawful carrying of explosive substances or of devices made with such explosive substances; [...] Edited.

¹⁴⁰ Kevin O'Brien; P.23

These regulations and the modifications of 1996 to the Criminal Code to emphasize the need not to turn France into an operational base for terrorists,¹⁴¹ allowed France have to develop one of the strongest legislative systems in the world.

The national and international courts have had a rare opportunity to assess if the criminal the international and national legislative efforts to criminalize terrorism are acceptable. For example, the UN Special Tribunal for Lebanon recognized that the crime of terrorism should be composed by: 1. perpetration of a criminal act, 2. intent to spread fear or coerce a government, 3.transnational element.¹⁴² The European Court of Human Rights from the case *Fox Campbell and Harley*¹⁴³ established that terrorism as crime includes violent actions with the purposes of causing insecurity or undermining the government. National courts, in particular the ones of the jurisdictions subject of this study have remained neutral and partially reluctant to chance the legislator criteria's.

Terrorism is a reality in our world, nobody is safe from it. We have seen how governments fail constantly trying to achieve political agreements on what to combat in general terms. However governments already pacted to combat certain conducts that represent the hardcore of terrorism. It is questionable to say that governments have not reached an agreement on terrorism when governments have reached so many agreements to eliminate terrorism. Those agreements have created on governments the obligation to combat terrorism. However, the obligation is referred to legislative and practice effortsto achieve the goal of eradicate terrorism. We had the chance on this chapter to study the

¹⁴¹Loi n° 96-647 du 22 juillet 1996 tendant à renforcer la répression du terrorisme et des atteintes aux personnes dépositaires de l'autorité publique ou chargées d'une mission de service public et comportant des dispositions relatives à la police judiciaire. Version consolidée au 13 juillet 2001.

¹⁴²Ben Saul; P.Lxx.

¹⁴³European Court of Human Rights, Case Fox, Campbell and Hartley v. The United Kingdom; A 182, Ap 12244/86, 12245/86, 12383/86; 30 /08/1990

legislative efforts that have been adopted by governments with no problem. However practical methods of counter-terror are still being rejected by governments as part of the obligation for its level of exigency. This is the case of prevention of terrorism that we pass to study as a part of the general obligation to combat terrorism.

Chapter 2

Now that we can have a clear overview of the general demands on international law of counter-terrorism and its implications we can start getting deep in the theory of the obligation of governments preventing terrorism. As we saw, the international obligations to eliminate terrorism are many; however, with the exception of the prevention of terrorism, all other obligations require mainly legislative efforts only. It is never enough to create legislation condemning terrorism, prevention is necessary. However, the prevention has been neglected by the States who are willing to take advances on preventing terrorism but that do not want to be judged by the failure in their efforts. After 9/11 the duty of States preventing terrorism cannot be denied.¹⁴⁴ Our countries of study are especially well known because of their efforts on prevention. Even in Spain where there is a general lack of culture of prevention of crime, prevention of terrorism is the exception.¹⁴⁵

I will write about the obligations in domestic law of governments not in the American understanding of executive and legislative powers united, but government as the activity that cannot be framed as legislative or judicial.¹⁴⁶ The chapter focuses on prevention to make reference to those operational domestic police efforts to combat terrorism in the daily life. When preventing the government can use force or go to the

¹⁴⁴ Tal Becker; P.334

¹⁴⁵ Juanjo Medina Ariza; *Políticas y estrategias de prevención del delito y seguridad ciudadana*; Edisofer; Madrid; 2011; P.16

¹⁴⁶ Eduardo Gamero Casado; Severiano Fernandez Ramos; *Manual de derecho administrativo*; Tecnos; Madrid; 2008; P.42

other extreme and seek for the sympathy of terrorist supporters to minimize the harms of imminent attacks.¹⁴⁷

Sadly, terrorism is a reality and we have to learn to live with it, no matter how good our efforts to eradicate it are, terrorism is not likely to disappear.¹⁴⁸ Terrorist causes may dissolve, but terrorism will be always used as last resource of radicals to send their messages.¹⁴⁹ We have to learn how to always be prepared and to be prepared means to study the field and to prevent all possible happenings. The principle of prevention is a major principle in Europe as in America, in situations of uncertainties the machine of the State has to do all in its hands to prevent the crisis from occurring.¹⁵⁰ The point of counter-terrorism on prevention is to diminish that that is impossible to stop and to prevent the things we can presume can happen.¹⁵¹ Terrorism does not depends on the capacity to prevent only, but into knowledge or doubt that a terrorist attack may occur, both have to be merged in order to study if the State is acting diligent or not.¹⁵²

States may try to cover their duties on prevention by implying that it is impossible to prevent and that there is no strict norm related to the prevention of terrorism. However, sources from both, International and domestic law are proof that the obligation of prevention exists.

¹⁴⁷ Ronald Clarke; Graeme Newman; *Reducing the opportunities for terrorism: applying the principles of situational crime prevention in Terrorism and Torture*; Edited by Stritzke, Werner et al; Cambridge University Press; New York; 2009; P 86

¹⁴⁸ Richard English. *Terrorism: How to respond*; Oxford University Press; New York; 2009; P. 120

¹⁴⁹ Richard English; P.123

¹⁵⁰ Mark B Salter, Nicolas Martin-Lalande; *La gestion du risqué et la lutte contre le terrorisme*; in *Repenser le terrorisme: concept, acteurs et reponses*; Edited by Charles-Philippe David et Benoit Gagnon; Les presses de l'Universite Laval; Quebec; 2007; P.307

¹⁵¹ Sheehan, Michael. "Diplomacy" in *Attacking Terrorism: elements of a grand strategy*; Edited by Cronin, Audrey and Ludes James; Georgetown University Press, Washington D.C; 2004; P.98

¹⁵² Kimberley Trapp. *State responsibility for international terrorism*; Oxford University Press; New York; 2011; P.65

Sources of the Obligation of prevention

Sources of International law and human rights law

The development in international law on the prevention, control and eradication of terrorism come from the demand of protection, not only of the security of the country but of its inhabitants. The prevention policies are a response to the globalization of terror.¹⁵³ Spain and France have specifically made strong changes to their policies adapting their systems to international requirements on prevention.

The obligation to prevent has been framed similarly in several international forums. The UN being with the universal forum has deeply influenced the policies of the international community on prevention. The international body has focused efforts on the fight against terrorism, not only by the achievement of the international criminalization of the conduct, but trying to coordinate actions among the States that to do actually prevent terrorism.¹⁵⁴ The biggest effort of the UN (the thirteen specific conventions on terrorism) regulates very narrow types of terrorism; however its content goes beyond the mere obligation to legislate, imposing on the States the obligation to prevent in action.¹⁵⁵

The General Assembly of the UN has constantly recognized the importance of the prevention; the Commission for the Prevention of Crime and Justice¹⁵⁶ emphasized the importance to change national legislature to reach effective policies preventing terrorism.¹⁵⁷ Probably the most important effort was made by the Security Council

¹⁵³ Frederic Neyrat; *Le Terrorisme: un concept piege*; ERE; 2011; P.177

¹⁵⁴ Jean-Paul Laborde; P. 91

¹⁵⁵ Elizabeth Stubbins; P.12

¹⁵⁶ United Nations General Assembly special *Commission on Crime Prevention and Criminal Justice*; Resolution 11/1; Symposium entitled "Combating international terrorism: the contribution of the United Nations" December, 19, 2001.

¹⁵⁷ Jean-Paul Laborde; *Une nouvelle convention internationale contre le terrorisme: la convention internationale pour la repression des actes de terrorisme nucléaire*; in *Revue Internationale de droit Penal*

enacting the resolution 1373 of September 2001; this resolution is binding to all the UN members.¹⁵⁸ The resolution establishes general obligations towards prevention of terrorism and gives an open letter to States to apply their best policies on prevention. Though this resolution created a wide margin of appreciation to the States to apply whichever policies they considered the bests, this is to be seen as a mandate for efficacy but not for escaping the obligation of prevent. Resolution 1373 requires States to create a network of cooperation in intelligence and assistance, reinforcing the mandate on prevention.¹⁵⁹

In a regional forum, both, Spain and France are members of the European Union and the Council of Europe. Europe normally faces many difficulties trying to reach agreements on the topics of common policy, but counter-terrorism the exception being a policy approved by necessity unanimously.¹⁶⁰ On the framework of the CoE, the Tampere decisions on prevention of terrorism¹⁶¹ were adopted; the document did not impose strict criteria to be followed by the States, but guidance in order to establish minimum standards of protection.¹⁶²

Before 2001, the EU coordinated several efforts in the obligation of prevention without binding character, inviting States to apply their best policies to face internal problems of terrorism as in Spain or Northern Ireland¹⁶³. Following advances were made

076 année – 3ème et 4ème trimesters 2005 (*Victimes et terrorism*); Editions Eres; Ramonville-Saint-Agne; 2006; P. 99

¹⁵⁸ Elizabeth Stubbins; P.222

¹⁵⁹ Sheehan, Michael. P.104

¹⁶⁰ Louis Balmond; *Politique de securite et de defense commune et terrorisme; L'Union Europeenne et la lutte contre le terrorisme (Etat des lieux et perspectives)*; Edited by Josiane Auvret-Finck; Larcier; Brussels; 2010; P.199

¹⁶¹ European Council Tampere conclusions; October; 15 and 16, 1999.

¹⁶² Frederic Baab; P. 84

¹⁶³ From 1969 The United Kingdom has faced the terrorist campaign of the Provisional Irish Republican Army, a paramilitary group that claims the independence of Northern Ireland from the United Kingdom.

with the creation of defense institutions as the “Police Working Group on Terrorism (PWGOT).” But as mentioned, the increase in cooperation came after 9/11; in 2001, the European Union established more strict norms regarding the governmental duty preventing terrorism.¹⁶⁴ Several mechanisms of cooperation were created to face the new threats of international terrorism with special emphasis on prevention. The cooperation in intelligence was a legitimate way to demonstrate the commitment in Europe to prevent.¹⁶⁵ The Europol was reinforced as a body of coordination between the State bodies of security to maximize safety conditions,¹⁶⁶ but still the efforts were merely of coordination.

To my mind the prevention as an obligation was born in the EU after the attacks of Madrid in 2004 for being the first sample of terrorism on large scale in European soil. After M11 a special reunion was organized in Madrid by the G5 (Germany, Spain, Italy, France and United Kingdom) where was agreed to build a system of information against new terrorist threats.¹⁶⁷ Probably the strongest piece of EU legislation came the 25 of November 2004 when the Council of the EU draw its conclusions about prevention, preparation and possible responses of terrorist attacks,¹⁶⁸ emphasizing the governmental commitment to prevent terrorism and eradicate it.

In the field of International Human rights there is no Convention establishing the obligation of States to prevent terrorism, nonetheless there is a general obligation on

¹⁶⁴ Lucia Martinez Garay; Javier Mira Benavent; P.29

¹⁶⁵ Miguel Revenga Sanchez; P.21

¹⁶⁶ Cesareo Gutierrez Espada; *Derecho Internacinoal, alianza de civilizaciones y terrorismo global*; Diego Martin librero editor; Murcia; 2011; P.111

¹⁶⁷ Miguel Revenga Sanchez; P.114

¹⁶⁸ Council conclusions on improving the European civil protection capabilities; *Official Journal C 304*, 01/12/2005 P. 0001 – 0002.

States to prevent and investigate those acts that directly impact on human rights¹⁶⁹. In that sense, International Courts of Human Rights have established that those large scale crimes as crimes against humanity (were terrorism fits) are responsibility of the State.¹⁷⁰

It is well accepted by the academia that, the obligations of the State in the human rights field include the prevention of crimes; this because the States have on the protection of life and security of those in their jurisdictions. Stubbins agrees and argues that the same principles developed by human rights law on prevention apply to the prevention of terrorism.¹⁷¹ This has even been supported by the Security Council of the UN¹⁷² when recognizing that terrorism involves the attack to civilians.¹⁷³ This puts a bigger burden on the State, for the State is responsible for the citizens and non-citizens in its jurisdiction. The obligations of the State go beyond the implementation of counter-terrorism policies, but include the implementation of those policies respecting human rights. This does not only mean to the rights of those captured and identified as possible terrorists, but as well those who may be victims of it.¹⁷⁴

The international courts do constantly recognize the duty of protection of the State against any threat against the life of their citizens.¹⁷⁵ The ECtHR established in the

¹⁶⁹ See 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.unhcr.org/refworld/docid/3ae6b3b04.html> [accessed 19 November 2012]. Article 2. Organization of American States, *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <http://www.unhcr.org/refworld/docid/3ae6b36510.html> [accessed 19 November 2012]. Article 1.

¹⁷⁰ Elizabeth Stubbins; P.82

¹⁷¹ Elizabeth Stubbins; P.84

¹⁷² UN Security Council, *Security Council Resolution 1566 (2004) Concerning Threats to International Peace and Security Caused by Terrorism*, 8 October 2004, S/RES/1566 (2004), available at: <http://www.unhcr.org/refworld/docid/42c39b6d4.html> [accessed 19 November 2012]

¹⁷³ Adam Roberts. P.7

¹⁷⁴ Elizabeth Stubbins; P.163

¹⁷⁵ Ludovic Hennebel and Helene Trigroudja; P.71

case *Dujardin*¹⁷⁶ that the duty of the States preventing terrorism included not only the creation of a strong legislative system but taking all the measures in their hands to confront the threats to life of the people.¹⁷⁷ Further developments have established the duties in prevention, investigation, condemnation and compensation of the victims in case of human right violations. These recognitions in international and human rights law cannot be ignored and left as merely political compromises. International organizations have achieved the indirect recognition of preventing terrorism as an obligation.

Sources of Domestic law (established by constitutional and administrative law)

There are general mandates in national constitutions and legislation that shape the actions of government; these obligations are not to be seen as limits to power only, but as responsibilities before the population. By accepting the structure of a social state, the government compromises to generate an environment where the citizen is safe of danger¹⁷⁸ and moreover it compromises to prevent those dangers to occur.

Constitutional mandate of granting national security

The government enjoys the monopoly of force; he cannot ignore the use of force by individuals on its territory.¹⁷⁹ Since the State is sovereign owner of the use of force he is responsible of preventing terrorism.¹⁸⁰ This obligation is framed within the constitutions in different manners; some norms refer to granting national security, others to defense, and others to public order. The three concepts point in the same

¹⁷⁶ European Court of Human Rights, Case Laurence Dujardin and Others v. France, Application No. 16734/90, Decision of 2 September 1991 on the admissibility of the application, Decisions and Reports 72(1992)

¹⁷⁷ Pedro Tenorio Sanchez; P.337

¹⁷⁸ Juan Alfonso Santamaria Pastor; *Principios de Derecho Administrativo General I* (2da ed); Iustel; Madrid; 2009; P.67

¹⁷⁹ Tal Becker; P.281

¹⁸⁰ Tal Becker; P.338

direction, the protection of the individuals in their day life as an obligation; we can analyze them separately and conclude that they are in the same track.

Public order is a broad concept, it implies: security, calm and public health.¹⁸¹ Constitutionally the meaning of public order and security goes beyond a concept of values and has to be considered a duty.¹⁸² Public order has been understood in comparative law as the judicial function of prosecution of crimes; meanwhile National security is a broader concept including prevention.¹⁸³ However both terms are connected, their practical meaning is related to a concept of calm and peace as a guarantee of liberties.¹⁸⁴ It may be true as Parejo Alfonso points that security is more related to prevention, then security may be defined as lack of threats; but security has to be assessed in the lack of existence of surprise factors.¹⁸⁵ National public security is a concept within the concept of security that involves the protection of goods and populations guarantee to maintain the public order.¹⁸⁶

The obligation of granting the national security comes from a development of the defense techniques and integration of services in the fight against bigger threats that cannot be controlled as easily as internal menaces.¹⁸⁷ The government has a general obligation of safeguard in all aspects; it cannot be excused from its function as guardian on the constitutional limits of their actions. In the terms of the public law, “No matter

¹⁸¹ Charles-Edouard Minet; *Droit de la police administrative*; Vuibert; 2007; P.35

¹⁸² Luciano Parejo Alfonso, Roberto Dromi; *Seguridad publica y derecho administrativo*; Ciudad Argentina; 2001; P.32

¹⁸³ Luciano Parejo Alfonso, Roberto Dromi; P.45

¹⁸⁴ Luciano Parejo Alfonso, Roberto Dromi; P.48

¹⁸⁵ Vincente Garrido; *Introduction; in Modelo Espanol de defense y seguridad*; Centro superior de estudios de la defensa nacional; Ministerio de la defensa; Madrid; 2007; P.9

¹⁸⁶ Loup Francart; P.88

¹⁸⁷ Maria de los Angeles Lopez Espinosa; *Inteligencia y terrorismo internacional, un panorama de cambios*; in *La inteligencia, factor clave frente al terrorismo internacional*; Edited by the Instituto Espanol de Estudios Estrategicos (Centro Nacional de Inteligencia); Ministerio de defensa; Madrid; 2009; Pp.212-213

whom hurts a citizen, he offends indirectly the State, and is the State who must protect that citizen”.¹⁸⁸

In France, security is granted as a right of the population to be claimed from the government.¹⁸⁹ The guide on defense (livre Blanc sur la defense) of 1994; established that defense and security is to be focused in a system of strategic axes. First; mutual trust: a reinforcement of the international security. Second; safeguards: joining universal, concentrated systems of defense. And third; permanent anticipation: based on the prevention of social crisis and the intervention of any conflicts.¹⁹⁰

In Spain Article 104 of the Constitution imposes the duty to the forces of the State to protect the security and safety of the Spanish citizens. This has to be read along with Article 14.1.29 that gives exclusive competence to the State on the National public security. As well wide interpretations of the preamble of the Constitution and further legislative and administrative rules demonstrate how national security is one of the main Spanish constitutional values.¹⁹¹ The Spanish Constitutional Court established that terrorist groups “are characterized as the generation of conditions of insecurity within the population”.¹⁹² Therefore it can be interpreted that if the government has a duty to grant security and terrorism is equal to insecurity; the mandate is to eradicate terrorism.

¹⁸⁸ Cherif Bassiouni; *Le reconnaissance internationale des droits des victims*; in *Terrorisme, victime et responsabilite penale internationale*; Edited by Calmann-Levy, SOS Attentats; 2003; p. 134-135

¹⁸⁹ Loi n° 2003-239 du 18 mars 2003 pour la sécurité intérieure (1). Version consolidée au 01 mai 2012, quoted by Loup Francart; P.110

¹⁹⁰ Loup Francart; P.128

¹⁹¹ Vincente Garrido; Pp.18-19

¹⁹² Sentencia n° 199/1987 de Tribunal Constitucional, Pleno, 16 de Diciembre de 1987; Ponente: Don Miguel Rodríguez-Piñero y Bravo-Ferrer. Número de Recurso: Recursos de Inconstitucionalidad n° 285 y 292/1985 (acumulados) quoted by Jose Luis de la Cuesta; P.265

Referring to the declarations of Koffi Annan in 2001 about the concept of defense, the Spanish Ministry of defense recognized that defense implies the protection against external attacks to the territory but nowadays exigencies broad the concept to protect individuals against violence.¹⁹³ The Spanish white book of defense establishes that the aim of Spanish defense is to safeguard the interest of national security; this is to be deal in a “supranational way.”

The government has grant security and that implies to prevent crime by closing all the opportunities that the criminals (terrorists) have to succeed. For Clarke and Newman the crimes happen because there is an opportunity to happen, thus the duty of the government is not to create the opportunities for the crime to happen.¹⁹⁴ Some scholars can disagree with the theory of prevention of crime being applicable to terrorism for its exceptional character. If so, the government still has the ability to declare States of emergency to face exceptional threats. The government has a wide power to address terrorism with strategic plans. For example, the Spanish constitution allows the declaration of a State of emergency limiting liberties for the purposes of prevention in communication of captured terrorists or operations that might not be used in ordinary peacetime.¹⁹⁵

As a consequence of the obligation to grant national security, the government has a clear mandate to create a system of prevention of general crime including terrorism. The construction of the criminal system implies the transformation of governmental policies to grant the people a right to have a secure life. This legitimizes the government

¹⁹³ Vincente Garrido; P.7

¹⁹⁴ Ronald Clarke; Graeme Newman; P.88

¹⁹⁵ Pedro Tenorio Sanchez; P.186

to determine who the enemy is and who has criminal guarantees.¹⁹⁶ In the case of terrorism it is clear that prevention efforts have to go further for the impact and importance of the crime.

Constitutional explicit mandate

Some constitutions contain explicit constitutional mandates related to the fight on terrorism; this is the case with the Spanish Constitution. Article 55 of the Spanish constitution of 1978 is referred to the exceptional treatment of detained terrorists. The article was written thinking on prevention; the purpose is to cut the communications of terrorists to stop attacks on process. The framers of the Spanish Constitution had in mind the terrorist reality and for that reason the Article 55.2 of the Constitution was drawn; to emphasize the need to reinforce anti-terrorist legislation due the particular circumstances of each time.¹⁹⁷ The terrorist legislation has been studied by the Constitutional Court in several opportunities each time a new threat is present.¹⁹⁸

Other article related to the fight of terrorism in the Spanish Constitution is Article 104 related to the competences of the police to deal with terrorism. The competences given by the article are so broad that all involve activities combating terrorism.¹⁹⁹ However, not only the constitution regulates the police, there are several bodies specialized that are legally bounded by administrative directives developing the

¹⁹⁶ Francesca Galli; *La legislación antiterrorista en Europa y la normalización de medidas extraordinarias: hacia la prevención, la vigilancia y la seguridad*; in *Estado de Derecho y Derechos Fundamentales en la lucha contra el terrorismo (una aproximación multidisciplinaria: histórica, jurídico-comparada, filosófica y económica)*; Edited by Aniceto Masferrerl Thomson Reuters; Pamplona; 2011; P.413

¹⁹⁷ Anna Oehmichen; P. 185

¹⁹⁸ Anna Oehmichen; P. 192

¹⁹⁹ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.42

shared competences combating terrorism.²⁰⁰ In the case of these explicit mandates, governments have a bigger duty not combating but preventing terrorism.

Implicit Administrative function of police

We know for authors such as Gaudemet that the Administration has certain objectives;²⁰¹ these objectives can be divided in the police function,²⁰² and the activities of public service. Focusing on the classification of public function, the prevention of terrorism is within the functions of the administration. As consequence of the exercise of the powers of the use of force the administration has the function to make its sources of force to prevent crimes and terrorism via “public force.” The French theory of guardian as exercise of the police and service function implies that, the administration has on its guard the power of control, direction and command of public forces to ensure the public safety.²⁰³ Therefore, the administration in its police function has to protect its citizens and guard them, and in its service function has to provide a working force to ensure the enjoyment of that safety. Together the two administrative functions create subjective rights to citizens.²⁰⁴ As Garcia de Enterria affirms; if the citizens feel that their government is not working they shall have the right to demand it is functioning.²⁰⁵

Governmental undertakings

²⁰⁰ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.43

²⁰¹ Yves Gaudemet. *Traité de droit administratif*, L.G.D.J., 5 vol; 2002; pp.719-721

²⁰² Neville Brown; John Bell; Pp. 221-222.

²⁰³ Oscar A Rodriguez. *El derecho común de la responsabilidad extracontractual de la administración pública en Venezuela (Estudio del derecho venezolano y aspectos comparativos con el derecho francés)*, in *Revista 6 de Derecho Administrativo*. Editorial Sherwood; Caracas; 1999; Pp. 301-308

²⁰⁴ Eduardo Garcia de Enterria, Tomas Ramon Fernandez; *Curso de Derecho Administrativo. II (11 ed)*; Thomson Civitas; Madrid; 2008; P.35

²⁰⁵ Eduardo Garcia de Enterria, Tomas Ramon Fernandez; P.37

Besides the clear obligations aforementioned, governments as well often do declarations that enforce their conducts and their duties of prevention of terrorism. For example, the French government recognizes its commitment to ensure the safety of its population by the neutralization of terrorists by the action of arms even outside the country.²⁰⁶ For that reason from April 2008, the government has compromised to create a better and stronger system of intelligence to neutralize possible new attacks.²⁰⁷

Spanish government as well recognizes its position in granting the defense of their citizens and of the world.²⁰⁸ The fight against ETA occupies a major chapter in the Spanish security, but from the attacks of 2004 the national government realized a study to improve the lacks in security²⁰⁹ reinforcing their commitment to prevent terrorism. France as Spain increased their military budget in prevention of terrorism after the 9/11; the countries have invested in armament and technology of defense.²¹⁰

The fight against terrorism is as well a fight to safeguard the economy of the country that will moreover affect those same individuals. If terrorist attack public places like tourist installations, public in general may refuse visiting possible places target of terrorism and that will lead to lack of investment.²¹¹ For that reason States have invested more and more into defense budgets and in that way expanded their obligations in prevention of terrorism.

²⁰⁶ Documentation Francais; Premier Ministre; La France Face au Terrorisme (Livre Blanc du Gouvernement sur la securite interieure face au terrorisme); Paris; 2006; P.61. Note: This is an official document of the French Government that establishes the guides in security.

²⁰⁷ Maria de los Angeles Lopez Espinosa; P. 226

²⁰⁸ Juan Escrigas, Jesus de Miguel Sebastian; *Que Hacemos*; in *Modelo Espanol de defensa y seguridad*; Centro superior de estudios de la defensa nacional; Ministerio de la defensa; Madrid; 2007; P.56

²⁰⁹ Antonio Fernandez Hernandez; P.88

²¹⁰ Belen Lara Fernandez; P.129

²¹¹ Ignacio Sanchez-Cuenca; *Terrorism as war of attrition ETA and the IRA (Working Paper 2004/204)*; Instituto Juan Marçj de Estudios e Investigaciones; Ediciones Peninsular; Madrid; 2004; P.9

How to prevent.

It is clear now that the obligation to prevent is based on several sources of international and domestic law, and that prevention as an obligation is not only a matter of international compromise. Now we have to pass to study the implications of the obligation. To start, governments have to understand the causes of terrorism to see what methods are the most reliable to apply for the States. Secondly we will see how the systems of counterterrorism are built in France and Spain. To finish I will expose some of the methods that the government has to implement in other to comply with its obligation to prevent to effectively neutralize terrorism (Use of force, Intelligence, Protection of risk targets, negotiation and national integration).

Why terrorism happens.

As mentioned in the first chapter, the terrorism is a violent way to claim social demands. Terrorists are not conventional criminals, they want attention, and they need to send a message.²¹² There are several reasons why terrorism happens, the most important are two, to send a message in the political field of the State victim of terrorism, or to send a message to international community taking advantage of the fragility of a State in its security system.²¹³ Governments need to know precisely the bigger threats to their security in order to act. This does not mean that government have to focus their efforts preventing terrorism on the obvious threats, it has to analyze them all equally. However, there are threats that in reality are most alike to turn into an attack and governments have to strength their systems against them.

²¹² Brian Forst; P.341

²¹³ Klejda Mulaj; P.2

In the case of France, terrorism has three sources: the ethno terrorism, performed by separatists as Corsicans or ETA. Anti-colonial terrorism, executed by the extremists of former colonies as it happened when France was in war with Algeria. And last, the new threat of International Terrorism by groups as Al-Qaida or by groups that react to France international policy as the ones sympathizing with Palestinian terrorist cells.²¹⁴ In Spain on the other hand the terrorist threat comes from two reasons: the separatist terrorism product of the conflict with the Basque country and international terrorism produced by Spain's privileged geographical positions that offer military strategic position over the Middle East, the north of Africa and all the European community.²¹⁵ The qualification of Spain as a western country; its proximity to the Magreb; the presence of Spanish troops in Muslim countries in missions of peace and historical struggle of Spain and Muslim are other reasons.²¹⁶

Structure of counterterror systems in France and Spain

Since terrorism is so variable, and it may appear in many different forms, governments have developed a wide catalog of policies combating it. Diverse institutions have been created with different functions to fight against terrorism; there are specific police bodies to act in specific situations.²¹⁷

France has a strong system composed by a solid legislation from the decade of the 80's,²¹⁸ and preventive-repressive policies featured by a compound of institutions. The efforts on prevention are coordinated by the Ministry of Interior leading the CILAT

²¹⁴ Kevin O'Brien; P.20

²¹⁵ Jesus de Miguel Sebastian; *Quienes somos*; in *Modelo Espanol de defense y seguridad*; Centro superior de estudios de la defensa nacional; Ministerio de la defensa; Madrid; 2007; P.22

²¹⁶ Maria de los Angeles Lopez Espinosa; Pp.224-225

²¹⁷ Charles-Edouard Minet; P.53

²¹⁸ Kevin O'Brien; P.20

(*Comite Interministériel de lutte anti-terroriste*) along with the CSI (*Conseil de Sécurité intérieure*). Both institutions are under the coordination of the president of the Republic.²¹⁹ There is a special administrative division that includes almost all institutions in the public sector the UCLAT (*Unité de Coordination de la lutte anti-terroriste*).²²⁰ The French system UCLAT, has 3 missions:²²¹ First, training and intelligence by the DST (*Direction de la surveillance du territoire*) and the DCRG (*Direction centrale des renseignements généraux*).²²² Secondly is the division of repression, coordinated by the “*Direction centrale de la police judiciaire*” on its anti-terrorist division created in 1998.²²³ Finally the division of intervention that implements techniques to prosecute and arrest is on charge of the GIGN (*Groupe d’intervention et dissuasion*).²²⁴

The Spanish system is more central than in France, its measures against terrorism can be explained in 4 blocks: Creation of especial tribunals dealing with terrorism; creation of specific legislation criminalizing terrorism; adoption of several measures on the field of justice and vigilance of the police powers by specializing them.²²⁵ As in France, Spain counts with several institutions managing the anti-terrorist strategies. There is a central institution coordinating the efforts in intelligence, the “*Unidad central de Información Interior*” it has two divisions; one specialized on ETA and other in Arab-Islamic terrorism. This agency works along with the service of the “*Guardia Civil*” dependent of the Ministry of Defense.²²⁶ These two centers improved

²¹⁹ Jean-Francois Gayraud ; *Le terrorisme*; Presses Universitaires de France (PUF); 2006; Pp. 48-49

²²⁰ Kevin O’Brien; P.21

²²¹ Kevin O’Brien; P.28

²²² Jean-Francois Gayraud; P.51

²²³ Jean-Francois Gayraud; P.52

²²⁴ Jean-Francois Gayraud; P.53

²²⁵ Mauricio Fernandez Martin; P.92

²²⁶ Jordan, Javier and Horsburgh, Nicola. *Spain Part II: Islamic Extremism in Europe Confronts Terrorism*, Edited by Karin von Hippel, Palgrave MacMillan; New York; 2005; P.137

after 9/11 with the National center of Anti-terrorism coordination, in charge of processing information and coordinating measures but not carrying out operations.²²⁷

Methods preventing terrorism

When combating terrorism governments cannot have only one response; combating terrorism depends on a mutation of diverse techniques. Governments have to get familiar with the way to act of diverse terrorist groups, their methods, their weapons.²²⁸ There is not only one policy to implement in order to prevent terrorism, several policies are supposed to function in parallel.²²⁹ Prevention of modern terrorism implies a multidisciplinary system that moves all the apparatus of the state and not only the military forces.²³⁰ I pass to mention some of the mandatory techniques to be used by governments if they want to effectively prevent terrorism.

International cooperation

Nowadays, terrorism is more dangerous than in the past for it its international spectrum.²³¹ Facing modern terrorism, international cooperation is angular to achieve good results in prevention. For Sheehan the only way to end with terrorism is by international cooperation aiming to close the gates of opportunities for terrorists to act.²³²

Diplomacy is extremely necessary when it comes to combat terrorism, for terrorism is not a domestic problem anymore, there is an international demand for common understanding. The role of diplomacy is thus, to acknowledge the political

²²⁷ Jordan, Javier and Horsburgh, Nicola.P.138

²²⁸ Brian Forst; P.250

²²⁹ Ronald Clarke; Graeme Newman; P.100

²³⁰ McLoughlin, John, Noone, Gregory, and Noone Diana; *Security Detention, Terrorism and the Prevention Imperative*; Case Western Reserve Journal of International Law ,40, pp 463-505, reproduced in *Counter-Terrorism and International Law*; Edited by Katja L.H. Samuel, Nottingham University, UK and Nigel D. White, Nottingham University, UK; 2012. P.322

²³¹ Adam Roberts. P.3

²³² Sheehan, Michael. P.103

nature of terrorism. Diplomacy in order to combat mutually with the international community terrorism is demanded by international law.²³³

France for example explicitly believes in international collective protection against terrorism by taking measures as part of international institutions as G8 to advance in topics of cooperation and concentration of global institutions of intelligence or prevention.²³⁴

It is true that international cooperation is important, and that States should not be isolated anymore in the fight of terrorism, but this cannot be understood in a way that would undermine the importance of domestic efforts. There is a fake belief that domestic efforts combating terrorism are useless and the only efforts that have a worth are the international coordination even in the domestic problems. Roberts in this sense agrees that this affirmation is a fallacy and does not respond to the realities of the countries. He exposes Ireland as an example of good and successful policy on domestic prevention when combating the IRA between 1969 and 1999.²³⁵ I agree with this position putting the example of Spain in their struggle with ETA. It is true that international efforts are important but are not alone necessary to combat terrorism, a good domestic policy has to be implemented, and cannot be ignored as an obligation of the States. No State can rely on being part of the international efforts combating terrorism to fail displaying forces in the domestic forum to combat terrorism.

Use of force

²³³ Sheehan, Michael. P.102

²³⁴ Loup Francart; P.159

²³⁵ Adam Roberts. P.19

As mentioned, a sole technique is not useful to prevent terrorism, alone, the use of military effort as a respond to terrorism is useless.²³⁶ However, intelligent, rational and justified use of military power is needed and useful to prevent terrorism. We cannot ignore the fact that use of power can be misused and be the weapon of governments to get rid of undesired groups qualifying them as terrorist.²³⁷ But this is a matter of policy control and the power to stop that is in the domestic mechanisms of control of the State.

The reason to use the force is simple, it is true that there is organized terrorism and individual terrorism, nothing can prevent us from random attacks performed by radical fanatics, as Michael Sheehan affirms, we will have to learn to live with that. But it is important to marginalize the organized groups of radicals to prevent major scale attacks.²³⁸ In the case of organized terrorism it depends on a terrified audience by a symbolic power, once that It is demonstrated that the power of the terrorists is weakened by attacks to their cells it changes popular opinion on them and legitimizes governmental action.²³⁹ The normal way to weaken that power is by the use of force.

Basically the purpose of the use of force is to prevent in action an imminent attack and eliminate terrorist cells, whether by combat or by preventive measures to eliminate the recruitment of new members. I will focus on the preventive efforts when there is police interaction and the efforts to eliminate cells only by combat. The prevention of recruitment is more a problem of criminal law and is recognized in the framework of the EU.²⁴⁰ I will explain the difference of the operations carried by force

²³⁶ Richard English; P.130

²³⁷ Brian Forst; P.252

²³⁸ Sheehan, Michael. P.98

²³⁹ Audrey Cronin; *How terrorism ends: understanding the decline and demise of terrorist campaigns*; Princeton University Press; New Jersey; 2009; Pp. 32-33

²⁴⁰ Cesareo Gutierrez Espada; P.107

drawing a line between the use of force in the international field and in the domestic field.

To start with the international operations these maneuvers did not started after 9/11, they have been always active, especially between France and Spain for the location of the Basque country. Their purpose as we know were the elimination of any operational cell involved in terrorism, to weaken them and then prevent a domestic attack. The European response is not that aggressive and is directed to create for example systems of internal defense like anti-missiles shields.²⁴¹ European tendency is to combat not by military action but by diplomacy and the battle in the political and economic field.²⁴² This does not mean that the EU has left aside the fight against terrorism in the same fields than America, for example in the topic of prevention of the proliferation of weapons; the Union has been fighting against it as America with priority since 1990.²⁴³

In the domestic field the police efforts are as well focused on the eradication of any terrorist base on the territory and on the cut off of terrorist plans in action. In all its actions of use of force the operational bodies somehow or another play with the limitation of civil liberties. By repressing the administration is not encouraging to limit the liberties, but to coordinate them.²⁴⁴ I pass now to explain the domestic efforts on the case of elimination of cells to pass to the study of preventive actions and the implications in both scenarios with the limitation of civil liberties

²⁴¹ Vicente Garrido Rebolledo; *Redefinicion y respuestas de los europeos frente a las nuevas amenazas: proliferacion de armamento de destruccion masiva*; in *La seguridad europea y las incertidumbres del 11 de septiembre*; Edited by the Centro Superior de Estudios de la Defensa nacional; Ministerio de la Defensa; Madrid; 2003; P.89

²⁴² Miguel Campins Rahan; *Estados Unidos despues del 11 de Septiembre: Implicaciones para la seguridad Europea*; in *La seguridad europea y las incertidumbres del 11 de septiembre*; Edited by the Centro Superior de Estudios de la Defensa nacional; Ministerio de la Defensa; Madrid; 2003; P.39

²⁴³ Vicente Garrido Rebolledo; P.75

²⁴⁴ Ricardo Rivero Ortega; P.86

The elimination of cells, depend mainly on the efforts of intelligence, we will analyze them later on. We can mention in advance however that the governments selectively chose their targets of attack in the elimination of terrorism; however, this may cause certain political problems in an era of violence.²⁴⁵

What we can analyze here is the methods used once that the cells are identified. Normally the groups can be intercepted and taken to justice, this is the goal, but what to do to eradicate them, not only the cell but as well the civilian support to the groups. Normally the answer implies the decapitation or capture of leaders or high figures of the organization to de-moralize the group and hope for its disintegration. There are cases where the arrest or decapitation of the leader helped to calm the terrorist groups, as with the arrest of Abigail Guzman of *Sendero Luminoso* in Peru that lead to the surrender of his troops, or the death of Alfonso Cano of the *FARC* in Colombia that weaken the terrorist group and allowed the government to take control over part of them.²⁴⁶ There are as well bad examples as the case of the arrest of Mickey McKevitt of IRA in 2001, that lead to a scale of violence against the Irish police.²⁴⁷ Besides the obvious connotations on Human Rights, Killing a leader only exposes a greater risk to the State to have more popular support for the deceased and probably more attacks as it happened with the “Che Guevara.”²⁴⁸ There is a general skepticism in using force against the increase of recruitment in insurgent groups.²⁴⁹

There is another problem to consider, not every terrorist organization has a hierarchical structure; therefore, the elimination of cells is not the only options. ETA for

²⁴⁵ Cameron I. Crouch; P.20

²⁴⁶ Audrey Cronin; P.19

²⁴⁷ Audrey Cronin; P.22

²⁴⁸ Audrey Cronin; P.32

²⁴⁹ Cameron I. Crouch; P.21

example has not hierarchical structure.²⁵⁰ Therefore the obligation to prevent its more difficult to achieve.

Regarding the cases of prevention in action, this requires as well of intelligence, but normally leads to preventive detentions of suspects in order to obtain information or well to stop a plan in process. The Spanish regime on prevention on terrorism is not exceptional as in the United States or in Israel. The law establishes the terrorism as a crime and as such is treated, if there is a suspect of terrorism he is subject of the same judicial guarantees as any other criminal. However, in Spain by 1989 was implemented a policy under the name of “dispersion” the idea was to allow police forces to cut communications between members of ETA in prison with active members of ETA.²⁵¹

Spanish Constitution is one of the few that authorizes the limitation of rights of members of terrorist bands once captured.²⁵² The Spanish regime expanded the policy of dispersion to detained suspects, the government understands that terrorists are organized and usually work in constant communication to achieve large scale attacks. Therefore, it is needed to suspend some guarantees in order to restrain the communications of possible detained terrorists and possible perpetrators in order to dismantle a potential attack.²⁵³ Some liberties should attend to the proportionality test and be suspended in order to prevent. One may argue that preventive detention is unacceptable, however it has been proven that in case of terrorism it may help preventing some attacks.²⁵⁴

²⁵⁰ Audrey Cronin; Pp.14-16

²⁵¹ Anna Oehmichen; P.209

²⁵² Jose Luis de la Cuesta; Pp.264-265

²⁵³ Amos Guiora; *Global Perspectives on Counterterrorism*; Aspen Publishers; New York; 2007; Pp.133-134

²⁵⁴ McLoughlin, John, Noone, Gregory, and Noone Diana. See Pp.334-340

Intelligence

The most powerful weapon against terrorism is the intelligence.²⁵⁵ Basically no counter terrorist operation works without intelligence, the efficacy of the political and military efforts depend on intelligence.²⁵⁶ Without building a system of intelligence and reinforcing the existing ones, governments cannot comply their obligations of prevention of terrorism.

There is not uniform definition of intelligence, for the purpose of the obligation of prevention I believe that intelligence means the knowledge of the enemy secrets by the agents of information of the State²⁵⁷ to be processed with preventive-repressive aims.²⁵⁸

The role of intelligence is not to discover every single detail about terrorist plans, the goal of intelligence is to collect all sources of information and connect the dots so police and military forces can act upon presumptions.²⁵⁹ A fallacy of intelligence is to expect to obtain the exact information about a terrorist plan and to stop it 5 minutes before it happens. The reality of intelligence is not more than monitor possible terrorists, to investigate the identity of those potentially dangerous people on the globe and to keep them under strict supervision.²⁶⁰

²⁵⁵ Brian Forst; P.341

²⁵⁶ Richard English; Pp.131-139

Miguel Angel Esteban; *Necesidad, funcionamiento y misión de un servicio de inteligencia para la seguridad y la defensa*; in *Estudios sobre inteligencia, fundamentos para la seguridad internacional*; Edited by the Instituto Español de Estudios Estratégicos (Centro Nacional de Inteligencia); Ministerio de defensa; Madrid; 2004; P.80

²⁵⁸ Miguel Revenga Sanchez; P.25

²⁵⁹ Brian Forst; Pp.341-349

²⁶⁰ Pillar, Paul. "Intelligence" in *Attacking Terrorism: elements of a grand strategy*; Edited by Cronin, Audrey and Ludes James; Georgetown University Press, Washington D.C; 2004; P.117

There is a debate on the purpose of the intelligence as well, it may be used as a weapon of psychological control over terrorist or as a weapon of attrition of the groups, leading to more killing and more counter effects.²⁶¹

The structure of intelligence requires that the information transmitted to the government will be assessed and analyzed in order to take actions toward the aims and objectives to be desired.²⁶² The intelligence is a work of various actors of the administration; normally all of them are authorized to act immediately in case of processing information about terrorist threats.²⁶³ The military intelligence bodies have access to broader information to guard the frontiers of the country without any limit for there is no judicial control over their actions. The police intelligence is more immediate, even when they have a function of prevention their apparatus is more limited to immediate crimes, therefore they can repress but their actions are controlled by the judiciary with a degree of discretion.²⁶⁴ However these two forces work in coordination with the other bodies of security; their services have a strategic function, collecting neutral information to the disposal of the governments who at the end of the day are the ones who decide their plans of action.

In France the institution in charge of the governmental coordination of security intelligence is the SGDN (General Secretary for the National Defense, in English). It counts with an institution of vigilance of international conflicts and policies (AIS), and an entity in charge of asses all the possible risks of the French territory (PSE).²⁶⁵

²⁶¹ Cameron I. Crouch; P.25

²⁶² Miguel Angel Esteban; P.96

²⁶³ Miguel Revenga Sanchez; P.26

²⁶⁴ Miguel Revenga Sanchez; P.26

²⁶⁵ Elviro Aranda; *Servicios de inteligencia: Un estudio comparado; in Estudios sobre inteligencia, fundamentos para la seguridad internacional*; Edited by the Instituto Espanol de Estudios Estrategicos (Centro Nacional de Inteligencia); Ministerio de defensa; Madrid; 2004; Pp.126-127

Spanish model consists of a national center of intelligence (CNI), in coordination with the center of the armed forces (CIFAS) working along with the services of intelligence of diverse polices organized all by a delegated commission of the government for intelligence (CDGAI).²⁶⁶ Most of the police bodies can collect and manage information as the Spanish “Civil Guard” does.²⁶⁷ However is the “National Intelligence Centre” the service of process the intelligence and provided it to the governmental authorities to take decisions on counter-terrorism.²⁶⁸

Intelligence cannot be left alone to a single leading authority; it should be a work of coordination among institutions and of them with the international community. But international coordination should be a work of cooperation and not of supervision. The International community has to accept the independence of the domestic institutions, trusting that they will comply with international standards on prevention, for, it depends on the domestic forces of intelligence the management of information.

A concurrent characteristic of the obligation of prevention is the international cooperation in intelligence; governments cannot be isolated in the fight of terrorism and expect to prevent it successfully. “Terrorism is a common problem so intelligence is to be shared.”²⁶⁹

The importance of international cooperation in intelligence was seriously brought by the Security Council of the UN in the resolution 1373. The States were called to “Find ways of intensifying and accelerating the exchange of operational information,

²⁶⁶ Francisco Galvache Valero; *La inteligencia compartida; in Estudios sobre inteligencia, fundamentos para la seguridad internacional*; Edited by the Instituto para la seguridad internacional; Edited by the Instituto Espanol de Estudios Estrategicos (Centro Nacional de Inteligencia); Ministerio de defensa; Madrid; 2004; Pp.174-175

²⁶⁷ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.45

²⁶⁸ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.49

²⁶⁹ Adam Svendsen; *Intelligence cooperation and the war on terror*; Routledge; London; 2009; (Quoting the quoted in R. Norton Taylor; Kenya Terror Attack; GU; 30 Nov 2002); P.43

especially regarding actions or movements of terrorist persons or networks and cooperate more generally to prevent and suppress terrorist attacks and take action against perpetrators of such acts”.²⁷⁰ In the frame of the UN regulations on terrorism the obligation to cooperate in intelligence are essential to prevent terrorism and but have not been develop widely.

However, European legislation has special mandatory remark on the need to prevent terrorism and therefore cooperate in intelligence among the States to eliminate terrorist cells.²⁷¹

The efforts in intelligence are good not only to prevent but to take advantage of the potentialities of the EU.²⁷² The reform of the EU with the signature of the Lisbon treaty was not a step back of the measures taken by the European States before 9/11, in fact after the attacks of Madrid and London, Lisbon represents a ratification of the need of cooperation in intelligence.²⁷³

France adopted a more conscious position after 9/11 and added to its International discourse a message of necessity for the international cooperation to fight terrorism. However France was quite conditional when applying the policy of sharing intelligence, they demand to know the strategies and goals to be combated by the State that request the information in order to cooperate with them.²⁷⁴ In my opinion, this may seem as a difficulty to international cooperation in Intelligence, but contrarily, France takes a better position to be on the knowledge of all possible operations in part to protect their citizens and as well to put its machinery to work properly to combat terrorism and

²⁷⁰ Adam Svendsen; Pp.40-41

²⁷¹ Sambei, Arvinder, Du Plessis, Anton and Polaine, Martin. P.12

²⁷² Miguel Revenga Sanchez; P.22

²⁷³ Miguel Revenga Sanchez; P.21

²⁷⁴ Kevin O'Brien; P.19

not allowing only to the forces of the other State to take the burden on combating. French success dealing with terrorism is said to depend on its efforts in the field of international cooperation.²⁷⁵ France cooperates with 42 countries directly and coordinates several actions domestically and abroad, being the basis of this cooperation the mutual sharing of information.²⁷⁶

On the other hand Spanish development in intelligence was strong already before starting to be influenced by international regulations and before 2004.²⁷⁷ Spanish strategies on counter-terrorism are not only domestic despite the experience of the country of dealing with terrorism for more than 50 years. International cooperation to prosecute and coordinate anti-terrorist strategies has always been on the Spanish agenda.²⁷⁸

If a State wants to prevent, it must explode its intelligence, but the use of intelligence as I mentioned is not to say where the bomb is five minutes before detonating. For that reason, the government is ought to target who is dangerous or not to presume that a possible terrorist scenario might happen and then cut it. Prevention is assessed by the identification and control of individuals and groups that because of their activities are presumed to be dangerous.²⁷⁹ Even when it may collide with issues of non-discrimination and presumption of innocence, the role of intelligence is to study and try to predict who may attack in the future. Is not about who might look suspicious but, is a

²⁷⁵ Kevin O'Brien; P.38

²⁷⁶ Kevin O'Brien; Pp.33-34

²⁷⁷ Kimberley Trapp; P.266

²⁷⁸ Ana Ramos. P.125

²⁷⁹ Francesca Galli; P.410

study of sociology in general because in terrorism attackers are not repeated criminals but new.²⁸⁰

However, to do this, each person shall be studied as part of groups, not in a stereotypical way but by affiliation. Governments have to study those groups who are more alike to recur to terrorism. Governments have to prevent at the same time than not generalize among the population in its operations.

The methods to keep on the edge to possible dangerous groups is always going to collide with civil liberties and not always going to lead to successful results. Spanish legislation allows in states of emergency to intervene communications always justifying the situation.²⁸¹ And even when in Spain is allowed the surveillance of citizens in cases of emergency, the authorities failed to track and monitor the communications between train stations in Madrid in 2004.²⁸²

I agree with Stubbins when it is argued that techniques such as surveillance, check points and interception of communications are necessary even when they may collide with civil liberties.²⁸³ I am not by this saying that is justifiable a violation of Human Rights in a unreasonable policy. Obviously policies shall comply with the requirements of necessity and proportionality required in IHRL. But we cannot ignore that the prevention of terrorism is in other words the protection of the right to life of each person under the jurisdiction of a State. There are 2 laws in France of particular relevance for the prevention of terrorism: the act “sur la securite quotidienne”²⁸⁴ that granted more discretion and power to the public institutions to implement practical techniques

²⁸⁰ Pillar, Paul. P.115

²⁸¹ Kimberley Trapp; P.267

²⁸² Kimberley Trapp; P.266

²⁸³ Elizabeth Stubbins; P.227

²⁸⁴ LOI n° 2001-1062 du 15 novembre 2001 relative à la sécurité quotidienne.

preventing terrorism. And the act of electronic communications²⁸⁵, that allows the interception of communications to prevent terrorism. The true is that these techniques have to be always balanced and carefully measured to be proportional and not to collide with Human rights. By nature these measures are extremely necessary in order to avoid responsibility on the lack of prevention. Ironically, some may claim to have more fears by limiting their freedoms when we prevent possible attacks by methods of intelligence, than by being victim of an attack.

Intelligence itself is not perfect and can compromise heavily to the governments. First of all, one of the biggest problems facing terrorism and fighting against it with intelligence resources is the complicated and secret organizational structures that impede the penetration in the plans of the groups.²⁸⁶ Intelligence itself does not tell the whole story; intelligence may provide fragments of a complex tale and it is to the government to deduct a big conclusion.²⁸⁷ But the obligation of the State is not to know exactly about the attacks in order to prevent. Intelligence only gives a hint of what may happen and those hints allow the governments to know about possible threats to come.²⁸⁸

Another problem is that sometimes bureaucracy and jealousy of the governments with their systems of intelligence prevail over cooperation.²⁸⁹ We cannot forget that the States are competing at the time that trying to cooperate.

²⁸⁵Loi n° 91-646 du 10 juillet 1991 relative au secret des correspondances émises par la voie des communications électroniques.

²⁸⁶ Benoit Gagnon; *Les technologies de l'information et le terrorisme*; in *Repenser le terrorisme: concept, acteurs et reponses*; Edited by Charles-Philippe David et Benoit Gagnon; Les presses de l'Université Laval; Quebec; 2007; P.248

²⁸⁷McLoughlin, John, Noone, Gregory, and Noone Diana. P.323

²⁸⁸McLoughlin, John, Noone, Gregory, and Noone Diana. P.324

²⁸⁹ Miguel Revenga Sanchez; P.65

Domestically, the main problems for the intelligence in Spain come from the structure of terrorist groups in Spain; dependent of a higher structural network of terrorism only allows joining international efforts to attack it.²⁹⁰ Other problems are related to coordination; Spain in 2004 was qualified by authors of the time as new in the development of the systems of intelligence, with recognizable problems of coordination for the many institutions.²⁹¹

Intelligence no matter the structural problems, have a major problem, the control of information. For the dependence of our society to technology, new treats may be found in the functioning of services and services for everything now is controlled virtually.²⁹² Nowadays all the States are ruled by technology, and as a matter of fact all the national security system is classified by technological means.²⁹³ The gathering of intelligence of the counter-terrorism strategies and security weakness are collected by technological means presumably. Of course, presumably because intelligence does not depends on technology by itself but on the human work that manages the information. That is the most dangerous element of intelligence, not the possibility of the technology to be hacked but the possibility of the human leaking information.²⁹⁴

But technology may be as well a problem when obtaining information. Practically all communications between terrorist nowadays is based on the internet; that difficult the intelligence operations, for it is impossible to handle all the information circulating on the web and less to dig on every private e-mail.²⁹⁵

²⁹⁰ Javier Jordan; P.74

²⁹¹ Francisco Galvache Valero; P.176

²⁹² Miguel Revenga Sanchez; P.35

²⁹³ Brian Forst; P.197

²⁹⁴ Brian Forst; P.199

²⁹⁵ Mathieu Guidere; *Les nouveaux terroristes; Autrement*; Paris; 2010; P.10

The truth is that intelligence should be regularly tested, in order to effectively prevent. The experience in Spain as in US after 9/11 lead to improvements in the intelligence fails.²⁹⁶ However the regular change of techniques of intelligence seems necessary to avoid failures.

Immigration control

Control of immigration is a common necessary policy nowadays, this because of the obvious fact that most of the terrorist that were behind the attacks of the last decade managed to cross frontiers to spread terror.²⁹⁷ From 9/11 the efforts in security are focused on the control of the immigration as a way to prevent further attacks.²⁹⁸

Both France and Spain have to face major risks because of the clandestine immigration. Legislation has been introduced as temporal and preventive with specific persons having suspicious affiliations.²⁹⁹ Other of the main problems is the existence of immeasurable immigration that may support in some part the groups.³⁰⁰ The temporal resident character of the immigrants makes them more dangerous for the lack of legal connection with the territory.³⁰¹

Because of ETA, Spain was one of the first's countries to develop a special police body to combat terrorism and illicit immigration, the "Guardia Civil."³⁰² In is questionable if immigrants are really dangerous or merely victims of the preventive

²⁹⁶ Kimberley Trapp; P.270

²⁹⁷ Lucia Aparicio Chofre; *La amenaza del terrorismo internacional en la regulacion restrictiva de la inmigracion*; in *Estado de Derecho y Derechos Fundamentales en la lucha contra el terrorismo (una aproximacion multidisciplinaria: historica, juridico-comparada, filosofica y economica)*; Edited by Aniceto Masferrerl; Thomson reuters; Pamplona; 2011; P.648

²⁹⁸ Lucia Aparicio Chofre; P.649

²⁹⁹ Francesca Galli; P.403

³⁰⁰ Javier Jordan; P.76

³⁰¹ Lucia Aparicio Chofre; P.653

³⁰² Ana Ramos. P.127

rule of law.³⁰³ In France, the government is proud of its machine of prevention of terrorism, by its apparatus of intelligence and control in immigration of dangerous people who may want to access the territory.³⁰⁴

Protection of risky targets

The concept of risk is of major importance for prevention, in the absence of prevention the risks are to grow.³⁰⁵ Analyzing terrorism, there are targets that present a bigger risk than others; that is why, protecting risky targets of attacks is vital in the fight of terrorism.³⁰⁶ Understanding that terrorism is a social problem and is basically a political response, the lesson on how to prevent terrorism should be focused on the protection of those targets in risk for being the most valuable goal for terrorist to spread their message.³⁰⁷

Reinforcing the vigilance in risky targets is a valid technique to prevent an opportunity to appear.³⁰⁸ This may sound over protective, but as a matter of fact, we have to remember that terrorist need to have an impact in their attacks, therefore, their selection on targets is not random.³⁰⁹ Then the government must learn from previous attacks in order to think as a terrorist and think what must places are alike to be attacked.³¹⁰

The Securitization theory developed by the Copenhagen School proposes that visible targets should pass by a process of securitization. On this sense, security should be

³⁰³ Lucia Aparicio Chofre; P.659

³⁰⁴ Livre Blanc du Gouvernement sur la securite interieure face au terrorisme; P.45

³⁰⁵ Jean-Marie Pontier; *Le droit de la prevention des risques, droit en devenir des societes developpees d'aujourd'hui et de demain*; in *Les Plans de Prevention des Risque*, PUAM, Marseille; 2007; Pp.49-50

³⁰⁶ Ronald Clarke; Graeme Newman; P.86

³⁰⁷ Richard English; P.123

³⁰⁸ Ronald Clarke; Graeme Newman; P.89

³⁰⁹ Ronald Clarke; Graeme Newman; P.94

³¹⁰ Ronald Clarke; Graeme Newman; P.95

apart from the political agenda, politics only help in de-securitization, and security only depends on the targets.³¹¹

Prevention in the EU is mainly referred to the study of potential terrorist targets as may be persons, public installations, public spaces, etc. The EU is conscious that there are places more dangerous than others and that somehow the security systems in the States should be reinforced in such points.³¹² For that reason several scenarios are in the study of the governments as the French one such as campaigns of explosives, biologic, chemical and even nuclear attacks.³¹³

For some authors the risks are ought to be specific, the administration is not supposed to be a general insurance company.³¹⁴ I disagree with this position because as we continue explaining the prevention of terrorism is an obligation that requires presumptions. By protecting dangerous targets we will face the problematic liberal paradigm of confronting the liberties with the conservative position that in the presence of any dangerous factors prevention of the risk is the only way to finally safeguard mayor liberties.³¹⁵

The government in its functions has to take actions against risks, the risks are not only natural, and they may be created by the humans. People are exposed to risks when they are near dangerous places.³¹⁶ What to consider as dangerous is no longer reduced to the protection to military objectives, Health installations, post offices,

³¹¹ Andrew Neal; *Exceptionalism and the politics of counter-terrorism: liberty, security and the war on terror*; Routledge; London; 2009; Pp.101-105

³¹² Cesareo Gutierrez Espada; P.108

³¹³ Livre Blanc du Gouvernement sur la securite interieure face au terrorisme; Pp.41-44

³¹⁴ *Manual de responsabilidad publica* of the Ministry of Justice, Government of Spain on the direction of Joaquin de Fuentes Bardaji; Thomson reuters; Navarra; 2010; Pp.211-213

³¹⁵ Cahier francais, N.360; P.7

³¹⁶ Jean-Marie Pontier; Pp.34-35

frontiers, are obviously a possible terrorist objective.³¹⁷ The ports are a special threat to national security, and governments have to see them as special target of terrorism.³¹⁸ It depends on the governments to study what targets are more dangerous than others, might be even temporal targets as massive assistance events or discrete as a small church if it has political relevance.

There are diverse aspects to determine the priorities when protecting. One of those aspects is the possible place where an attack may occur; terrorism is all about impact, the biggest the attack from an important center of activity the biggest the impact.³¹⁹

The protection of dangerous places require of operational plans that allow the police forces whether to be present at the place, to watch it over or simply to be ready to display a plan if the target is under attack.

In France prevention has always involve protection of vulnerable targets of terrorism; in 1978 was created a contingency plan on prevention of terrorism called the “Vigipirate Renforce Plan.” The plan enables the use of force and command of military power to assist in a rapid way to special anti-terrorist units. This plan was barely used and was re-activated after the 9/11 attacks and is now active to strength the security at airports and visible targets including air control.³²⁰

Prevention in France is successful as well on the basis of police action on possible terrorist scenarios. Under the law of everyday security the police forces are

³¹⁷ Mark B Salter, Nicolas Martin-Lalande; P.299

³¹⁸ See. Pamela Prah; *Port Security: are new anti-terrorism measures adequate?* in *Issues in terrorism and homeland security*; Selections from CQ researcher; Sage; London; 2010; Pp. 282-292

³¹⁹ Loup Francart; P.144

³²⁰ Kevin O'Brien; P.26

reinforced in the border control, airport checking, and after the Madrid attacks of 2004 at several public spaces including public transport.³²¹

In Spain, ETA have regular targets as governmental buildings, dissidents of opposition symbolic places of impact³²² increasing in that sense the need for secure those risky places.

As part of its obligation the State has to prevent to create high risks by policies, actions or simple conducts that might compromise the safety of its citizens. There are innumerable situations where the administration can expose the victims to dangerous situations.³²³ Citing Michel Foucault, the modes of governance may cause a risk; the responsibility of the government should be acknowledged as generator of the crisis.³²⁴ An example is the French position towards the Muslim population when the government prohibited the use of the veil in public schools. This was a policy of security and equal treatment, the use of the veil was not seen a matter of culture or religious freedom but an issue of public order and identity.³²⁵ However, these types of policies may cause great risks on Muslim radicals affiliated with terrorist cells.

In the domestic fight against ETA, the government failed preventing when the terrorist organization ran a campaign of terror against all those familiars of victims that opposed them.³²⁶

Other example is the support of military causes, whether initiated by the State or in cooperation. On the international context States in cooperation as France and Spain

³²¹ Kevin O'Brien; P.38

³²² Antonio Fernandez Hernandez; P.37

³²³ Gilles Darcy; *La responsabilite de l'administration*; Dalloz; Paris; 1996; P.105

³²⁴ Mark B Salter, Nicolas Martin-Lalande; P. 303

³²⁵ Wassyla Tmzali; *El burka como excusa (Terrorismo intelectual, religioso y moral contra la libertad de las mujeres)*; Editorial Saga; Madrid; 2010; P.81

³²⁶ Francisco Llera and Alfredo Retortillo; P.10

can create risks by combating terrorists groups from the neighbor States. No State now has the military force to confront a global menace; Spain for example could not face the menaces of ETA without the support of France. The implementation of political alliances and mutual protections are a demonstration of the possible risks that a country may suffer. A bigger risk of terrorism attacks grew in France because of the support to the Spanish government in the Basque conflict.

The problem is that today the international community requires of common efforts in the intelligence and military as I explained. Therefore States are not ought to participate in international operations of counterterrorism but if they do so, they get exposed to domestic risks. The intervention in the war against terrorism by many European countries as Spain or France put them in a dangerous path for the war was seen as conducted somehow against Muslim values; knowing that the Muslim immigration in Europe is quite significant.³²⁷

It may seem justifiable for a country to enter in the war on terror but is proven that long term operations on a foreign territory may increase the sympathy for the terrorist groups and encourage further attacks.³²⁸ The incursion of France in the world fight against terrorism involves a bigger risk of attacks in its territory.³²⁹ To be more precise we have the example of the attacks of 2004 in Madrid, result of the Spanish incursion in the intervention of Iraq and Afghanistan and that made Spain withdraw a significant number of its troops from the field.³³⁰

³²⁷ Miguel Campins Rahan; P.27

³²⁸ Brian Forst; P.253

³²⁹ Francois Heisburg, Jean-Luc Marret ; Pp. 25-38.

³³⁰ Max Abrahams; P.162

Other risks may be created by strategic alliances with countries that support or are victims of terrorism. For example, when the French government supports the policy of United States with threats as Libya or Iran is exposing itself to possible attacks by unorganized radicals against those policies.³³¹ On the other hand, relations with some States that support terrorism (As Sudan did with Hamas in the 80's providing material help and support to the group) as part of an international policy creates risks on the States who are against the supporter state but still have relations.³³²

To specify, States can face terrorism for several reasons created by their policies even when they are neutral. France for example keeps an equilibrated international policy, and is not in conflict against any other State and still it is object of the terrorist. This has been built in base of past topics, from the crusades to the colonization, from the military presence in Muslim territories.³³³ There are factors of aggravation that increase the risk in France; we can name the presence of Muslims in the territory in the meanwhile of the support of the Iraq war, or the decree of secular laws.³³⁴

A huge problem that governments face today is with the position of media on terrorism, media may create risks by helping the terrorists giving them the desired publicity and causing alarm. There is a debate if is up to the State shall regulate media to control risks. Media, is not as recognized as a creator of risks as it really is, In my opinion, certain regulations should be implemented in media as part of the obligation of prevent for media gives what terrorists wants, attention and diffusion of fear. The media coverage is an essential part of the terror, without the media, terrorists are not able to

³³¹ Loup Francart; P.56

³³² Jean-Francois Gayraud; P.45

³³³ Livre Blanc du Gouvernement sur la securite interieure face au terrorisme; P.33

³³⁴ Livre Blanc du Gouvernement sur la securite interieure face au terrorisme; P.35

spread their goal of fear.³³⁵ We cannot prohibit information about terrorism, by not criticizing terrorism we are offending the victims directly.³³⁶ The idea of media coverage of terrorism is obviously needed, moreover in a world with so much abuse of power. However media sometimes may explode the information irresponsibly and terrify citizens,³³⁷ this is the case for example of hostage videos sent to media directly without being notified first to governments.

Some media regulations may be claimed as necessary when the information delivered collides with sensible issues specifically on the matter of religion that may be very sensible for some radical religious terrorist groups. The examples of reactions after the Danish cartoons or the recent Mohammed movie are only examples on how the conduct of simple individuals can be confused with the general position of the government and the entire population justifying an attack.

The protection of risky targets is highly criticized as a feature of the obligation to prevent for two reasons, impossibility to protect every target and objectification of the creation of risks. First, scholars as Brian admit that it is impossible for any government to protect every risky target.³³⁸ Of course is impossible to say that the governments are in capacity to safeguard all possible targets, but, their capacity and intelligence should make them decide which are the most vulnerable for a possible attack.³³⁹ Secondly, the theory of risks will generally cause a paradox on the obligation of the State to prevent; on the one hand it has to prevent the existing risks, on the other by preventing by protecting those risks to suffer damage it creates more risks. This is at some point a fallacy, it

³³⁵ Brian Forst; P.312

³³⁶ Mauricio Fernandez Martin; P.126

³³⁷ Brian Forst; P.317

³³⁸ Brian Forst; P.341

³³⁹ Ronald Clarke; Graeme Newman; P.102

depends on the State to select the best policies to prevent terrorism and at the same time not to create risks, to that we have to add that even when it creates risks that creates a cycle of protection of more risks. The governments are in a cycle of protection and cannot excuse their obligations on the multiple efforts that have to be done. There are mechanisms that not necessarily create risks when are played in the right way.

Negotiation

Even when it may be difficult to think about, counter-terrorism involves the evaluation of the demands of terrorists and the possible conciliation, this is not made to justify their causes but to arrive to a middle point and try to understand unheard social demands.³⁴⁰ For some, pre-mediation instead of prevention, is the key for the future of peace, States that does not negotiate certain aspects of peace are more and more close to a terrorist attack.³⁴¹ For Clarke it is up to the government to eliminate causes of terrorism, terrorism is normally the expression of the dissatisfaction with the political systems and the governments shall conciliate interests to diminish reasons to attack.³⁴² I have to partly disagree in this with the position of Clarke since it has been proven that not all the time the concession of request of terrorist has finished the violence, but indeed I agree that integration of the society that must alike will support terrorism is good.

Since terrorist normally operate in illegal ways one cannot talk properly on “conciliation” with them.³⁴³ It may appear that is better to negotiate with terrorist than to have a military action, we can see the statistics of the number of deaths of combatants

³⁴⁰ Roberts, Adam. Pp. 19-20

³⁴¹ Gabe Mythen; *Regulating Political Violence*; in *Le Terrorisme: un concept piege*; Edited by Frederic Neyrat; ERE; 2011; P.145

³⁴² Clare, Joseph; Morgan, Frank. *Reducing terrorist risk: integrating jurisdictional and opportunity approaches in Terrorism and Torture*; Edited by Stritzke, Werner et al; Cambridge University Press; New York; 2009; P.333

³⁴³ Brian Forst; P.251

since the war on terror began and come to a conclusion like that easily. However, negotiations only show a weak side of governments and make them more vulnerable to further attacks.

ETA's peace processes are, in my opinion, a demonstration of failed negotiations with terrorist group. The Spanish government granted partial administrative independence to the Basque country, and ETA continued its operations in order to seek for total independence. ETA, no matter how much it expresses its peace intentions, is in a constant "war of attrition" where the side able to support more the costs is the one that is going to win.³⁴⁴ It appeared that the events of 11S finished with the patience of the Spanish government any terrorist group. Any attempt of negotiation was over; a fight to eradicate terrorism began.³⁴⁵ However, ETA tried to conciliate with the government in a process of peace, but, this processes have been interrupted constantly as the ones before 9/11. In a moment of pact, in 2006 an attack in the airport of Barajas showed that the discourse of ETA was not consistent and legitimized the actions of the government to eradicate this dangerous group.³⁴⁶

In France the situation is the same, to the requirements of the AQMI when requested the abolition of the burque law in order to release hostages in 2010, the French government tried to negotiate. However, the group was at the same time announcing new attacks putting the government in constant alert.³⁴⁷

With this I am not implying that negotiation is useless, it is indeed necessary, and is part of the obligation of prevention, but in the processes of negotiation, it has to be

³⁴⁴ Ignacio Sanchez-Cuenca; P.1

³⁴⁵ Rogelio Alonso; P.1102

³⁴⁶ Rogelio Alonso; P.1173

³⁴⁷ Francois-Bernard Huyge; *Terrorisme, Violence et propaganda*. Gallimard; Paris; 2011; P.64

taken into account the seriousness of the terrorists and their further intentions. Normally a group does not finish operating only because it is agreed with them to accede to some of their demands. Efforts shall continue to try to eradicate the groups, otherwise it can be understood as tolerance of terrorism. For other authors terrorism is the consequence of social conflicts and though not clear to be solved by peace negotiations it may be solved by the attention to the population who may support terrorism.³⁴⁸

Integration

The terrorism of nowadays is the response of a historical fight, a defense of ideologies not a specific claim.³⁴⁹ We cannot forget that terrorism is so strong because there are social groups who are identified with the demands of the terrorists. The social integration as a solution to eliminate in the future the terrorism is indeed a valid technique that shall be considered by governments in order to prevent terrorism. Governments are supposed in general to harmonize society; in the fight of terrorism this is important. Clarke and Newman call this duty “facilitation of conditions”, meaning that support of terrorism should be diminishing in the society and by doing that terrorism will become more difficult to happen.³⁵⁰ Pubic initiatives as peace processes and social integration may be more efficient than dialogue and negotiation.³⁵¹

For example, Spain has opted for an integration of Islamic society instead of marginalization. Spanish efforts are focused on the raise of social support and

³⁴⁸ See Jose Manuel Sabucedo and Monica Alzate; *Conflicto, Terrorismo y cultura de paz*; in *Madrid 11-M: Un analisis del mal y sus consecuencias*; Edited by Amalio Blanco; Rafael del Aguila and Jose Manuel Sabucedo; Editorial Trotta; Madrid; 2005.

³⁴⁹ Gabe Mythen; P.137

³⁵⁰ Ronald Clarke; Graeme Newman; P.86

³⁵¹ Brian Forst; P.398

inclusion of new cultures including Islamic cultures.³⁵² This may result in a future lack of support for radical individual terrorism and this does not mean the weakness of the government but its diligence.

How to assess the efforts and failure of prevention?

Efficacy mandate on preventing terrorism

The fight against terrorism is a mandate of efficiency between policies, security response and guarantees.³⁵³ We cannot expect that a State is truly preventing unless it sharpens all its machinery. Of course that population in general is conscious that it cannot be granted with the same safeguards in all moments with the same criteria of efficacy.³⁵⁴ It is not excusable for states nowadays to avoid the efficacy criteria of the obligation of prevention.

Even when the international law grants a large margin of appreciation when it comes to apply policies related to counter-terrorism, the due diligence principle is applicable to all the policies domestically adopted. When the thirteen specific UN conventions on terrorism make reference to the application of the most “appropriate measures” is making reference as Barnidge indicates to the principle of due diligence.³⁵⁵ For Professor Trapp international custom imposes the States to take the obligations of prevention of terrorism seriously for every conduct on prevention is a subject to the due diligence standard of acting.³⁵⁶

³⁵² Jordan, Javier and Horsburgh, Nicola. P.138

³⁵³ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.23

³⁵⁴ Loup Francart; P.144

³⁵⁵ Robert Barnidge; P.111

³⁵⁶ Kimberley Trapp; P.64

In the domestic arena the principle of efficacy is inherent from the action of the administration;³⁵⁷ efficacy itself means accomplishment of objectives or at least effort reaching them; efficacy can only be assessed after the result, however the principle is to be exercised before, when organizing taking measures to grant the duties of the administration.³⁵⁸ The principle of efficacy is inherent to the police function, meaning that the administration has to ensure that they will develop the resources necessities to fulfill the aims.³⁵⁹

But efficacy in prevention is difficult mainly because of the need of quick action of measures and the attention at the same time to the principle of legality. It is clear that legality is a vital for the fight of terrorism but we have to acknowledge that the governments cannot grant a high level of action with a strict legal framework.³⁶⁰ If the principle of proportionality must guide the discretion of the actions of the administration when preventing,³⁶¹ we cannot forget the principle of opportunity, meaning that the administration has to have a margin of appreciation broad enough to intervene in the cases where they think a danger exists.³⁶² The purpose of terrorists is to be discovered, to discover it discretion is needed.³⁶³ France for example conscious about the need of the discretion and acted rapidly to the 9/11 attacks enacting the Daily security act 2001-1062 of November 2001 to grant police powers to combat terrorism more effectively.³⁶⁴

³⁵⁷ Juan Alfonso Santamaria Pastor; P.67

³⁵⁸ Juan Alfonso Santamaria Pastor; P.69

³⁵⁹ Ricardo Rivero Ortega; Pp.133-134

³⁶⁰ Juan Alfonso Santamaria Pastor; P.71

³⁶¹ Luciano Parejo Alfonso, Roberto Dromi; P.102

³⁶² Luciano Parejo Alfonso, Roberto Dromi; Pp.104-106

³⁶³ Barthelemy Courmont; *Terrorisme et contre-terrorisme (L'incomprehension fatale)*; Le cherche midi; Paris; 2003; P.66

³⁶⁴ Anna Oehmichen; P.315

We have to acknowledge as well that efficacy cannot be compromised by procedures. In cooperation the attention to the procedures of international institutions sometimes may impede to act in the most rapid way. As a member of EU and NATO, Spain has always attended to the regulations and implemented the principles required in the fight against terrorism. However, its policy has been always flexible to achieve a more operational and practical machinery that results in efficacy instead of procedures.³⁶⁵

Foreseeability of terrorist attacks.

After analyzing all the methods that are involved in the obligation of prevention we have to think of prevention as a realistic policy. Can the government know when a terrorist attack will happen and can they dismantle it before it happens?

Of course that terrorism nowadays is unpredictable; it can appear in New York as it may appear in Indonesia.³⁶⁶ New forms of terrorism do not show respect of frontiers, no State no matter how powerful is immune to terror. There are threats that are obviously out of the control of the governmental security systems.³⁶⁷ But prevention is not about knowing exactly where and when is going to be an attack, as we mentioned at the beginning of the chapter, prevention is an obligation of being ready to deal with terrorist situations. There are many factors that will chance, for example whom to blame or what techniques to implement in the future. The attacks October of 1980 to the synagogue of the Rue Copernic in Paris first leaded to think about neo-Nazi groups, when, the reality is that behind those attacks were Palestinian terrorists.³⁶⁸ In general terms the long history

³⁶⁵ Ana Ramos. P.130

³⁶⁶ Jeanclos Yves; P.15

³⁶⁷ Loup Francart; P.146

³⁶⁸ Francois-Bernard Huyge; P.61

of the fight against terrorism left several lessons to be taken into account in policy making.³⁶⁹

We can see in our countries of study some examples of governments successfully accomplishing their obligations on prevention. Police authorities in Spain affirm today that they have the capacity to act effectively against terrorism.³⁷⁰ For example, effective control of polices showed that the labors of intelligence where enough to detain and prevent several terrorist attacks from jihadist cells.³⁷¹ Spanish intelligence has managed to discover cells from Al-Quaida thanks to phone interferences as done in Andalucía in 2005 ending in the arrest of 85 individuals members of the terrorist group.³⁷² The same examples are with ETA, Spanish intelligence cooperation especially with France has allowed them to prevent attacks like the train bomb in Burgos in the Christmas Eve of 2003.³⁷³

France is proud if the cut off of the main terrorist cells and almost control of terrorist acts in all the territory. The reasons argued efficacy of the terrorist system and evolution of the anti-terrorist legislation.³⁷⁴ A prove of the efficiency of the counter terrorism forces of intelligence was the French response in the attacks of Toulouse in March 2012.³⁷⁵

For many, there is an inability of the contemporary State to manage terrorist threats.³⁷⁶ However, I do believe that there is an obligation to prevent and that is possible

³⁶⁹ Adam Roberts. P.3

³⁷⁰ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.41

³⁷¹ Javier Jordan; P.83

³⁷² Kimberley Trapp; P.268

³⁷³ Ana Ramos. P.128

³⁷⁴ Francois Heisburg, Jean-Luc Marret; Pp.61-63

³⁷⁵ <http://www.elmoudjahid.com/fr/actualites/25654> /<http://presidentielle2012.ouest-france.fr/actualite/la-lutte-contre-le-terrorisme-sinvite-dans-la-campagne-22-03-2012-676>

³⁷⁶ Gabe Mythen; P.137

to comply with, because of the international conscious on cooperation and the willing of the States to protect their citizens and show their power. As we studied, the obligation of prevention is present in many international and domestic norms. Some may suggest that the documents which imply that prevention of terrorism is an obligation are not binding or contain just principles instead of establishing obligations. However, even when some norms such as UN resolutions or constitutional principles are not binding for States, they guide the action of the governments. As well we had the chance to see how governments are themselves participating in the public debate and adopting everyday more policies to prevent terrorism which implies only the enforcement of the obligation. The obligation of prevention as we saw is not an open letter to governments to do what they want. It implies a series of methods that governments shall carry together to act upon the obligation. Prevention implies efficacy, the fact that governments pretend not to take seriously the obligation does not allow them to apply policies that are not proficient in practice. The prevention of terrorism is indeed a obligation of the State, may be in evolution, but it is an obligation by nature; governments are conscious about it and it is up to the academic debate to continue exercising pressure on its acceptance.

Chapter 3

After exposing the obligations that governments have preventing of terrorism, is convenient to explain why a system of responsibility shall exist to assess the failure of the governments to accomplish the obligation of prevention. In this chapter we will study the reasons behind the creation of a system of responsibility for the State. There is a need to pass from a system of charity to victims to a system of real responsibility that allows the citizen to claims the government for its duties on prevention. To build that system we need to study the theories of governmental responsibility regarding third actors specifically on terrorism. To conclude the chapter I will analyze the possible ways to seek responsibility of the government on failing preventing in international and domestic law.

Situation on responsibility of the State for terrorism

Today is impossible to say that governments are not taking care of victims of terrorism. Governments assumed a brave commitment to help victims of terrorism trough many charitable initiatives. However, even when the government has a clear responsibility in compensating the victims of terrorism³⁷⁷ there is a lack of governmental commitment of governments to accept further responsibility for its actions. So far, governments are ought to support the victims but this support is not to be confused responsibility. The government is at some general level taking responsibility of victims as a *pater familias*, but governments are trying to avoid its accountability for the lack of prevention. To seek for the responsibility of the State, is to ensure that the State will react on real daily threats complying with its proper obligations preventing terrorism.³⁷⁸

³⁷⁷ Francisco Llera and Alfredo Retortillo; P.129

³⁷⁸ Tal Becker; P.398 et ss

Why not to accept a system of responsibility if the responsibility since the XIX century has been expanded and continues doing so.³⁷⁹ Nowadays the enacted legislation on terrorism affects almost all aspects of law; human rights law, humanitarian law, and the rules of State responsibility on the local and international level.³⁸⁰

We first have to understand the situation of the victims of terrorism on the field of compensation for damages. Before 9/11 the victims of terrorism were invisible, only the government was present only to give them recognition on their funeral.³⁸¹ The victims of terrorism have been excluded and relegated even with the big media impact produced by terrorism. They are because of compassion permanent victims, because our impact is temporal but, with time, victims enter quickly into desolation. This situation may be different in countries such as Spain where terrorism is a matter of constant reality. The public humiliation by the mock of the victim character of those who suffered terrorism got typified in Article 578 of the Criminal Code.³⁸²

But this situation changed, victims increased dramatically in the last two decades and international community as the domestic legislator intended to force the government to take care of them. But again, these efforts didn't create a system of responsibility of the State.

The UN has encouraged governments to grant the victims of a terrorist attack and their families and enforce it as a right.³⁸³ The UN stated that governments shall create

³⁷⁹ Gilles Darcy; P.23

³⁸⁰ Ben Saul; P.Lxix

³⁸¹ Reyes Mate; *Justicia De Las Víctimas Terrorismo, memoria, reconciliación*; Anthropos; 2008; P.18

³⁸² Cherif Bassiouni; P. 146

³⁸³ Fundamental principles and directives related to the right of reparation to victims of violations of human rights and humanitarian international law" (UN Doc 2/CN. 4/2000/62, Annexe 18; January, 2000) Further developed on UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law : resolution / adopted by the General Assembly*, 21 March

mechanisms to ensure compensation of the victims of large scale crimes in case of the unwillingness or lack of possibilities of the criminals to repair. The problem of the UN resolutions is that it does not count with a binding character and they do not mention terrorism specifically.³⁸⁴ However it is understandable that these resolutions include all the most atrocious crimes against humanity where we can set terrorism.

In Europe there are several Conventions creating rights on the victims of terrorism to receive compensation, these norms can be enforced in domestic courts and if not by European jurisdiction. For instance the European Convention on the Compensation of Victims of Violent Crimes³⁸⁵ establishes a number of situations where governments are in charge of granting compensation. The Convention requires that compensation is paid to victims who suffered directly an intentional violent action; States will determine how.³⁸⁶ The article 10.2 of the framework decision on combating terrorism of 2002 of the European Union Council; establishes that the governments are ought to create mechanisms to help the victims of terrorism and their families. But these documents have been rejected several times by multiple governments for their non-democratic and violent past and fear to accept responsibility.³⁸⁷

In the domestic forum the funds of help are a figure to grant the victims a compensation in general terms without triggering the responsibility of the governments for terrorism. The legislation of Spain establishes that the State is responsible to

2006, A/RES/60/147, available at: <http://www.unhcr.org/refworld/docid/4721cb942.html> [accessed 20 November 2012]

³⁸⁴ Elizabeth Stubbins; Pp.211-212

³⁸⁵ Council of Europe, European Convention on the Compensation of Victims of Violent Crimes; November, 24, 1983; E.T.S N° 116. Quoted by Cherif Bassiouni; Pp. 146-147

³⁸⁶ Cherif Bassiouni; P.147

³⁸⁷ Cherif Bassiouni; P.151

compensate the victims of terrorism, whichever the origin and type is.³⁸⁸ The same in French Law all the damages caused in situations of war and terrorism are not of the responsibility of the administration and therefore there is no regime of reparation. However, the government is obliged to create mechanisms of grace to repair some damages.³⁸⁹ If governments are able and have the will to be supportive, the compensation by funds is indeed a rapid and good way to repair the victims.³⁹⁰

French law recognized in that Funds of guarantee³⁹¹ have to be created to integrally repair the damages suffered by victims of terrorism.³⁹² Financing of the fund depends of national solidarity, for example, in every contracts of insurance a fee is charged to support the fund of help. The fund covers not only the physical treatments of victims but as well psychological recuperation.³⁹³ The procedure of compensation is led by the Procurator of the Republic who after identifying the victims makes an initial offer; the victims have the right after the first offer to appeal that to civil tribunals.³⁹⁴ The victims are assisted by “SOS Attentats,” an organization created in France to assist legally the victims of terrorism in order to seek for legal remedies.³⁹⁵

In Spain the efforts to compensate victims are remarkable, the government as a political agreement, commits to be in charge of victims of terrorism and compensate them for the damages suffered.³⁹⁶ A governmental system of help to the victims was created in Spain in 1995 and modified 4 times until 2003 where the State takes charge of the

³⁸⁸ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.33

³⁸⁹ Benoit Delaunay; *La faute de l'administration*; LGDJ; 2007; P.275

³⁹⁰ Robert Cario; P.356

³⁹¹ Loi n° 86-1020 du 9 septembre 1986 relative à la lutte contre le terrorisme. Version consolidée au 19 juin 2008. Article 9.

³⁹² Françoise Rudetzki; P. 232

³⁹³ Françoise Rudetzki; P. 233

³⁹⁴ Livre Blanc sur la défense, 1994, Paris, ministère de la défense; P.92

³⁹⁵ Françoise Rudetzki; P. 232

³⁹⁶ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.33

corporal and physical damages of the victims of terrorism as well as material damages. The benefit requires the victims to demonstrate a causal nexus to terrorism; the actions are directed by the Ministry of Interior.³⁹⁷ The system depends as well on the collective help of the population, civilians are welcome to help in the efforts to compensate in the way they can. For example, the psychological injuries after the attacks of M11 were covered by cooperation of the associations of psychologists of the country.³⁹⁸

The funds of help seem as a good option to compensate the victims and effective, however, There are two problems regarding this charity system that will help us understand why we need a system of solid responsibility. First regarding the victim position and secondly regarding the future obligations of the State.

The first problem is related to the victims and their place within on the fund, several scenarios are present. The first one is the lack of recognition of the victim and therefore lack of compensation. The most important right of the victims of terrorism is the recognition of their status; this supposes the access to benefits and other rights as victim.³⁹⁹ This might not be the case for many direct victims that can be identified as victims easily, but it is the case for relatives of those victims who might not be included on the lists of the funds, for example for lacking to prove the relation with the victim. The truth is that the right to compensate to the families of the victims comes from a presumption direct of moral harm in case of death.⁴⁰⁰ However, many relatives may not

³⁹⁷ Jose Luis de la Cuesta; P. 272 et ss.

³⁹⁸ Ana Lillo, Enrique Parada; Antonio Puerta; Fernando Munoz; *Asistencia Psicologica urgente; in Madrid 11-M: Un analisis del mal y sus consecuencias*; Edited by Amalio Blanco; Rafael del Aguila and Jose Manuel Sabucedo; Editorial Trotta; Madrid; 2005; P.354

³⁹⁹ Robert Cario; Pp.355-356

⁴⁰⁰ Jesus Gonzalez Perez; *Responsabilidad patrimonial de las administraciones publicas (4ta ed)*; Thomson Civitas; Navarra; 2006; P.227

be included for their particular situations because of the difficulty of the fund to deal with individual cases.

The second scenario is when the fund in order to act effectively tries to generalize the compensation amounts of the victims. For that reason the administration fails many times to remember that the amounts of compensation of the victims should be different in every case.⁴⁰¹ It is a principle that a damage to be compensated must be effective, measurable economically and individualized⁴⁰² this might not be the reality with funds. Therefore if we talk about reparation, the right to repair means reintegration of the victim of the losses caused.⁴⁰³ But if this is not studied case by case in detail the government fails to repair.

It is because of that reason that in many cases the psychological damages are not covered completely. It is normal that the victims to be depressed after 4 to 6 weeks of the event, but the trauma continues and treatment is needed. Always from a violent event, the victims are in difficult emotional situations affecting the development of their life. The psychological pain of the indirect victims of terrorism is bigger when the direct victim has survived with a physical injury to remember the terrorist scar. However, it is hard to see how the funds can subside those damages for in every individual will be different.

The third scenario is related to the dissatisfaction of the victim with the amount given and the lack of effective remedies to appeal it. The law admits the appeal of the compensation as a possible solution to deal with psychological damages. A possibility to

⁴⁰¹ Lucana M. Estevez, Dalibor Pavolka, Jaroslav Niznansky; P.33

⁴⁰² Eduardo Gamero Casado; Severiano Fernandez Ramos; P.514

⁴⁰³ See Robert Cario; Pp 358-360

seek for compensation in the national level is a civil lawsuit;⁴⁰⁴ the regime of compensation to victims created in the civil procedure has the same basis of integral restitution of the losses.⁴⁰⁵ The French legislation on protection of victims⁴⁰⁶ allows the request of higher compensation on the criminal jurisdiction. This was reinforced in 1990 and 2001⁴⁰⁷, when the French national assembly recognized that reparation of the material losses must be granted.⁴⁰⁸ However, the type of remedies is still a problem; in normal conditions the civil or criminal tribunals will not judge the acts of their governments.⁴⁰⁹

The second problem with the fund come from the perspective of the obligations of the governments as mentioned. The duty of reparation to the victims goes beyond a moral conviction of solidarity between individuals to repair those things that cannot be repaired.⁴¹⁰ The funds are created as an excuse to avoid responsibility by admitting an anticipated compensation; however, this is not only about compensation but about recognition of obligations. There is a real lack of commitment of governments to accept further responsibility, to seek for the responsibility of the State is important to ensure State to react on real daily threats and make them comply with their proper obligations.⁴¹¹

Theories of responsibility of the State for terrorism.

⁴⁰⁴ Michel Paillet; La responsabilité *administrative*; Alloz; 1996; P.188

⁴⁰⁵ Jean-Francois Gayraud ; P.74

⁴⁰⁶ Loi n°83-608 du 8 juillet 1983 RENFORCANT LA PROTECTION DES VICTIMES D'INFRACTION.

⁴⁰⁷ Loi n° 90-589 du 6 juillet 1990 modifiant le code de procédure pénale et le code des assurances et relative aux victimes d'infractions; Version consolidée au 13 juillet 2001.

⁴⁰⁸ Robert Cario; Pp.346-347

⁴⁰⁹ Cherif Bassiouni; P.168-169

⁴¹⁰ Reyes Mate; P.7

⁴¹¹ Tal Becker; P.398 et ss

When we study the responsibility in general we get to the basic principle that if someone causes harms it has to repair it.⁴¹² To find responsibility, a nexus of conduct is required, it is needed to know who caused the harm to know who has to compensate. In the case of our study we know the harm caused by terrorism. In theory, terrorists are ought to compensate as criminals, however is ought to the government to repair whether he caused the harm or not. This is because the government failed to prevent or because the impossibility to cover the victims damages with the patrimony of the terrorists. However, the governments have based their lack of responsibility on theories that require a direct nexus to trigger the responsibility. This governmental rejection of responsibility acceptance is based mainly on three fears. The fear that the State will take care of all the damages that happen to its citizens no matter the reason behind. The fear that the State is required to perform conducts impossible to comply for lack of resources, cooperation or simply of will. No matter the fear, it is proven that the acceptance of responsibility does not mean that the terrorists are not accountable, nor than terrorists are responsible in the same way as the government.⁴¹³

Depending on the theory of responsibility the governments are more or less accountable to pay compensation. Before 9/11, 3 theories were relevant on the attribution of State responsibility for terrorism. The first theory is related to the absolute responsibility, this is an acceptance that as a consequence of the holding of sovereign power, governments shall be responsible for all the attacks against its territory. The second is the agency theory, establishes that the States are only responsible for the acts caused by its agents and it is only responsible for terrorism if one of its agencies was

⁴¹² Michel Paillet; P.89

⁴¹³ Tal Becker; P.299

involved. The last and more accepted theory nowadays is the theory of causality, it establishes that the State may be responsible for complicity by tolerating terrorism when it does not prosecute.⁴¹⁴

Theory of the absolute responsibility

In international as in domestic administrative law there is a conception that governments are not responsible for the action of privates.⁴¹⁵ But some scholars at the beginning of the 20 century created theories about absolute responsibility of the State, Garcia Mora was the main promoter of the theory of the absolute responsibility.⁴¹⁶ Based on feudal principles in the middle ages, there is an idea that governments are responsible for all the damages caused in their territory.⁴¹⁷ It is a further duty to the State to criminalize and to prosecute those who cause harm and to grant that those who cause harm repair the ones who got harmed.

This theory has many critiques; I can mention the most important ones on my perspective. First, the theory if accepted, creates a government with no will to prevent if it has frequent and really impossible attacks to prevent, this because, preventing or not, the government will have to compensate.⁴¹⁸ Secondly, if the government is in capacity to counter attack, the theory will justify the government to use any type of measures preventing terrorism for the important thing will be to prevent no matter the costs.⁴¹⁹ This is the position for Becker who argues that absolute responsibility is not the answer mainly because politically this will be used as a justification to interfere with Human liberties for

⁴¹⁴ Tal Becker; Pp.169-176

⁴¹⁵ Tal Becker; P.12

⁴¹⁶ Tal Becker; P.174

⁴¹⁷ Tal Becker; P.13

⁴¹⁸ Ricardo Rivero Ortega; P.220

⁴¹⁹ Ricardo Rivero Ortega; P.224

the need of a more secure State.⁴²⁰ This point counts with more relevance when we think that using this justification the State will use the prevention of terrorism to eliminate political enemies capriciously. Even nowadays, terrorism has been used as an excuse to use unlawful methods against desired targets of the world most powerful countries.⁴²¹ The generalization of who might or not be the terrorist and the grant amount of discretion to the governments is a blank letter to the abuse of administrative power.⁴²²

To the second critique however, I would like to say that the abuse of discretionary power is a general characteristic of counter-terrorism and is not only a consequence of the acceptance of objective absolute responsibility. From a philosophical point of view, the terrorism itself produces a society with risks; counter terrorism no matter the regime of responsibility legitimizes the governmental intervention for the erosion of the trust in the individual.⁴²³

This theory was neglected by the theory of strict liability or agency of the State; however, there some scholars are now coming back to the theory of Absolute responsibility of the State for the duty of the State to grant the repair of damages by individuals who cannot compensate by their own the damages caused. These cases involve major scale damages, as environmental damage or nuclear testing, cases were the State may not be directly responsible but were it has to compensate.⁴²⁴ In the same way I propose that it is studied to include terrorism.

Theory of the agency theory

⁴²⁰ Tal Becker; P.270

⁴²¹ Ben Saul; P.Lxviii

⁴²² Francesca Galli; Pp.403-404

⁴²³ Francesca Galli; P.399

⁴²⁴ Tal Becker; P.14

Probably the most accepted theory in the convenience of the States is the theory of the agency. The modern idea of State responsibility is to deny their duties towards the actions of third actors. The theory as formulated by the International Legal Commission, establishes that the State is responsible only for the acts performed by its agents and third actors related or empowered by one agent of the State.⁴²⁵ For Ian Brownlie the agency theory is the only valid solution, the government is responsible only for the acts of its agents or in any case for their negligence.⁴²⁶

I do believe that to limit responsibility of the State to agency acts is the same as excusing the State from its duties combating terrorism.⁴²⁷ It is almost impossible to clarify the nexus between terrorists and the government. The agency theory demands of a test to assess the obligation of prevention in order to admit the negligent conduct of the government. As I will further explain a test cannot be created for the prevention is an accumulation of efforts to be considered together and not even the failure of one element of the obligation triggers the responsibility of the government.

Theory of separate crime or causation

In 1925, Max Huber on the “Spanish zone” or “Morocco case” of UK v Spain⁴²⁸ created the responsibility theory of the separate crime.⁴²⁹ This theory proposes that States are not only responsible for their own acts but for the lack of preventive crime measures implemented with due diligence.⁴³⁰ This complies with the argumentation of

⁴²⁵ Tal Becker; P.43

⁴²⁶ Robert Barnidge. P.70

⁴²⁷ Tal Becker; P.258

⁴²⁸ Arbitral Tribunal, *British Claims in the Spanish Zone of Morocco case (Affaire des biens britanniques au Maroc espagnol)*, Arbitral Award, 1 May 1925, reprinted in *Reports of International Arbitral Awards*, Vol. II, United Nations, New York, 1949, Section III(II), pp. 642–646, §§ 3–6

⁴²⁹ (2r international arbitration awards 6.15)

⁴³⁰ Tal Becker; P.25

the father of international law, Hugo Grotius who says that the State is responsible for the tolerance of criminal acts, meaning the lack of (effective) measures to prevent crime.⁴³¹

This theory was put aside mainly because of the interests of governments to accept the theory of the agency, however, this is the closest theory to be accepted as an alternative by courts when assessing the responsibility of the State. This theory was rescued by scholars as Becker who think that in the field of terrorism Governments should respond not only for the actions caused by their agents.

The evolved and now called theory of causation establishes that any harm is caused as a consequence of an act or omission of the original actor.⁴³² This theory does not require a real relationship between State agents and terrorists; instead it needs that there is an act of one of the representatives of the government to create conditions that in the future will generate the harm.⁴³³ Actually, this theory is a figure of municipal law applied by analogy to international law.⁴³⁴ The test to assess the responsibility requires the evaluation of a cause to see if condition “sine qua non” for the consequent act is.

This theory will be applicable perfectly to the State responsibility on prevention; it includes the responsibility for creating risks, of opportunity for crime to be executed and social conditions to encourage terrorism. For example: a policy that discriminates against a cultural or religious group, the interference of public affairs, and provocation of terrorists. The question is if we can apply this theory to the States when we ask ourselves “was the State responsible for the cause of the attack by not preventing it?” Becker insists that it applies and the assessment will be the effectiveness of the

⁴³¹ Tal Becker; P.14

⁴³² Tal Becker; P.285

⁴³³ Tal Becker; P.266

⁴³⁴ Tal Becker; P.287

measures against terrorism.⁴³⁵ But this is not to be understood over broadly, the defenders of this thesis have made a distinction between causes and conditions. The rule is that the responsibility comes from causes only meaning abnormal factors that are not natural and may cause harm.⁴³⁶

As Becker remarks, to think in responsibility of the State for terrorism is not to think in the responsibility that State has for the lack of involvement of its agents in terrorism, which is not proper. Today's responsibility goes beyond the responsibility of the agency, and by that Becker means responsibility for action only. The concept of responsibility today is satisfied with toleration, lack of condemnation and acquiescence.⁴³⁷ The responsibility of the State for Becker depends mainly on the acts, omissions or negligence of the State.⁴³⁸

If we accept that, then we will have problems of proof, what is the burden to know if the government tolerates terrorism beyond the obvious causes as support or lack of criminalization. I do not believe that there should be a test to determine State responsibility for its failure to prevent, instead, an analysis pro-victim should be assessed and if there is something to study to determine the failure of the State should be assessed on a comparative method of effective measures successful in other States.

For Becker, depending on the harm of the attacks and wrongdoing of the policies, States are ought to respond in compensative terms.⁴³⁹ A theory of responsibility for Becker must contemplate several scenarios of participation of the State to study its level of responsibility. This does not mean that the State in general will not be held

⁴³⁵ Tal Becker; P.291

⁴³⁶ Tal Becker; P.293

⁴³⁷ Tal Becker; P.258

⁴³⁸ Tal Becker; P.332

⁴³⁹ Tal Becker; P.339

responsible, but that responsibility have different levels. Some examples of scenarios are, lack of prevention, failure combating it, lack of prosecution of terrorist among others.⁴⁴⁰ It has to be taken into account that there are several forms of terrorism and each attack leaves a different harm.⁴⁴¹ In causation, the responsibility of the State will depend not only on the duty itself but on the circumstances surrounding the facts as capacity in prevention for example.⁴⁴²

The governments are not only to be responsible for the conduct of tolerance but as well for creating conditions sine qua non for terrorism to happen. The question then will be, how to assess if the government created conditions for terrorism to occur? For Becker, we need to have real conditions created by the State for the attack to happen.⁴⁴³ For example, in order to prevent a *coup d'etat*, governments may arm the population as done in Colombia and therefore create conditions for the creation of guerillas that with time will become terrorists.

For Becker, causation is not to be widely expanded to the sociological causes of terrorism. We cannot link the State as responsible for all political, religious and ethnical factors,⁴⁴⁴ I disagree with his position. I must remark that advances in conciliation among population are necessary and impliedly mandatory for States and that the State shall be held responsible for causing social tensions, even when this is not part of the theory.

Causation as a theory of responsibility is generally well accepted in the academic field, however, in practice and related to terrorism has been neglected by

⁴⁴⁰ Tal Becker; P.246

⁴⁴¹ Tal Becker; Pp.247-250

⁴⁴² Tal Becker; P.334

⁴⁴³ Tal Becker; P.156

⁴⁴⁴ Tal Becker; P.331

governments.⁴⁴⁵ I do believe that causation is a good approach to assess the responsibility of the State for terrorism for it contemplates the failure in prevention and it presents it in a plausible way to the courts to accept it. For example, if the State fails in intelligence because some information is leaked, it would be understood as a condition created by the State. If the State fails preventing an attack in a risky target it would be understood that the government created the condition of insecurity by not taking good care of the visible target. If a State decides to implement a policy to combat terrorism, whether domestic or international it understands that its creating conditions for terrorism to happen as a revenge at the same time that combats it.

Methods looking for responsibility

The situation in court is relatively different in every system when looking for the responsibility of the government on terrorism. As we mentioned, the cases where the victims are not included or not satisfied with their compensations are in principle susceptible to be appealed on civil and criminal jurisdictions that may modify the amounts of the compensation, but that do not compromise the obligations of the government. As mentioned, those remedies are not alike to succeed for no court in criminal or civil jurisdiction would like to reverse a previous governmental compensation. More than a simple remedy, the individual victims of any type are granted decision by the fundamental principles of justice, and the States have to facilitate the judicial and administrative mechanisms to grant the victim the rapid and effective reach of compensation.⁴⁴⁶ The tribunals in public law may defy the power of the government

⁴⁴⁵ Tal Becker; P.331

⁴⁴⁶ Cherif Bassiouni; P 142.

and be the solution for fair compensations and the forced establishment of the already clear obligations of the government preventing terrorism.

The courts we are making reference are courts in international law, most alike in Human rights and domestic constitutional and administrative tribunals, the jurisprudence of those jurisdictions normally favor the citizen against the administration.⁴⁴⁷ Those courts may apply without any problem the theory of causation to find the responsibility of the State in a simple way and some courts have even applied the objective or absolute theory of responsibility. I will pass to study the practice of those courts and the possible principles to be applied in order to find the responsibility of the government for lack of prevention.

International law and human rights law

International accountability is not attractive to the States, governments are temporal and they do not like to be controlled.⁴⁴⁸ Governments accept usually international mechanism of cooperation not controlled by any jurisdiction so they cannot be judged. For some authors such as Salter, by consensus international community decided not to talk about responsibility of State in cases of terrorism.⁴⁴⁹

What the international community has done concretely is to emphasize that the responsibility for lack of prevention in any case should be found in the domestic forum, because the obligation it is considered as part of the legislation of the country therefore in

⁴⁴⁷ Ramon Parada; Derecho administrativo: Concepto, fuentes, actos, contratos, actividad administrativa, expropiación forzosa, responsabilidad, procedimiento, recursos, jurisdicción. Parte general; Marcial Pons Ediciones Jurídicas; 1993; P.585

⁴⁴⁸ Ian Leigh; *Accountability and intelligence cooperation: framing the issue; in International Intelligence Cooperation and Accountability*; Edited by Hans Born, Ian Leigh and Aidan Wills; Routledge; New York; 2011; P.7

⁴⁴⁹ Mark B Salter, Nicolas Martin-Lalande; P.310

the field of the responsibility of the legislative State.⁴⁵⁰ But this is not true, as mentioned in second chapter, the international law is a source of the obligation of prevention and governments are responsible for the conducts that they have to implement.⁴⁵¹ Those obligations are not only towards the international community, but to the victims of possible attacks based on the realization or not of a conduct by the State.⁴⁵²

I have to add that regional systems as the European and systems of protection of Human rights in fact have failed to speak about responsibility of the State for prevent. However, they have created parallel arguments to prove the obligation and enforce it. Example of this is the case of the Bosnian genocide as explained by Trapp, the prevention of large scale crimes such as terrorism depends on the conduct that the States adopt that is subject to the principle of due diligence for the State is expected to produce desired results.⁴⁵³

In Human rights courts the argumentation to find the responsibility of the State can be based on two arguments; Fail in prevention to protect the right of life and the lack of remedies to compensate. It may be seen that the State has a duty with the victims because they failed to guarantee their right to life. We can use the example of Spain with ETA, the government knows the treats, and they can or cannot stop a terrorist act from happening. A court of human rights may see this as a case where the State knew the consequence because of the visibility of the treats and the long history of terrorism that

⁴⁵⁰ Jesus Gonzalez Perez; P.112

⁴⁵¹ See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 4; available at: <http://www.unhcr.org/refworld/docid/3ddb8f804.html> [accessed 20 November 2012]

⁴⁵² Elizabeth Stubbins; Pp.34-35

⁴⁵³ Kimberley Trapp; P.65

may allow the government to take enough measures to prevent terrorism from the lessons the past.

The jurisprudence of the Regional courts of Human rights had move the concept of nexus necessary to activate the responsibility to a field broader and open to interpretation given pass to the theory of causality. The Inter-American Court in its jurisprudence⁴⁵⁴ said that is a duty of the State the prevention of crime and for that; they have to adopt all the measures in their hands to assure that crime does not happens in the first place. This has allowed the court to in several cases find the State responsible for the acts performed by regular criminals, being the nexus the lack of action.⁴⁵⁵ The European Court on the other hand has not overcome the concept of responsibility to the wrongdoing of the agents of the state in private occasioned harm.⁴⁵⁶ In the case *Eigu v Turkey* however, the Court found the State responsible of the death of several civilians by private actors on the basis of the failure of the State commanding military operations to avoid or minimize the risk of conflicts to civilians.⁴⁵⁷ As well, as I mentioned before, in 1991 The ECtHR in the case *Dujardin* clarifies the obligation of the government to prevent terrorism.⁴⁵⁸

The other way to accept a case on a Human rights court is for lack of remedies to compensate. Because of the codification of human rights we know that a remedy is an issue to be granted to victims of any type no matter who was the responsible.⁴⁵⁹ There is no written obligation of States to repair to the victims of terrorist attacks by third party

⁴⁵⁴ See CorteIDH. Caso Haitianos y Dominicanos de origen Haitiano en la República Dominicana. Resolución de la Corte. 2-feb-2006 República Dominicana. CorteIDH.Caso de los Niños y Adolescentes Privados de Libertad en el "Complejo do Tatuapé" da FEBEM.Resolución de la Corte 30-nov-2005 Brasil.

⁴⁵⁵ Tal Becker; Pp.50-53

⁴⁵⁶ Tal Becker; P.53

⁴⁵⁷ Tal Becker; P.55

⁴⁵⁸ Pedro Tenorio Sanchez; P.337

⁴⁵⁹ Cherif Bassiouni; P.138-142.

actors, but States shall provide remedies to allow victims to pursue compensation under the premise of IHRL violations on the lack of prevention or investigation.⁴⁶⁰ Then, if the victims receives an aid by the government but is not satisfied, it should be able to have an available remedy to achieve the desired.

One of the reasons of the general conventions implying the need to compensate the victims, is the magnitude of the crimes. Victims cannot expect compensation from the patrimony of the terrorists; they have to ask the government for their assistance. Not only in International law but under IHRL victims of the most atrocious crimes of humanity have always had access to a just compensation on behalf of the State.⁴⁶¹ This is because, the State as responsible for their citizens shall grant compensation to victims in case of failure of compensation by individual actors.⁴⁶²

Human rights courts are the most suitable place to look for responsibility of the governments in the international forum; however, this has not always been the case. Before human rights courts existed; the State was judge to repair the damage cause by its actions or omissions in front of international courts on the basis of conventional law as customary law. For instance; the Permanent Court of International Justice in the case *Factory at Chorzow*⁴⁶³ declared that the violation of the obligation of granting security brings with it the obligation to repair the damage in an adequate form.⁴⁶⁴

In the Nuremberg trials was established that individuals performing crimes against humanity are responsible themselves for that crime. Germany was not found

⁴⁶⁰ Elizabeth Stubbins; P.206-207

⁴⁶¹ Elizabeth Stubbins; Pp.191-192

⁴⁶² Elizabeth Stubbins; P.204

⁴⁶³ *Factory at Chorzow* (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26); Publications of the Permanent Court of International Justice, Series A - No. 9, Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927.

⁴⁶⁴ Cherif Bassiouni; P. 144

responsible for the crimes of the Nazi, the same principle of today's International criminal law. Nobody argues against that, however, in principle is responsibility of the criminal to compensate the victims of its crimes. But, if we take into account the magnitude of crimes as the ones judged at Nuremberg the possibility of compensation to the victims of the specific crimes was unimaginable to lie in one criminal. Then the Nuremberg tribunal found Germany as State concurrently responsible for the crimes and condemns paying the damages, this of course because the Nazi regime was acting on behalf of the State.⁴⁶⁵ But from another point of view, Germany was responsible not only for the action of Nazi officials but for the tolerance of acts by non-officials as well. In the same sense terrorism should be judged, of course we acknowledge the individual responsibility of terrorists, but in many cases, this cannot be reached. Therefore, States should take responsibility in front of the victims, for the magnitude of the act and tolerance of the happening.

Constitutional and administrative law

There are legal concepts that even with variations on their application have the same meaning; that is the case of responsibility of the State.⁴⁶⁶ International responsibility is different from domestic responsibility, but in the field of protection to the people in their jurisdiction, the same principles apply. State responsibility for terrorism related to aliens in international law does not have any difference with the regime of responsibility established by human rights or domestic law.⁴⁶⁷

⁴⁶⁵ Kimberley Trapp; P.230 et ss

⁴⁶⁶ Robert Barnidge. P.55

⁴⁶⁷ Tal Becker; P.285

In domestic law, the perfect forum to seek for compensation on the failure of the government's action is the administrative jurisdiction. Superior courts in constitutional jurisdiction will have a decisive role analyzing the established by the administrative courts. But in principle in the domestic forum there is a need to claim first in administrative courts because the governmental obligation to prevent terrorism is in the functions of the administration and therefore the jurisdiction is to that area. The government in administration is an actor of the law, when acting no matter the functions exercising is the titular of the public interest, that its why in its actions the administration is responsible for the possible harms caused.⁴⁶⁸

It is obvious that as in France the victim has a right to claim reparation only if it comes to prove that the administration is the responsible for its harm.⁴⁶⁹ To proof the administrative nexus of fault we have to know that the responsibility may come from lack of service; personal fault in the exercise of the service; personal fault outside the service and consequences of the acting of the administration translated in responsibility without fault.⁴⁷⁰

There are several cases were the administration can be assessed by its responsibility; there is a regime existing in France and Spain under the name of responsibility with fault. The regime requires that the administration in the exercise of its powers causes a direct harm. The responsibility with fault implies all those acts where the administration had a purpose and caused damage because of its fault.⁴⁷¹ This is the case for example of the collateral victims of the counter terror operations, or any of the cases

⁴⁶⁸ Jesus Gonzalez Perez; P.55

⁴⁶⁹ Michel Paillet; P.39

⁴⁷⁰ Marcel Waline; *Notes D'Arrets (Volume II) L'action de l'administration: police – service public – responsabilite et agents publics*; Dalloz; Paris; 2005; P.298

⁴⁷¹ Gilles Darcy; P.65

of harm clear and directly imputable to the administration. In cases of doubt of the guilt of the administration preventing terrorism the citizen will not try to look responsibility for the fault but instead responsibility without fault or for lack of service. However, this regime is not the frequent case in cases of terrorism for its referred to the direct responsibility of the administration.

Responsibility without fault

The regime of responsibility without fault is quite new and is difficult for some courts adopt it. It expands the concepts of responsibility to those cases where it may be imputable to the administration the creation of some conditions that generated the harm, in other words “causation”. This was a jurisprudential French invention that established that the victim does not have to support always the charge if the Administration acted without fault for its non-equal position.⁴⁷² For some relevant authors on administrative law as Nieto, the administration should not be blamed for the damages caused for third actors because the administration should compensate only for the damages caused for a certain risk or created by a public service. To this same point Fernandez, having a progressive approach, explains how the administration can be responsible for the third actors when they do not watch them.⁴⁷³ Then we can think about the creation of risks in general by policies or by failing watching the third actors.

The regime of responsibility without fault is basically a regime of responsibility for risks. It is an exceptional regime that allows finding the responsibility of the administration for expose the victim to a risk situation or to a situation where the

⁴⁷² Gilles Darcy; P.96

⁴⁷³ Ricardo Rivero Ortega; P.226

public charges were disproportional.⁴⁷⁴ The responsibility for the police function is based in the mentioned objective responsibility; the same is based on the assessment of risks.⁴⁷⁵

It is common to see how the responsibility without fault is more imputable only to the responsibility by creating risks.⁴⁷⁶ However the Spanish legislation has made clear that the risks in order to be imputable to the administration have to be measurable and foreseeable.⁴⁷⁷ Some of the risks contemplated in this regime are for example; the risk for the use of extremely dangerous weapons by the police in general.⁴⁷⁸ The risk for the use of fire in operations of counter terrorism, of course this will depend on discretion of the police to act.⁴⁷⁹ Finally includes as well the risk of the government by exercising dangerous activities.⁴⁸⁰ Examples are, generating energy plants that are dangerous, placing military bases among big amounts of civil population, but as well policies as, combating terrorism itself or simply political opportunities against determined group.

This regime should include as well the risks created by the government by international policies; however, this is not very accepted in the academy. This is because the government when exercising political actions on representation of the State is not acting as Administration, the administration acts in public interest.⁴⁸¹ The States have blinded their systems as well; the law that determines the administrative jurisdiction in

⁴⁷⁴ Chrystelle Shaegis; *Dictionnaire de Droit administratif*, Ellipses; 2008; P.252

⁴⁷⁵ Ricardo Rivero Ortega; P.222

⁴⁷⁶ Jean Rivero; *Droit Administratif*; Dalloz; Paris; 2011; P.237

⁴⁷⁷ Ricardo Rivero Ortega; P.223

⁴⁷⁸ Conseil D'Etat, Assemblée; Arrêt 232, 24 juin 1949, Lecomte, RDP 1949, 583

⁴⁷⁹ Joaquin de Fuentes Bardaji; P.819

⁴⁸⁰ Conseil D'Etat, Section 3; Arrêt 233, 3 février 1956, Thouzellier, RDP 1956, 854.

⁴⁸¹ Eduardo Gamero Casado; Severiano Fernandez Ramos; P.42

Spain⁴⁸² establishes that courts are not allowed to assess the responsibility of the State coming from international acts.⁴⁸³

Responsibility for the lack of service

The responsibility for lack or deficiency on the public services can be claimed when the administration fails to generate a public service that is commanded to do, whether by not delivering the service, simply by not acting or by doing it in the wrong way.

It derives from the public administration in guard of the public services,⁴⁸⁴ however there is a debate to consider if the police actions are a service or not. The administration has separate functions; the police function is related to the prevention of crime, and service function to the public needs.⁴⁸⁵ But this is not to be confused with what can be considered as public service, police, as the jurisprudence has proven, can be included as a service. Police is a service that even when not remunerated by citizens it is accepted by them.⁴⁸⁶ And even if not, the inactivity of the administration can be claimed for services not accepted⁴⁸⁷ by the citizen; for example, the damages caused to a car on a road when the administration did not repairs it.⁴⁸⁸

Once this clear, the administrations have made huge efforts to improve their public services nowadays.⁴⁸⁹ The better the conditions in the services, the better protected

⁴⁸² Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa. Published in BOE núm. 167 de 14/07/1998; Article 2.

⁴⁸³ Jesus Gonzalez Perez; P.109

⁴⁸⁴ Jesus Gonzalez Perez; P.189

⁴⁸⁵ Luis Jordana de Pozas; *Ensayos de una teoria del fomento en el derecho administrativo* in *Revista de estudios politicos* vol.XXVIII, num 48; Madrid; 1949. Pp. 42 et ss.

⁴⁸⁶ Ramon Parada; P.414

⁴⁸⁷ Juan Alfonso Santamaria Pastor; P.497

⁴⁸⁸ Juan Alfonso Santamaria Pastor; P.499

⁴⁸⁹ Benoit Delaunay; P.81

is the administration from being responsible of a possible fault.⁴⁹⁰ I will now pass to analyze how courts can assess the lack or deficiency of the service on preventing terrorism.

The first case is the most simple, the responsibility of the administration for lack of services. Constitutions, further developed by laws impose a burden on the State to create services, as we saw the police as service to grant security is one of this cases. The functions of the administration commanded by articles of the constitution can be matter of responsibility in the case the government do not develop the service.⁴⁹¹ For example, courts in France have condemned the administration for the lack of police services⁴⁹² and even for the poor existence of them.⁴⁹³

The lack of service depends on the agents of the administration, if the failure of the service comes for another reason for example nature, it may be an exception of responsibility. It has to be remarked that the lack of service is not imputable to agents directly, goes strictly to the administration responsibility.⁴⁹⁴

Secondly is the case of deficiency of service; this depends of a number of factors as difficulties of the administration and the will to overcome them.⁴⁹⁵ The bad functioning depends on the imputable negligent conduct of the administration. It has to derive from that bad acting of the administration, the responsibility unlimited for the normal use of services cannot exist, and there should be a nexus of inefficacy fault of the

⁴⁹⁰ Benoit Delaunay; P.82

⁴⁹¹ Joaquin de Fuentes Bardaji; P.835

⁴⁹² Conseil D'Etat, Assemblée ; Arret 219, 20 octobre 1972, Marabout, RDP 1973, 832

⁴⁹³ Conseil D'Etat, Section; Arret 217, 24 nov 1967, demoiselle labat, RDP 1968, 648.

⁴⁹⁴ Jean Rivero; P.234

⁴⁹⁵ Gilles Darcy; Pp.87-88

public server.⁴⁹⁶ Here I will make a distinction between omissions of the administration and bad functioning of the police

There are cases where the administration knows something is wrong and decides to do nothing about it. This is the case when the State had information about a particular attack and did nothing to prevent it. Courts agree that responsibility may come for the inaction of the police where a risk is proven.⁴⁹⁷

In the case of granting security the Spanish courts found that if the police are in position of knowing a situation and they do not act; they are responsible. The example by De Fuentes is the inaction of the police in a jewelry robbery when the thieves broke the establishment and ran away making the alarm to sound even when the thieves disconnected the wires of the police.⁴⁹⁸ This case is a perfect example to know how the government can be held responsible for not of constantly checks their security systems.

Related to terrorism in the judgment about the attacks of Hipercor by ETA, the administration was found guilty for not paying attention to an alarm of possible bomb against an economic building,⁴⁹⁹ even when it was a visible target independently that it was never target of the terrorism. It was determined of course that the responsibility was from the terrorists; however, the administration was not excused from its duties.⁵⁰⁰

The other scenario in deficiency of the service is related to those cases when the administration in fact is aware of an irregular situation but they act in an inattentive manner. Every time that an actor of the government does something in the name of the

⁴⁹⁶ Eduardo Garcia de Enterría, Tomas Ramon Fernandez; P.396; Robert Barnidge. P.77

⁴⁹⁷ Chrystelle Shaegis; quoting the case (Conseil D'Etat; oct 1959; Doublet rec540); P.213

⁴⁹⁸ Joaquin de Fuentes Bardaji; P.836

⁴⁹⁹ Audiencia Nacional, Caso Hipercor, sentencia 49/1989.

⁵⁰⁰ Joaquin de Fuentes Bardaji; Pp.835-836

service it has to imply responsibility of the administration.⁵⁰¹ Therefore the bad action of one simple individual in a counter-terror operation triggers the responsibility of the administration.

The problem is then, how to know when the administration took a bad decision besides the harm caused. In principle it has to be understood that the good functioning of a service does not depend on the aspiration of the agents of the administration when they think the service is functioning well.⁵⁰² Since counter-terror operations require of a high level of discretion, the judge must measure each case separately. It is to be known that courts of administrative law have assessed the responsibility of the governments for the adoption of non-adequate measures to deal with terrorism.⁵⁰³

Objective responsibility of the administration

The administrative theory has evolved in the late years to create a concept beyond the responsibility without fault to an administrative objective responsibility. The debate of today is the elimination of the concept of fault and the acceptance of the administrative responsibility for all on its charge.⁵⁰⁴ Very few courts are brave enough to deal with the theory of absolute responsibility; it is a reality that the innovative judgments may be overruled by many superior traditional justices. For me, responsibility of the State is to be objective, not because is its fault, but because it doesn't complies properly with its obligations.⁵⁰⁵ However we have to take into account the contras of the acceptance of absolute responsibility as excessive security or abuse of power.

⁵⁰¹ Pierre Esplugas; *Le service public*; Dalloz-Sirey; 2012;P.14

⁵⁰² Benoit Delaunay; P.29

⁵⁰³ Jesus Gonzalez Perez; quoting S. 20 DEC 2004 Ar 598 de 2005 and june 15 Rec 4247/2001 P.429

⁵⁰⁴ Jean Rivero; P.240

⁵⁰⁵ Tal Becker; P.337

In our countries of study some courts have arrived to this absolute approach of responsibility. Spanish courts and legislation recognizes that the system is based on the objective administrative responsibility. This means that the responsibility of the administration is not limited to the traditional concepts of responsibility (abnormal functioning of services or responsibility without fault) but that ensures that the administration is responsible for the damages suffered by their citizens, as a guarantee of protection.⁵⁰⁶ In France some courts have admitted the objective responsibility of the lack of service by the administration.⁵⁰⁷ French system has evolved to the objective responsibility over the merely responsibility on the basis of the fault, to scenarios where moral damages are covered but still is not as objective as the Spanish system.⁵⁰⁸

Excuses avoiding responsibility on the failure of prevention.

The responsibility for terrorism can be limited to levels where the responsibility is more acceptable for the governments.⁵⁰⁹ Governments have developed a series of excuses when it comes to confront the assessment of their duties on the prevention of terrorism. Of course that there is a problem to proof the failure of the counter-terrorism obligations,⁵¹⁰ but as mentioned, courts have opted for methods to assess responsibility for the fail preventing without having many problems with the burden of proof. To finish this chapter I would like to review some of those excuses used by governments followed by some contrasted comments.

The excuse of lack of capacity

⁵⁰⁶ Jesus Gonzalez Perez; P.203

⁵⁰⁷ Ramon Parada; P.589

⁵⁰⁸ Joaquin de Fuentes Bardaji; P.79

⁵⁰⁹ Miguel Revenga Sanchez; P.40

⁵¹⁰ Tal Becker; P.334

Capacity, referred to resources and to the ability to mobilize to a visible a like situation of course is a main factor to assess the responsibility of States in their counter-terrorism campaigns.⁵¹¹ I only agree with the excuse of lack of capacity for the difficulties of mobilization in operations, as I said, the State even with the best machinery may face random attacks. In international law is required to proof that the State had the capacity or equipment to effectively prevent and this is a sign of its acceptance.⁵¹² However, this does not means that responsibility for compensation will be avoided, as we said courts who follow the causation theory of responsibility will just take this argument to diminish the charge of governmental compensation.

What is not acceptable is that with certain regularity, States use the excuse of lack of economic resources to justify their lack of success on their counter-terrorism operations.⁵¹³ Even when this argument may be supported by many scholars, I do believe that is abusive since the allocation of resources certainly influences the policy making of a State. However, the international community, conscious about the topic has led to some powerful countries to economically support counter-terror campaigns in countries with few resources. International community should not accept the lack of resources as valid argument, instead more exigencies should be required to States to mobilize their resources to the fight of terror if not to organize properly the forces they have and cooperate economically with States with fewer resources. Normally States that argue lack of resources are States with terrorist presence that does not take into account the existence of auxiliary preventive methods to act towards visible risks. This was the case when in Syria and other Arab countries, terrorist attacks happened against the European

⁵¹¹ Kimberley Trapp; P.70

⁵¹² Tal Becker; P.342

⁵¹³ Kimberley Trapp; P.73

Nordic States as a response of the publications of the Mohamed cartoons, when the States should have acted more instantly to reinforce protection to those places for the visible risk they were going through.⁵¹⁴ International law does not excuse States of their duties towards counter-terrorism on the basis of lack of institutional capacity meaning a legal frame that mandates in the domestic jurisdiction the fight to terrorism.⁵¹⁵

The excuse of lack of knowledge

Courts domestically and internationally have justified the failure on prevention of terrorism on its foreseeable character. It has been agreed that the courts cannot diminish the efforts of governments in prevention and condemn them for situations impossible to prevent. Some Spanish courts have excused the administration of the responsibility over damages that could not have been prevented.⁵¹⁶ The Supreme Tribunal of Spain⁵¹⁷ established that it cannot be asked an exorbitant action to the administration, nor the prevention of any harm cause only because the administration is in charge to coordinate.⁵¹⁸

However, suspicion is always preferable than reasonable belief when it comes to the action of the administration. Prevention in action may escapes from the judicial control for its urgency but this does not excuse the governments to be controlled in posteriori by the judiciary for their actions.⁵¹⁹ A complete lack of knowledge does not separate to the state for its duties nor for its responsibility.⁵²⁰ It is an obligation of the

⁵¹⁴ Kimberley Trapp; P.73

⁵¹⁵ Kimberley Trapp; P.71

⁵¹⁶ Ricardo Rivero Ortega; P.223

⁵¹⁷ Tribunal Supremo de Justicia Espanol; Sentencia del 17 de abril de 2007 (RJ\2007\3683)

⁵¹⁸ Joaquin de Fuentes Bardaji; P.204

⁵¹⁹ Francesca Galli; P.411

⁵²⁰ Kimberley Trapp; P.66

State to be informed of all possible threats, that is the role of intelligence, but not only of intelligence, a measure of risks has to be taken into account to study possible threats.⁵²¹

The excuse of lack of responsibility for risks created by the State

The responsibility for knowing the risks is completely available in general law. In 1992 in the case *Noble Ventures Inc. v Romania*⁵²² it was claimed the lack of prevention of the attacks to the Noble Ventures installations by a group of workers after a labor dispute. The claim was based on the knowledge by the Romanian government of the actions of workers after labor disputes and the lack of action by not taking special preventing measures to prevent the damages.⁵²³

Other special case to mention where the State is responsible even for third actors in risks is when the State fails preventing harm on foreign diplomatic agencies⁵²⁴ on their territory by private actors.⁵²⁵ The same principle should be applied to terrorism, diplomatic agencies are covered in this special responsibility because of the risk they may have in a foreign land. Therefore, in general application of the principle States should be responsible for the fail of protection of high risk places to be attacked.

The last case to mention is the precaution principle of Environmental law related to the prevention of the natural disasters and natural emergencies of pandemics or

⁵²¹ Kimberley Trapp; P.70

⁵²² International Centre for Settlement of Investment Disputes (ICSID): *Noble Ventures, Inc. v. Romania* (October 12, 2005)

⁵²³ Robert Barnidge; Pp.102-103

⁵²⁴ See UN General Assembly, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, No. 15410, available at: <http://www.unhcr.org/refworld/docid/3ae6b3afc.html> [accessed 20 November 2012]

⁵²⁵ Tal Becker; P.62

threats to human health. This principle faces the States as the French, to a dilemma of responsibility for the lack of methods to know about a situation of risk.⁵²⁶

In my opinion the allowance of exceptions to take responsibility for risks like these is the proof that we are ready to implement principles that ensure the duties of the state to prevent human caused catastrophes. There is nowadays a big technological development to prevent with intelligence and espionage future acts of terrorism.⁵²⁷

The excuse of exceptional personal fault

This excuse is used when it is said that the government in the operation of counter terrorism tried to separate civilians from danger but they rejected the governmental orders. Is used as well when the government indeed created risks as military bases but civilians that were supposed to be away from them exposed themselves to the danger.

If the victim exposes himself to a risk the theory requires that that victim be excluded from the right of reparation. In French law the victim intervention in the prejudice may constitute a partial or complete exoneration of compensation.⁵²⁸ French Jurisprudence contains a large catalog of Exonerative cases because of the fault of the victim.⁵²⁹ The fault of the victim has an exonerator effect, if is determined that the administration and the person have fault, an assessment of faults must be done and it may

⁵²⁶ Francesca Galli; P.409

⁵²⁷ See Arnaud Gossement; *Le principe de precaution (essai sur l'incidence de l'incertitude scientifique sur la decision et la responsabilite publiques)*; L'Harmattan; Paris; 2003 and Pierre Bechmann; Veronique Mansuy; *Le principe de Precaution*; Litec; Paris 2002.

⁵²⁸ Chrystelle Shaegis; P.288

⁵²⁹ Xavier Latour, *La responsabilite des services de police et de secours*; L'Harmattan; Paris; 2003; P.67

cause the beginning of a criminal investigation in case of criminal behavior of the victim.⁵³⁰

The excuse of problems of international coordination

Many countries enjoy of the cooperation agreements of counter terrorism; however they use the bureaucracy of the system of coordination as an excuse to cover their failures on prevention. This is not to be confused by seeing international intelligence cooperation as a diplomatic effort and therefore exempt to responsibility.⁵³¹ Coordination with foreign agencies is a matter of jurisdiction but not of excuse for the administration by itself has to have a coordinated system of action.⁵³² Spanish courts have already come to approaches on how to assess the concurrence of several police powers in order to determine who is responsible. However the main rule shall be the unitary responsibility for coordination.⁵³³

The excuse of no jurisdiction

The excuse of no jurisdiction is the most invalid of all excuses. However many International Courts might accept the cases for lack of jurisdiction. If we take cases as a problem of Human Right to life, Human Rights Courts may decline jurisdiction for not being able to demand the enforcement of the International Conventions on terrorism. In our case of Study it is not clear how the Court of Justice of the European Union would decide a case that involves the violation to the right to life of a citizen because of the lack

⁵³⁰ Michel Paillet; P.48

⁵³¹ Ian Leigh; P.6

⁵³² Joaquin de Fuentes Bardaji; P.111

⁵³³ Joaquin de Fuentes Bardaji; P.818

or insufficiency of measures to prevent terrorism as established in the European Convention on the suppression of terrorism.⁵³⁴

Some domestic courts have established that they will not know of cases of terrorism, in Spain for example some courts affirm that administrative responsibility without fault is excluded from acts of terrorism.⁵³⁵ The system of responsibility in Spain has been generalized to the point to determine by law the limits to the responsibility in certain fields as the one of security.⁵³⁶

The existence of these excuses demonstrate that governments are not interested in recognize their obligation to prevent terrorism. It is obvious that every obligation of the government have causes that excuse him of his wrongdoing. However, the causes presented in the case of prevention of terrorism are not solid enough and after a strong debate can be undermined. As we studied, the governments are nowadays ignoring completely the obligation to prevent terrorism; not in practice where governments are doing great efforts combating terrorism, but when it comes to assess their responsibility in front of courts. As we had the chance to see, governments are constantly creating mechanisms to morally comply with its obligations but at the same time avoid to be enforced by courts of those obligations. This is because governments fear of courts recognizing the obligation preventing terrorism that will be binding to them. We had the chance to see how those mechanisms as funds of help and remedies on criminal or civil courts are not effective to compensate the victims of terrorism. Victims may face problems with those mechanisms and the problem goes beyond the victims; the

⁵³⁴ Elizabeth Stubbins; P.16

⁵³⁵ Michel Paillet; quoting (Conseil D'Etat, sec. 29 avr. 1987, Consorts Yener et Erez Rec. CE p.151), P.187

⁵³⁶ Joaquin de Fuentes Bardaji; P.204

importance of court recognition of the obligation is the future acknowledgment of the duty of the State preventing terrorism. Because of that we reviewed the different theories of responsibility of the State regarding terrorism and we could see how governments support the more conservative theories that barely bound them when fail preventing. On the other hand we saw how Courts of public law on international and domestic jurisdictions are taking progressive steps to adopt theories of responsibility that force governments to respond in general for terrorism or to be responsible in a strict way for its prevention. It is on this direction that the academic discourse is directed and we will possibly see future judgments recognizing every day more the obligation of the State preventing terrorism and assessing its responsibility because of their failure.

Conclusion

After the review of the Spanish and French systems regarding the general theory of obligations on terrorism, I am more convinced about the compulsory mandate to governments to prevent terrorism. Since Spain and France have faced international and domestic terrorism, they develop the commitment to eradicate terrorism even earlier than the international community. It is not right to say that governments want to avoid their duties fighting terrorism. As I mentioned, the obligation to combat terrorism is a priority of legal theory today. In chapter 1 we had the chance to see how not only the UN or the EU, but specific jurisdictions that go beyond Spain and France have adopted legislative measures against terrorism. I did not need to doubt the existence of the general obligation to combat terrorism. However, what I intended to demonstrate was that combating terrorism implies both legislative modifications and material actions on the behalf of States (prevention and repression). The States with no doubt have changed their legislation in the area of combating terrorism, as I mentioned, the financing of terrorism and its criminalization are more than secure in the modern State. Even when I do not question the will of the States combating terrorism, changing legislation does not mean that terrorism will disappear. First because terrorists alone will not get scared of ending their life on prison, secondly because governments simply can ignore domestic legislation and argue that it exists at the same time. However, the States have taken more than legislative measures and tried to put their security apparatus to work. In the field of repression for instance, there is no doubt that the States are willing to prosecute and take to justice the responsible for terrorism.

What it is proven after this research is that the State is reluctant to accept the obligation of prevention of terrorism. During the second chapter, I was skeptical about the real obligation of the governments preventing terrorism. If we give a quick read to documents such as resolution 1373 of the Security Council of the UN one might think that there is no obligation to prevent, instead incentives to governments to stop terrorism with no binding character. However, as we saw, there are several sources of the obligation to prevent terrorism within international and domestic law. But the scholars who support a broader interpretation of norms are not the only ones quoted in this paper; in academia, prevention is perceived as a natural obligation of the government because of its monopoly on force. It is true that the obligation has no standards and grants a wide margin of appreciation to States to apply their best policies; this does not mean the obligation is not present. To the contrary we were able to see that a large amount of discretion granted to the administration in order to effectively prevent does nothing else but increase the responsibility of the government. We had the chance to reaffirm our position by studying that some sources of the obligation come as an explicit mandate of the constitution of the countries. If not convinced by this, we had the opportunity to see as well how governments have compromised actively their states to the obligation of prevention through years by several implicit and explicit commitments that create subjective rights on the citizens.

On the other hand, in the second chapter I reviewed the policies that governments shall adopt in order to properly comply with their obligation to prevent terrorism. Through this I implied that the obligation of prevention is not only a matter of unmeasured discretion to governments. An important part of the scholars while exposing

the methods of intelligence, use of force, immigration control, among others explained, coincide that the government have to comply with these policies as standards to prevent effectively terrorism. The academic discussion points today to the lack of standards when it comes to the prevention of terrorism. However, a comparative study such as the one in this paper shows that the implementation or reinforcement of certain policies is within the obligation of prevention setting parameters of conduct to the States. These actions to be carried by the governments have standards of efficacy as well, by the review of standards in international law and administrative law. I came to the conclusion that prevention of terrorism implies due diligence and strict controlling, is not only a governmental open letter. After the reasons given in this chapter it is clearer that the prevention of terrorism is more than just a commitment of governments but has serious binding implications.

Because of these implications I passed to analyze a further problem, under the premise that prevention of terrorism is a binding obligation that incorporates several conducts, there is a need to build a system to assess the responsibility of governments by failing prevention. In the academic debate there are very progressive positions as the ones we analyze ahead agreeing with the idea of the government being responsible if it fails to prevent terrorism. There is no doubt that the obligation of prevention exists or that it should be the matter of responsibility of the State. However, the real challenge is to pass from the academic discussion to the recognition of the responsibility of the government in front of courts.

As I mentioned, the acceptance of possible responsibility by governments is not a popular claim in the political field. Governments are indeed compromised to combat terrorism, but they are afraid to be controlled in their efforts because many operations of

prevention in fact fail due to difficulties of combating terrorism. As I explained, the good faith of governments by helping victims of terrorism by funds of help is to be doubted. I tried to demonstrate that governments by creating funds have tried to avoid their responsibility by satisfying the victims of terrorism with prudential compensations preventing them from seeking the state responsibility in courts. This becomes clearer when we reviewed that the jurisdictions to appeal for compensation given by funds were criminal and civil. Governments do not want courts of public law that can deal with police powers to assess their responsibility in the failure of prevention. In this sense I emphasized that when studying several theories of responsibility the governments tend to support the conservative theory of the agency to limit their responsibility for third actors (terrorists). Nonetheless the academia should focus on the development of the theories of the absolute and causal responsibility because they give not only a more pro-human solution to the victims of terrorism, but expose the obligations of the government.

Since the academic discussion is still on, I explained in the third chapter the possible approaches by courts who would take the cases on the assessment of responsibility of the government on prevention of terrorism. I tried to show some of the limited examples in courts of Human rights and administrative law, where the judges overcome the limits of the agency theory to assess the government on the basis of causality and even objectively. I review those cases because I do believe that in the upcoming years more courts will break the criteria of agency responsibility and understand that governments should be judged by not providing their citizens more secure conditions of life. Finally I exposed some of the excuses governments may use in further cases where its responsibility is pondered. To excuses as the lack of resources,

lack of jurisdiction and foreseeability I used the arguments of many scholars who deny in advance those excuses on objective grounds.

The outcome of this research is the reality of the obligation to prevent terrorism by the State. The academic efforts should be concentrated in convincing governments of an obligation that is clear and has no possible escape. Governmental efforts combating terrorism should not be seen as an act of kindness where citizens should be grateful because of the mercy that the government shows. The truth is that governments create risks, governments ought to protect citizens from threats; governments have the technology to disperse many of the terrorist attacks of today. Errors may happen and this may lead to the recognition of governmental failure in prevention, but this is not bad, this only encourages our governments to be more efficient in prevention. As I said to open this paper, terrorism is a sad reality and is going to be among us maybe forever, we have to live with it and be always prepared.

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