

**Péter Kovács:**

## **The United Nations in the Fight against International Terrorism<sup>2</sup>**

*Dies horribilis*: the numbers “Nine Eleven” (9/11) definitely entered the history of mankind as a landmark of challenges against civilized world. The number of victims<sup>3</sup>, the method used, the worldwide known pictures of the smoking and collapsing Twin Towers transmitted by TV-channels are all such elements which can never be forgotten.

Following the extreme rapidity with which the legal reviews based on the Internet reacted on the events<sup>4</sup>, hundreds of scientific articles and many colloquia<sup>5</sup> were devoted to problems of fight against terrorism and international organizations opened special chapters on their homepages for the presentation of their *acquis* and endeavors in this field<sup>6</sup>. The aim of the

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<sup>2</sup> The article was prepared during the author's visiting professorship with Fulbright-grant at the Denver University, College of Law, in the fall semester 2002. The first version of the article was published in: Publicationes Universitatis Miskolciensis, Sectio Juridica et Politica Tomus XXI/2, Miskolc University Press 2003. The current version takes into consideration the events occurred and documents adopted since 2002.

<sup>3</sup> Probably, the exact number of victims will never be known with absolute certainty. Nevertheless, as the New York Times (April 24, 2002) reported it: "Officials estimate that as of yesterday, 3,066 people had died, or were missing and presumed dead, as a result of the attacks on Sept. 11, including the 19 hijackers."

According to a UN database, established under the auspices of the UN Office for Drug Control and Crime prevention, terrorist incidents having occurred between 1979-2000 and involving more than hundred fatalities did not reach the five hundred. [http://www.undcp.org/odccp/terrorism\\_high\\_casualty.html](http://www.undcp.org/odccp/terrorism_high_casualty.html)

<sup>4</sup> See the documentation of the American Society of International Law on terrorism and international law (<http://www.asil.org/ilib/ilib0411.htm>) and the scholars' debate initiated by Frederic L. Kirgis's article ("Terrorist Attacks on the World Trade Center and the Pentagon") in ASIL Insights (<http://www.asil.org/insights/insigh77.htm>)

See also the dispute on the Internet version of the European Journal of International Law: "The attack on the World Trade Center: Legal Responses", [http://www.ejil.org/forum\\_WTC/ny](http://www.ejil.org/forum_WTC/ny) with Alain Pellet ("No, This is not War!"), Antonio Cassese ("Terrorism is also Disrupting Some Crucial Legal Categories of International Law"), Pierre-Marie Dupuy ("The Law after the Destruction of the Towers") and Giorgio Gaja (In What Sense was There an «Armed Attack?»). See also a similar dispute in a French net-based review: RIDI (Reseau Internet pour le droit international – Actualite et droit international) and in particular Robert Charvin ("L'affrontement Etats Unis – Afghanistan et le declin du droit international") and Charles-Philippe David (Après le 11 septembre, le deluge?) <http://www.ridi.org/adi/200111chr.htm> and <http://www.ridi.org/adi/200111dav.htm>.

<sup>5</sup> Let us mention only two: the 2002 Sutton Colloquium and McDougal Lecture on International Terrorism, Ethnic Conflicts and Self-Determination (March 23, 2002, Denver University, School of Law) and Terrorism and International Law (November 19, 2001, Miskolc University, Faculty of Law). See the proceedings of the latter in: Kovacs (ed): Terrorism and International Law (European Integration Studies Vol.1, n°1 (2002), Miskolc University Press. (see *infra*: EIS-Miskolc...) <http://www.uni-miskolc.hu/~wwwdrint>

<sup>6</sup> For the UN <http://www.un.org/terrorism/>;

For the Interpol: <http://www.interpol.int/Public/Terrorism/>;

For the Council of Europe:

[http://www.coe.int/T/E/Communication\\_and\\_Research/Press/Theme\\_files/Terrorism/](http://www.coe.int/T/E/Communication_and_Research/Press/Theme_files/Terrorism/)

present study is limited to give a short presentation of the related activities of the United Nations. Far from being exhaustive, this modest paper, following the author's oral contribution at the 2002 UN Day of the Denver University, will concentrate on to the activity accomplished since that horrible day in order to see whether repeated criticism against alleged incapacity of the organization are well founded or not.

It is a commonly followed approach to present the UN output according to the distinction between treaty law and soft law norms, not to forget the documents being still *in statu nascendi*. Let us follow that method also in the presentation of the most important anti-terrorist documents of the UN.

### *Treaty-making of the United Nations in the Fight Against International Terrorism*

Even if this issue was certainly not on the agenda in San Francisco in 1945, one cannot say that the United Nations grew up blindly *vis-à-vis* the emerging force of international terrorism<sup>7</sup> even if existing gaps are also pointed out by authors.<sup>8</sup> A good dozen of so-called sectoral conventions were adopted by the United Nations or their specialized institutions<sup>9</sup>. The two most recent ones are the International Convention for the Suppression of Terrorist Bombing (1997) and International Convention for the Suppression of the Financing of Terrorism (1999). These conventions can be considered as the fruit of the activity already begun under

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For the European Union: in Justice and Home Affairs, Area of Security:  
<http://www.europa.eu.int/scadplus/leg/en/s22004.htm> with the following chapters: Fight against terrorism;  
Fight against terrorism: directory of skills; Combating the financing of terrorist groups.  
For the Europol: <http://www.europol.eu.int>

<sup>7</sup> See the analysis of the activity e.g.: Alexander, Yonah – Browne, Marjorie Ann - Nanes, Allan S: Control of Terrorism, Crane Russak 1979 New York p. 3-14; Almand, Henry H: Limits and Possibilities of International Regulations of Terrorism, and Murphy, John F: The United Nations and International Terrorism, both in Han, Hyunwook Harry: Terrorism, Political Violence and World Order, University Press of America 1984 Lanham; Higgins, Rosalyn: The General International Law of Terrorism in: Higgins, Rosalyn – Flory, Maurice (ed): Terrorism and International Law Routledge & LSE 1997 New York, especially p. 16-17; Lambert, Joseph L: Terrorism and Hostages in International Law Grotius 1999 Cambridge and especially p.46-47

<sup>8</sup> As Scharf emphasizes it “assassinations of businessmen, engineers, journalists and educators are not covered while similar attacks against diplomats and public officials are prohibited. Attacks or acts of sabotage by means other than explosives against a passenger train or bus, or a water supply or electric power plant, are not covered; while similar attacks against an airplane or an ocean liner would be. Most forms of cyber terrorism are not covered by the anti-terrorism conventions.”

Scharf, Michael P: Defining Terrorism as Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law ILSA Journal of International & Comparative Law, Spring 2001, 7 ILSA J Int'l & Comp L 391, p. 393

<sup>9</sup> Convention on Offences and Certain Other Acts Committed on Board of an Aircraft (1963), *Convention for the Suppression of Unlawful Seizure of Aircraft* (1970), *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (1971), *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents* (1973), *International Convention against the Taking of Hostages* (1979), *Convention on the Physical Protection of Nuclear Material* (1980), *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (1988), *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (1988), *Convention for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (1988), Convention on the Marking of Plastic Explosives for the Purpose of Detection (1991), Convention on the Safety of United Nations and Associated Personnel (1994), *International Convention for the Suppression of Terrorist Bombing* (1997), International Convention for the Suppression of the Financing of Terrorism (1999).

the auspices of the League of Nations where the antiterrorist convention (1937) prepared after the murder of Alexander, king of Yugoslavia, had not been ratified by the necessary number of states.<sup>10</sup> Having *verbatim* identical sentences<sup>11</sup>, both these conventions aim the criminalization of the activities under their material scope of application and they promote the international co-operation in information and intelligence issues, in the field of investigation, prosecution and extradition matters. Being the basic technical approach of the multilateral conventions contracted in the field of fight against terrorism since 1937, the principle *aut dedere, aut judicare*, is reaffirmed. Some particularities related to the life of banks are enshrined in the 1999 Convention, more or less in the same manner as we can also see it in the conventions contracted against money laundering.

However, as you will all know, the reading of the text of a convention is rather imperfect till the circle of the contracting parties, the admissibility of reservations and the number and content of reservations effectively passed upon the ratification or accession have not been checked. The *ratio* of participation is not too bad if we take into consideration the relatively young age and the recent entry into force of these conventions.<sup>12</sup> Some of the so-called problematic countries are missing from the list of the contracting parties but some not less problematic ones are however bound or they are at least in signatory status.<sup>13</sup> The major part of the reservations is directed against the traditional dispute settlement clause involving the competence of the International Court of Justice and emphasize the necessity of a proper *ad hoc* submission before being adjudged.<sup>14</sup> As the Convention for the Suppression of the Financing of Terrorism contains a reference<sup>15</sup> to an annexed list of nine UN international treaties<sup>16</sup> elaborated in this field according to a particular clause of the convention<sup>17</sup>, eight countries (not being contracting parties to some of them) submitted reservations to this solution and restricted accordingly the material scope of application of the treaty. From the point of view of the general rules of the law of treaties and in particular the principle *pacta tertiis*

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<sup>10</sup> Kovács, P.: Le grand précédent: la Société des Nations et son action après l'attentat contre Alexandre, roi de Yougoslavie (in: EIS-Miskolc... p.135-144)

<sup>11</sup> See e.g. the *verbatim* identity or the very close character of the first five §-s of the preamble and articles 1(1), 3, 5, 6(1-2) of the Convention for the Suppression of Terrorist Bombing and the first five §-s of the preamble and articles 3, 4, 5, 7(1-3) of the Convention for the Suppression of the Financing of Terrorism.

<sup>12</sup> In October 2002, 73 states were bound by the Convention for the Suppression of Terrorist Bombing and 55 by the Convention for the Suppression of the Financing of Terrorism.

<sup>13</sup> Iraq has not even signed these conventions. North-Korea has signed only the Convention for the Suppression of the Financing of Terrorism, Sudan is bound by the Convention for the Suppression of Terrorist Bombing but she has only signed the Convention for the Suppression of the Financing of Terrorism. Libya is bound however by both of them and apparently the post-Talib Afghanistan has not yet arrived even to signature.

<sup>14</sup> There are 10 reservations of this type to article 20 of the Convention for the Suppression of Terrorist Bombing and also 10 to article 24 of the Convention for the Suppression of the Financing of Terrorism.

<sup>15</sup> Article 2 (1): "Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or... "

<sup>16</sup> These are those which were typed in *italic* in our footnote n°9.

<sup>17</sup> Article 2(2): "(a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex, may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary this fact.

(b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty."

*nec nocent, nec pro sunt*, this step can certainly seem to be justified. Nevertheless the efficacy is evidently considerably weakened and one can ask whether it would not have been more opportune to insert the referred terrorist type activities into the main corps.

One can hardly understand North Korea's reservation refusing *in toto* the application of the Convention for the Suppression of the Financing of Terrorism for the annexed treaties and refusing also the interdiction of qualifying these crimes as political crimes. One can even less understand why this was only The Netherlands who objected formally this absurd reservation challenging the purpose as well as the object of the treaty. Pakistan's declaration of excluding from the scope of application of the Convention for the Suppression of Terrorist Bombing the acts committed "for the realization of the right of self-determination" is also a matter of serious doubts. The other reservations putting the emphasis on the reiteration of the principles of the UN Charter or the 2625 (XXV) declaration and in particular non-aggression and non-intervention principles can be understood even if they can be considered as superfluous.

The destruction of the World Trade Center also accelerated the preparatory works of a comprehensive antiterrorist treaty, initiated in 1996 by India. How is this work getting on, begun with scholars' skepticism<sup>18</sup>? At what point? For the moment, probably long before the date of the final adoption, on the basis of the accessible documents<sup>19</sup>, it seems that it will closely follow in structure and in wording the Convention for the Suppression of Terrorist Bombing. The definition of crimes<sup>20</sup> falling under the draft comprehensive convention, provided that they concern more than one state, by the nationality of the victim or the perpetrator or by the geographical location of preparation and the execution of the crime<sup>21</sup>, does not seem to be too far from the definition given by the judge Guillaume<sup>22</sup>, since then president of the International Court of Justice or from the definition given in the 1937 convention of the League of Nations.<sup>23</sup> Nevertheless, huge debates<sup>24</sup> surrounded the draft in

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<sup>18</sup> "Terrorism is a term without legal significance (...) The term is at once a shorthand to allude to a variety of problems with some common elements and a method of indicating community condemnation for the conduct concerned." Higgins: *op. cit* p.28

<sup>19</sup> A/C.6/57/L.9. General Assembly, Fifty-seventh session, Sixth Committee, Agenda item 160, Measures to eliminate international terrorism, Report of the Working Group, 16 October 2002 and A/57/37 General assembly Official Records, Fifty-seventh session, Supplement n°37: Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 (Sixth session, 28 January – 1 February 2002)

<sup>20</sup> Draft Article 2: "1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes: a.) Death or serious bodily injury to any person; or b.) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or c) Damage to property, places, facilities or systems referred to in paragraph 1(b) of this article, resulting or likely to result in major economic loss, when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.

2. Any person also commits an offence if that person makes a credible and serious threat to commit an offence as set forth in paragraph 1 of this article.

3. Any persons also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article."

<sup>21</sup> See draft article 3: "This Convention shall not apply where the offence is committed within a single State, the alleged offender and the victims are nationals of that State, the alleged offender is found in the territory of that State and no other State has a basis (...) to exercise jurisdiction (...)"

<sup>22</sup> Guillaume, Gilbert: *Terrorisme et droit international*, RCADI 1989-III (215) p.304

<sup>23</sup> Kovács: *op. cit* p.143

the sixth committee where the objections were linked partly to the eventual exceptions, partly to the envisaged priority<sup>25</sup> of the existing sectoral conventions over the future comprehensive convention. In the first case, once again an *ex lege* pardon for the wars of national liberation and the condemnation of state terrorism is at the stake: both are claimed by radical third world countries mainly from the Middle-East. In the second, the point is that mainly those countries are opposing this priority which are not contracting parties to all the sectoral conventions.<sup>26</sup> (In this case however the given priority could hardly have a real impact on them. The claim for the reversal of the priority was apparently more political than legal,<sup>27</sup> but partly the same considerations are behind as in some reservations of the Convention for the Suppression of the Financing of Terrorism, as presented *supra*.)

#### *The Hard and Soft Law Resolutions Against International Terrorism Adopted by Main Organs*

The Security Council had already adopted several resolutions before 9/11. Some of them concerned the issue in a more abstract style<sup>28</sup>, others were directed against responsible countries<sup>29</sup>, *inter alia* the Talib Afghanistan<sup>30</sup>.

In the list of the resolutions adopted after the tragedy in New York, we can find the famous resolution S/RES/1368(2001) which condemns strongly the attack and expresses condolences to the victims, after having recalling the right to self-defense in the context of the destruction of the WTC. But the most remarkable one is S/RES/1373(2001) where the Security Council “*acting under Chapter VII*” (i.e. by adopting a mandatory resolution required by a threat to international peace and security) established a counter-terrorism committee and imposed the obligation on states to submit in a three months’ term comprehensive reports to this organ on the implementation of measures imposed by the Security Council in the same resolution. These measures enhance cooperation in judicial, administrative and intelligence matters, warn on the abuse of asylum seeking and point also as target transnational crimes, drug commerce, money laundering, classical arms traffic and smuggling of nuclear and other dangerous (in particular biological) devices. Nearly all<sup>31</sup> the member states of the United Nations submitted

<sup>24</sup> See a deep analysis in: Prandler, Árpád – Silek, Rita: United Nations and Measures to Eliminate International Terrorism in: (in: EIS-Miskolc... p.39-45 and in particular on p.41-42)

<sup>25</sup> Draft Article 2 bis: “Where this Convention and a treaty dealing with a specific category of terrorist offence would be applicable in relation to the same act as between States that are parties to both treaties, the provisions of the latter shall prevail.”

<sup>26</sup> Prandler – Silek: *loc. cit*

<sup>27</sup> In this case the unwillingness to join *all* the sectoral conventions could be forgotten...

<sup>28</sup> S/RES/1269(1999) on international co-operation, S/RES/635(1989) on marking of plastic or sheet explosives for the purpose of detection,

<sup>29</sup> S/RES/1054(1996), S/RES/1054(1996), and S/RES/1044(1996) against Sudan; S/RES/748(1992) or S/RES/731(1992) against Libya etc.

<sup>30</sup> S/RES/1363(2001), S/RES/1333 (2000), S/RES/1267 (1999), S/RES/1214(1998) etc.

<sup>31</sup> As the chairman of the Counter-Terrorism Committee reported in October 2002 about its activity to the Security Council “with 174 reports submitted to the Committee, the response of Member States to resolution 1373 had been remarkable.(...) Still, 16 States had not yet filed a report. Of those, seven – Chad, Dominica, Equatorial Guinea, Guinea-Bissau, Liberia, Swaziland and Tonga – had not made any kind of written contact.” Press Release SC/7522, Security Council 4618<sup>th</sup> Meeting, 04/10/2002

The Security Council points out however in the S/RES/145(2003), that the reports of a good number of states were far from being comprehensive and 56 states were in late in January 2003 with the deposit of the addenda asked by the CTC.

the report<sup>32</sup> claimed by the resolution “of a historical importance [because states] are to be complied with a number of binding measures in their domestic legislation as well as the requirements for international cooperation.”<sup>33</sup> Because of the voluntary implementation of the obligation, there was no need to have a recourse to the inherent potentiality of sanction<sup>34</sup> contained at the end of the document, being “one of the most expansive resolutions in the history of the Council”<sup>35</sup> as we can read it in a recent UN stock-taking paper.

Since then the subsequent resolutions<sup>36</sup> adopted by the Security Council have imposed no new obligations on States: they only reaffirmed in general terms the determination to implement consequently resolution S/RES/1373(2001) or they reacted to current terrorist acts<sup>37</sup>.

As far as the General Assembly has in principle only a recommendatory competence (with the exception of some hypotheses linked to the customary law or the interpretation of the Charter or some acts related to treaty-making), by definition, its resolutions cannot have the same importance as those of the Security Council especially if adopted under Chapter VII. The UN anti-terrorist database enumerates twenty-four resolutions<sup>38</sup>. Their political colors are different so we can hardly speak of “a global consensus which may help in the development of national legal principles”<sup>39</sup> or the consensus, if any, was lacking just in the crucial point of the definition.<sup>40</sup> Let us consider only two resolutions<sup>41</sup> from this point of view. A/RES/39/159 considers the use of force by a state against another state, especially if this is an ex-colony, as

<sup>32</sup> To read them on <http://www.un.org/Docs/sc/committees/1373/>

<sup>33</sup> Szelei K, Gyula: Global action by the Security Council against Terrorism, in: EIS-Miskolc... p. 145

<sup>34</sup> The reference on «take all necessary steps» is “reminiscent of the Council’s authorization to member states in Resolution 678 to «use all necessary means» to restore international peace and security after Iraq invaded Kuwait in 1990. But resolution 1373 does not authorize states to take all necessary steps to implement it. Instead, it stands as a warning that the Council itself stands ready to take further steps which presumably could involve an authorization of some form of armed force that would not necessarily be limited to self-defense, to ensure that the measures taken in the resolution are adequately implemented.”

Kirgis, Frederic L.: Security Council Adopts Resolution on Combating International Terrorism (1 October 2001) in ASIL Insights, referred *supra*.

<sup>35</sup> Report of the Policy Working Group on the United Nations and Terrorism, Annex to A/57/273, S/2002/875 § 32, <http://www.un.org/terrorism/a57273.htm>

<sup>36</sup> S/RES/1377(2001) contains a declaration on the global effort to combat terrorism, written mostly in the traditional style of the organization. The S/RES/1456(2003) is a declaration adopted at the special anti-terrorist session held on level of ministers for foreign affairs and it calls not only on the danger of the easy access to arms of mass destruction and on the importance of the adherence to the sectorial anti-terrorism conventions but also on the necessity of a greater understanding between religions and cultures.

<sup>37</sup> The S/RES/1438(2002) reacts on the bomb attacks in Bali (Indonesia), the S/RES/1440(2002) condemns hostage taking by Chechens in a Moscow theatre.

<sup>38</sup> A/RES/57/220; A/RES/57/219; A/RES/57/83; A/RES/57/27; A/RES/56/160; A/RES/56/88; A/RES/56/1; A/RES/55/158; A/RES/54/164; A/RES/54/110; A/RES/54/109; A/RES/53/108; A/RES/52/165; A/RES/52/133; A/RES/51/210; A/RES/50/186; A/RES/50/53; A/RES/49/185; A/RES/49/60; A/RES/48/122; A/RES/46/51; A/RES/44/29; A/RES/42/159; A/RES/40/61; A/RES/39/159; A/RES/38/130; A/RES/36/109; A/RES/34/145; A/RES/32/147; A/RES/31/102; A/RES/3034(XXVII);

<sup>39</sup> Alexander-Browne-Nanes: op. cit p.14

<sup>40</sup> “If the West was nervous that a definition of terrorism could be used to include «state terrorism», the third world was nervous that any definition which emphasized non-State actors would fail to differentiate between terrorism properly so called and the struggle for national liberation.” Higgins: op. cit p.16

<sup>41</sup> A/RES/39/159: Resolution on the inadmissibility of the policy of State terrorism and any actions by States aimed at undermining the socio-political system in other sovereign States; A/RES/55/158: Resolution on measures to eliminate international terrorism.

state-terrorism; A/RES/55/158 uses however a less ideological language and in rather objectivist terms, urges states to consider becoming parties to the Convention for the Suppression of Terrorist Bombing and the Convention for the Suppression of the Financing of Terrorism. An important work was done in an *ad hoc* committee established<sup>42</sup> by the General Assembly, responsible first for the elaboration of the text of the Convention for the Suppression of Terrorist Bombing, later charged also with the duty to work on the text of a convention for the suppression of acts of nuclear terrorism and the already mentioned draft of a comprehensive anti-terrorist convention. The Terrorism Prevention Branch established by the General Assembly in 1999 has as a special vocation the assistance to states by expertise in their fight against terrorist crimes and their prevention. It works closely related to two organs based also in Vienna, the UN Office for Drug Control and Crime Prevention and the UN Center for International Crime Prevention.

The list of resolutions *posterior* to 9/11 is not too long. One resolution<sup>43</sup> condemns the attacks committed at this date. A resolution on disarmament<sup>44</sup> consecrates a special although rather short chapter to multilateral cooperation in the field of disarmament, non-proliferation and global efforts against terrorism and another resolution<sup>45</sup> notes the results occurred but repeats the same appeal as A/RES/55/158 and it calls the above mentioned *ad hoc* committee to work as a matter of urgency on the comprehensive convention.

The Secretary General set up a Working Group composed of several of his deputies and other high functionaries of the organization seconded by leading American scholars. On the 28<sup>th</sup> of June 2002, the Working Group submitted a report with proposals for a strategic definition of priorities to orient the Organization and recommendations on steps to be taken. This report<sup>46</sup>, made public on the first anniversary of the New York tragedy, aims to place the fight against terrorism in a broader context. This seems conform with the views of the Secretary General who considers that “just as terrorism must never be excused, so must genuine grievances never be ignored simply because terrorism is committed in their name.”<sup>47</sup>

The report defines a tripartite strategy for the organization namely to i.) dissuade disaffected groups from embracing terrorism, ii.) deny groups or individuals the means to carry out acts of terrorism and iii.) sustain broad based international cooperation in the struggle against terrorism.<sup>48</sup>

The creation of “inhospitable environments for terrorism”<sup>49</sup> means not only interstate judicial, police and intelligence cooperation. Beside the traditional – and apparently not really efficacious – appeal for an urgent adherence to the UN antiterrorist conventions<sup>50</sup>, the document devotes particular attention to the strict observation of human rights by states in

<sup>42</sup> A/RES/51/210 (The efforts of the General Assembly when setting up such a committee in 1972 and 1976 were not crowned with success in treaty-making. See: Alexander-Browne-Nanes: *loc. cit*)

<sup>43</sup> A/RES/56/1: Resolution on the condemnation of terrorist attacks in the United States of America

<sup>44</sup> A/RES/56/24: Resolution on the general and complete disarmament

<sup>45</sup> A/RES/56/88: Resolution on measures to eliminate international terrorism.

<sup>46</sup> See the references *supra*, in our note n°35!

<sup>47</sup> Address of the Secretary general to the Security Council, Press Release SG/SM/8417, SC/7523

<sup>48</sup> Report of the Policy Working Group ... Executive Summary p.1

<sup>49</sup> Report of the Policy Working Group ... Executive Summary p.2

<sup>50</sup> Report of the Policy Working Group ... recommendation n°1

their fight against international terrorism<sup>51</sup> and of basic rules of humanitarian law in a UN Charter-conform use of force.<sup>52</sup> The report condemns in the meantime the abuse of the fight against terrorism while “labelling opponents or adversaries as terrorists offer a time-tested technique to de-legitimize and demonize them.”<sup>53</sup>

The Working Group suggests assuring larger influence of messages by the United Nations on civil society and especially on Arabic countries<sup>54</sup>. The document puts the emphasis on a need of greater synergy between activities of the United Nations organs, specialized institutions – namely and *inter alia* the World Bank group – and other international organizations.<sup>55</sup>

Taking into consideration the fact that current challenges could hardly be imagined in 1945 at the solemn adoption of the UN Charter<sup>56</sup>, practically all the aspects of the problems mentioned by the Working Group merit a proper analysis.<sup>57</sup>

The fight against international terrorism has certainly not become easier with the actual status of the draft-convention on the states’ international legal responsibility, adopted by the International Law Commission on the basis of the Crawford-report,<sup>58</sup> according to which it is sometimes difficult to attribute the responsibility for acts of terrorists (being non-state actors) to states, subjects of international law in case of alleged complicity or purely on the basis of a territorial harboring<sup>59</sup>. The state’s contribution to terrorism can be different<sup>60</sup> and its remoteness plays an important role (and an easy alibi) in the denial the responsibility.<sup>61</sup>

<sup>51</sup> Report of the Policy Working Group ... recommendations n°4-6

<sup>52</sup> Report of the Policy Working Group ... recommendation n°7

<sup>53</sup> Report of the Policy Working Group ... recommendation n°14

<sup>54</sup> Report of the Policy Working Group ... recommendations n°9-10

<sup>55</sup> Report of the Policy Working Group ... recommendations n°10-13, 17-20, 22, 24, 26, 29

<sup>56</sup> “There is little doubt that international terrorism presents a threat that traditional theories for the use of military force are inadequate to deal with and that were not contemplated at the time of the United Nations Charter.”

Travalio, Gregory M: Terrorism, International Law and the Use of Military Force, Wisconsin International Law Journal, Winter 2000, 18 Wis.Int’l.J. 145, p.173

<sup>57</sup> See the references in our footnote n°3 on articles written by leading European lawyers (Alain Pellet, Antonio Cassese, Pierre-Marie Dupuy and Giorgio Gaja) for the European Journal of International Law on the legal conditions of charter-compatibility of the use of force against states harboring terrorists.

On the Charter-conform use of force, see also Valki, László: The 11 September Terrorist Attacks and the Rules of International Law p.29-37; Bóka, János: Forcible Measures against International Terrorism and the Rule of Law, p.65-73; Ádány, Tamás: Humanitarian Intervention against States Supporting Terrorism, p.75-81.

On humanitarian legal aspects see Kussbach, Erich: Die internationale Bekämpfung des Terrorismus mit Mitteln des Rechts, p.75-81; Sulyok, Gábor: Terrorism or National Liberation, p.83-93; Pákozdy, Csaba: La répression du terrorisme dans le contexte du droit international humanitaire, p.95-101.

On the current status of European cooperation and the observation of human rights rule, see namely Horváth, Krisztina: Le Conseil de l’Europe et la lutte contre le terrorisme international p. 103-110 and Les spécificités de la lutte contre le terrorisme dans la jurisprudence de la Cour européenne des droits de l’homme, p.111-123

From a historical approach and for policy analysis see: Takács, Tibor: Le terrorisme international peut-il déclencher une guerre mondiale? L’assassinat de François-Ferdinand à Sarajevo p.125-134,

All in: EIS-Miskolc...

<sup>58</sup> Draft articles on the Responsibility of States for Internationally Wrongful Acts (rapporteur: James Crawford), adopted by the International Law Commission at its fifty-third session (2001) [http://www.un.org/law/ilc/texts/State\\_responsibility/responsibilityfra.htm](http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm)

<sup>59</sup> Sharp, Walter Gary: American Hegemony and International Law (The Use of Armed Force against Terrorism: American Hegemony or Impotence?) Chicago Journal of International Law, Spring 2000, 1 Chi.J. Int’l L.37, in particular p.41-42

On the same opinion: Travalio: *op.cit.* p.153 and 159

One can ask whether it would not be opportune to rethink some minor points of responsibility codification from the point of view of the specificities of the fight against international terrorism. It is certainly true that the notion of state responsibility covers a far larger field than the issue of fight against terrorism and it would be a considerable mistake to let the codification be taken hostage of the fight against terrorism. Nevertheless it would be worth looking into the pertinent part of the codification obviously based on the concept of the *test of the effective control*<sup>62</sup>, whether should not be completed on a subsidiary basis also with the *test of the potential of inherent control*.<sup>63</sup> As far as both tests were pronounced by respectful international tribunals, it may be not too iconoclastic to suggest thinking about it.

### Conclusions

It is a general belief with international lawyers that an international organization can hardly be a better performing actor of international life than its member states wish and allow it to be. It is obvious that the United Nations Organization has a large scale antiterrorist activity embracing not only treaty law and soft law but also the promotion of the on the spot cooperation between states. Are these all enough for the extirpation of international terrorism from the life of mankind?

Certainly not. But the performance of an interstate, intergovernmental organization depends by definition on its member states. If they would like to have a more performing organization they should instruct their ambassadors to act in a way of not to hamper or brake but accelerate the work of the organization, *inter alia* by the adherence to the pertinent conventions and that with the least reservations or interpretative declarations. There is also the question whether fight against terrorism belongs to the field of *inter partes* rules based on the *pacta tertiis nec nocent*,

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<sup>60</sup> According to Louis Renes Beres, this could be settled on the following scale: i. terrorist acts performed by actual state officials; ii. State employment of unofficial agents for terrorist acts; iii. state supply of financial aid or weapons; iv. State supply of logistical support; v. state acquiescence to the presence of terrorist bases within its territory; vi. State provision of neither active nor passive help.

Beres, Louis Rene: On international Law & Nuclear Terrorism, Georgia Journal of International and Comparative Law, 24 GA. J. Int'L & Comp. L. I (1994), as summarized in: Pickard, Daniel B: Legalizing Assassination? Terrorism, the Central Intelligence Agency and International Law, 30 GA. J. Int'L & Comp. L. 1, p.5-6

Richard Erikson uses a four element scale: i. sponsorship or direction; ii. support; iii. toleration; iv. inaction  
Erikson, Richard: Legitimate Use of Force against State Sponsored Terrorism (1989, US Air War College Publ.) p.32-34

See also Higgins: op. cit p.27 "Connivance in, or a failure to control, such as non State-action. This engages the indirect responsibility of the state."

<sup>61</sup> For a longer analysis, see from the author: Beaucoup de questions et peu de réponses autour de l'imputabilité d'un acte terroriste à un Etat, Anuario de Derecho Internacional n°XVII (2001) p.39-56. (The author also uses a four element scale for analysis: i. terrorism exercised by a state; ii. terrorism assisted by a state; iii. terrorism tolerated by a state; iv. terrorism suffered by a state. In the latter case, states, sources of the incapacity of self-defense of the country harboring *contra voluntam* a terrorist organization will reject the imputability of the act according to the test of the effective control. The only problem is, that *de facto*, they had largely contributed to the emergence of a vicious circle of terrorism escaping from whatever state control.)

<sup>62</sup> Case concerning the Military and Paramilitary Activities in and against Nicaragua (merits), 27 June 1986, ICJ Reports 1986 § 115

<sup>63</sup> ICTY: Dusko Tadic, 1<sup>st</sup> instance, IT-94-1-T, 7 May 1997, § 586-588

*nec prosunt* principle or whether it is already on the way to become part of the *erga omnes* norms with all the consequences that such a metamorphosis implies.<sup>64</sup>

A treaty law commitment is certainly not enough and it certainly is no guarantee of accomplishment of the aims. Without however a treaty law matrix-system, we can hardly achieve long standing results which will not be challenged from time to time by emerging political and military actors.<sup>65</sup>

If the United Nations Organization is not highly respected and if it does not perhaps truly meet the expectancies of the founding fathers and certainly not the exigencies of world opinion, member states should improve its failures by deciding about the necessary reform for being more efficacious<sup>66</sup>. To neglect the existing rules and current efforts is the worst possible option. As Charney puts it: “Over the long term the interests of the United States and the international community will be best served by the Charter-based system of world order. If international terrorists have a coherent goal, it is to undermine this system...”<sup>67</sup>

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<sup>64</sup> See the analysis of the principle *aut dedere, aut punire* from this point of view and in an affirmative approach at Higgins: op. cit p.26. For a skeptical (and not too recent) view, see Bassiouni, Cherif: An International Control Scheme for the Prosecution of International Terrorism. An Introduction, in Evans, Alona E – Murphy, John F: Legal Aspects of International Terrorism, Lexington 1978 p.487-488

<sup>65</sup> Concerning the approach of Hungarian international lawyers, see the discussion of János Bruhács János and László Valki in the Foreign Policy Review vol. 2 n°1(2003)]  
Bruhács, János: The Iraqi War and International Law: Surrealist Questions? (p.3-16)  
Valki, László: Legal Surrealism: The War Against Iraq (p.17-29)

<sup>66</sup> Almand: op. cit p.496, Murphy: op. cit 608-609

<sup>67</sup> Charney, Jonathan I: Editorial Comments: The Use of Force against Terrorism and International Law, American Journal of International Law, October 2001, 95 A.J.I.L. p. 838