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The international institutional and legal framework of the fight against terrorism

Ph. D. dissertation theses

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I. Short summary of the research project

The topic of this thesis is a particular part of the fight against terrorism on which there has been little research so far, namely the structure process and working method, by which the United Nations (UN) and the European Union (EU) react and deliver legal and institutional responses to the terrorist threat. The approach of the thesis is thus a sort of a „bureaucratic” or „administrative” approach, focusing not on the terrorism itself, but the legal and institutional reactions to it by the UN and the EU.

Furthermore, I am also looking for an answer to the question that came up during the last stage of the research, namely, whether the reactions since 2014, triggered by the substantially deteriorating terrorist threat caused by the emergence of the Islamic State, may be considered as marking a new era, just as the ones following the 2001 terrorist attacks were. Finally, I also try to put the counter terrorism action by the UN and the EU in comparison, along a few aspects.

II. The methods of the research and the description of the analyses performed

I started my research upon the beginning of my doctoral studies in 2005, when I already had a certain degree of experience in the international aspects of the fight against terrorism, due to my professional background as a civil servant. Several partial publications have been distributed at various domestic and foreign fora, partly in Hungarian and some in English.

Primarily I used the original texts of the source documents researched, through the official Hungarian versions (if there were any, such as the international treaties ratified by Hungary or Union legal acts also published in Hungarian); if there were no Hungarian translations, I used the English original versions¹. I had access to these mostly via legal databases (CompLex, net.jogtar.hu, eur-lex.europa.eu). The websites of the UN and the EU and other specialized organisations with documents and publications disclosed on these sites were of great help². Foreign (mostly in English) and domestic literature (i.e. secondary sources) were researched on-line and, whenever that wasn't sufficient, in libraries.

¹ In such cases, the Hungarian translations of English original texts are my own, unofficial translations.

² It has to be noted that I complied with the relevant confidentiality rules, therefore only those materials are directly quoted in the thesis, which are publicly accessible.

The dissertation is divided into three major parts. The first substantial part (Chapter II) describes the counter terrorism action of the UN, mapping the international conventions and the most important resolutions of the General Assembly and of the Security Council. The Global Counter Terrorism Strategy of the UN is subject to a separate analysis, as the most important reference document, framing the relevant activities of the organisation. Finally, the bodies, organisations and structures operating within the complex system of the UN and dealing with counter terrorism as a main activity, are scrutinized. *Mutatis mutandis*, Chapter III provides a similar overview on counter terrorism action of the European Union. In this Chapter, I introduce the relevant provisions of the primary law, the most important legal acts of the secondary law in a thematic division (judicial response, sanctions regime and information exchange) and finally the most significant entities that play a role in the counter terrorism action of the complex machinery of the Union. For both Chapters it is true that I have been trying to put an emphasis on the historical context of the described areas, also demonstrating the interaction among the institutional actors. The final Conclusions (Chapter IV), while creating a framework for the conceptual structure of the thesis, sum up the partial conclusions of the previous Chapters and draw more general conclusions as well. Here it is elaborated whether the most recent developments mean a new era as regards counter terrorism action, and the comparison of effectiveness of counter terrorism action of the UN and of the EU.

III. Brief summary of the scientific results and the options for use

In the counter terrorism activities of the UN, the elaboration of international conventions had been prevalent for a longer period, defining certain, typical terrorist behaviours in criminal law and stipulating the obligation to cooperate for the ratifying states. After the end of the stalemate of the cold war, the demand for a political approach beyond the criminal law aspect emerged. In the beginning, the main forum of this was the General Assembly. The terrorist attacks of 2001 brought along a substantial change by making the Security Council the primary scene of the political action in countering terrorism. Hence, the role of the General Assembly has somewhat diminished and the resolutions adopted by the Security Council have mostly taken over the role of the international conventions, with particular regard to the fact that the failure of the elaboration of a comprehensive convention against terrorism has signalled the lack of consensus and political will on global level to progress further, notwithstanding the adoption of the Global Counter Terrorism Strategy (GCTS) in 2006. Also after 2001, the counter terrorism organizations and bodies operating under the umbrella of the UN have emerged and

swiftly multiplied. Although the coordination of their activities has begun under the GCTS but it has been posing a continuous challenge for the UN.

The international conventions elaborated and adopted under the umbrella of the UN have been so far the cornerstones in the fight against terrorism. Since the 1960s they have repeatedly penalised various forms of terrorism and stipulated the related obligations of the states, mostly declaring the need to make these behaviours punishable by law and the principle of *aut dedere, aut iudicare*. However, there has been no definition adopted on the global level for terrorist acts and no chance thereof is in sight. Since 2001, the development of the instruments, *inter alia* legal instruments has mostly been possible through resolutions of the Security Council and not international conventions.

Among the main organs of the UN, the General Assembly and the Security Council play the main roles in the fight against terrorism. Up to 2001, the centre of UN counter terrorism action was in the activities of the General Assembly, but it has shifted into the Security Council framework afterwards.

The role played by the Security Council in counter terrorism is of utmost importance for several reasons. Firstly, it operates quickly, enabling immediate reactions, secondly, unlike the General Assembly and its resolutions, resolutions of the Security Council stipulate in general more concrete expectations, with the particular weight of permitting the use of force in order to enforce them.^{3 4} Thirdly, especially in the field of countering terrorism, it has created standing structures in order to implement its resolutions: the committees established by Security Council resolutions and their continuous and ever institutionalizing activities are indispensable in this respect. The two landmark resolutions, the evolutions of which are presented in the ostended manner are resolutions 1267(1999) and 1373(2001). Among the most recent developments these were joined by resolution 2178(2014), which is opening new perspectives for development.

³ See more in detail Prandler, Árpád: Az ENSZ Biztonsági Tanácsa (The Security Council of the United Nations). Közgazdasági és Jogi Könyvkiadó, Budapest, 1974.

⁴ See UN Charter Articles 41-42.

The use, permanent monitoring and lifting of the sanctions established by resolution 1267 in 1999 without precedent, placed into the centre of international attention after 9/11 and created under substantial political pressure, with the requirement to deliver immediate operational results has led during the years to a situation in which they are implemented in a cautious manner, with due regard to fundamental rights and within an organizational system assisting member states of the UN bearing the primary responsibility for implementation and in continuous cooperation with them.

Among the general counter terrorism resolutions, 1373(2001) is the most important one in our view, shaping the legal and institutional environment of international counter terrorism up to now. On the one hand, this resolution has renewed the international counter terrorism policy from the content and quality point of view, by placing the financing of terrorism into its centre, on the other hand, by establishing the Counter Terrorism Committee (CTC) of the Security Council it has brought along substantial progress from the institutional point of view as well. Beyond resolution 1267, resolution 1373 has remained the most significant reference document of the counter terrorism activities of the Security Council up to now.

Since its adoption in 2006, the UN Global Counter Terrorism Strategy can be considered as a most fundamental reference document in the international fight against terrorism. Its adoption and functioning as a „living document”, complemented by a regular review mechanism have substantially contributed to the success of combating terrorism on the institutional level. The Strategy is the common denominator for all states, thus, it comes on the first place for Hungary as well, if we wish to take stock of the international documents laying the ground for the counter terrorism obligations of our country. Being a global document, the Strategy is a unique instrument, which can be considered as the foundation of each and every national, regional and international effort to combat terrorism.

As regards the counter terrorism policy of the European Union, one may say that despite the development of the last decades, the role of the Union in combating terrorism is still complementary to that of the member states, who bear the primary responsibility. The most obvious fact in this respect is the lack of any self-standing law enforcement, intelligence or security capabilities of the Union, providing only a framework to the cooperation of the member states and to the use of the synergies offered by this (e.g. the functioning of Europol, Eurojust or IntCen).

The development of the counter terrorism action of the EU has also followed the general pattern observed during the research, i.e. an approach of purely (criminal) law has been replaced by a complex, strategically underscored one, manifesting in more and more aspects: however, in parallel, the proliferation of counter terrorism structures takes place within the organization, causing practical difficulties, which could not be fully mastered so far.

Counter terrorism action of the EU has grown from justice and home affairs cooperation into cross-cutting area overarching several policies, therefore, its development is inseparable from the development of justice and home affairs cooperation. Even more so, the start of justice and home affairs cooperation in the European Union actually started by an informal counter terrorism cooperation of member countries of the then European Economic Community (TREVI cooperation).

The 9/11 attacks meant a turning point in the counter terrorism policy of the European Union as well, and we may even say that these events have brought along the genesis of the counter terrorism policy of the EU. From an important, but quite particular bit of police and criminal justice cooperation, it has rapidly grown into a multidisciplinary, strategically underscored and cross-cutting approach, determining our subject ever since. Most obvious manifestations of this progress are the strategic documents defining the terrorist threat on the one hand and the responses thereto on the other. The development of counter terrorism action of the European Union has brought along the birth of *sui generis* strategic documents on terrorism, the EU Counter Terrorism Strategy adopted in 2005 to be mentioned in the first place.⁵

Sanction measures against individuals or organisation in connection with terrorism form an important part of EU counter terrorism action as well, similarly to the UN. Their first appearance were linked with steps against the Taliban regime in Afghanistan and the Al Qaeda supported by it, around 2000. These measures gained primary importance after the 9/11 attacks. Beyond similarities, it is even more correct to speak about direct links between counter terrorism policy of the EU and of the UN, i.e. a significant part of the Union sanctions mirroring the ones already adopted by the UN.

⁵ Council doc. 14469/4/05. In Hungarian: <http://register.consilium.europa.eu/pdf/hu/05/st14/st14469-re04.hu05.pdf>.

The Union managed to create a single criminal law definition for terrorist offences, the Framework Decision 2002/475/JHA being the legal foundation of EU policy on combating terrorism up to now. Its provisions, e.g. the definitions of terrorist offences and terrorist groups provide the background of many other legal acts. Furthermore, the Framework Decision has created the ground to the approximation of member states' criminal law provisions on terrorist offences. In 2017, a new Directive was adopted, further developing the criminal law approach.

The EU action against terrorism is of a multi-player nature, similarly to that of the UN, but a separate function was created to coordinate it, operating successfully since 2004: this is the counter terrorism coordinator (EUCTC), lacking actual powers.

Taking into account that the predominant actors of the fight against terrorism and the owners of the most important powers are the member states, among the EU institutions the Council, being made up of the Member States may be considered as the centre of political action. Several working parties are active on counter terrorism subordinated to the Council.

The most important one in terms of its significance among the preparatory structures of the Justice and Home Affairs Council is the „standing committee on operational cooperation on internal security”, COSI with its acronym well-known in professional circles⁶. COSI has become a prevalent player in the counter terrorism decision-making since 2015. It was tasked to liaise with other competent Council working parties, the Commission and the EU Agencies, in order to ensure actual implementation of the operational decisions adopted. Furthermore, COSI had to examine the possibility to elaborate the methods of a „structured multilateral approach” on the operational cooperation in action against the terrorist threat. In this respect, the strengthening of coordination of analyses on the terrorist threat became necessary, above all between Europol and IntCen.⁷ Against this background it is certainly to be expected that issues of counter terrorism will appear in the agenda of COSI in an even more significant manner in the foreseeable future, and they may even dominate the agenda; on the other hand,

⁶ The abbreviation stands for *Comité de la Sécurité Interne*, i.e. Internal Security Committee, but the official name of this body is the above-mentioned, longer form.

⁷ Details of this are set out in doc. 8409/2/16, approved by COSI, however, it is only partially public, see <http://data.consilium.europa.eu/doc/document/ST-8409-2016-REV-2/en/pdf>.

operational aspects are likely to be in the forefront. It is a question whether these developments would trigger the lifting of the limitations set out in the TFEU and in the secondary law currently making COSI somewhat one-sided, and by this, opening the way towards a more comprehensive EU cooperation, also encompassing the cooperation of secret services.

On the level of the agencies, the key player of the fight against terrorism with an ever growing importance is Europol, the law enforcement agency of the European Union. It has to be noted that its mandate is not limited to counter terrorism activities only, but it has powers to tackle other security challenges, namely serious and organised crime⁸. When it comes to law enforcement, one may easily say that Europol is the most important agency of European cooperation, as the highest volume of information exchange between member states is channelled through it.⁹ Fight against terrorism is becoming more prominent in the life of this organization, the current period may even be considered as a landmark, as the establishment of the European Counter-Terrorism Centre (ECTC) in 2016 brought along the necessary organisational framework for efficient action within Europol and it is possible that countering terrorism, having been somewhat below among the priorities in the Europol profile, could become more and more prevalent.

However, it has to be noted once again as an important starting point that no matter, how reinforced the agency would become, among the current framework it cannot but carry out coordinating and supporting activities, as all the legal possibilities of genuine action are with the member states. Thus, Europol, albeit having gone through a tremendous evolution in the last two decades, hasn't managed to become a „European FBI”, as it was the original ambition, and this is not even likely in the foreseeable future either.

We could identify several parallelisms during the overview of counter terrorism action of the UN and of the EU. Both organisations have gone through a similar development in the last decades:¹⁰ starting from the inception of a demand of counter terrorism action caused by the

⁸ N. B., one of the biggest added values of cooperation with Europol is to establish the link between fight against terrorism and organized crime and by that, to define new directions of investigation.

⁹ See Hegyaljai, Mátyás: Az Europol új jogi alapja (The New Legal Basis of Europol). In: Pécsi Határőr Tudományos Közlemények Volume XIV., Pécs, 2013., p. 423.

¹⁰ It has to be kept in mind that there is a continuous interaction between UN and EU: until 2002, lacking a self-standing legal basis, the EU only implemented UN counter terrorism action, but there have been efforts to ensure

new leftist wave of terrorism of the 1960s and '70s, this issue was perceived as a legal problem until the terrorist attacks of 2001, with the criminal law approach, i.e. the penalisation of terrorist behaviours in the centre. The 9/11 attacks, marking a new era, have made fight against terrorism an absolute priority, triggering the need for a more complex, political response, (criminal) law being only a part (albeit important) of the response. In the lives of both organisations this has led to the outlining the basic principles in strategic documents, on the other hand, in both organisations the proliferation of counter terrorism structures emerged, making the definitions of roles and responsibilities a must. It is equally visible that from the middle of the 2000s, the demand for an effective counter terrorism action became secondary compared to fundamental rights considerations, while we can witness this flow turning into the opposite direction since 2014, as the international security environment has changed drastically.

When comparing the effectiveness of counter terrorism actions of both organisations, we may make the following findings.

The basis of any efficient counter terrorism action is the existence of a clear legal definition, i.e. it has to be decided what is meant by terrorism, in order to tackle it effectively. In this are, since 2002, the EU has had a clear ground, as Framework Decision 2002/475/JHA (and the Directive adopted this year to replace it) has created by its transposition into national legal systems a consistent and straightforward common denominator for the member states. However, as we could see, on UN level the effort to adopt a comprehensive international convention on terrorism has not been successful so far. Although one may derive a more or less global consensus on the meaning of terrorism based on the behaviours criminalised by the sectoral conventions and the resolutions of the Security Council and of the General Assembly, this situation includes the possibility on the level of state policy and legal implementation that a state might (willingly or not) maintain loopholes in its legal system and by doing so, puts the consistency of the global counter terrorism effort in prejudice.

the maximum consistency between EU and UN actions ever since. At the same time, the Union takes an active role in the decision-making and in the other workflows on UN level, partly via its member states and partly by its own right, since the entry into force of the Lisbon Treaty. Parallelisms and identical points between the two organisations are thus not a coincidence.

When it comes to political steering, there is a consensus in the EU counter terrorism action. Although in certain cases, as we could notice it with the EU PNR directive, some counter terrorism measure may be delayed or hindered by rivalry or disagreement among the EU institutions, still, there are no fundamental considerations affecting the core of counter terrorism action behind this. In the UN, however, the necessary consensus for political decision making is only existing on the level of the Security Council, far less on the global level, in the General Assembly. This has led to a situation that any really substantial counter terrorism measures since 2001 were only possible to be decided by the Security Council. For the future, this raises the question that if the Security Council remains the centre of UN counter terrorism action, what implications this may trigger for the UN system as a whole.

A related, equally important issue is the one of coordination within the organisations. In this respect the EU has a clear advantage, as dialogue between the policies and proper information flow towards and the necessary helicopter view of the political level, just as the formulation of multidisciplinary responses are ensured by the office of the EUCTC. Although there has been a continuous effort since the adoption of the GCTS within the UN system to properly coordinate the relevant actors, so far this has not led to a clear definition of roles and responsibilities and the elimination of duplications and overlaps. All this creates a hurdle towards the effectiveness of UN action.

Last but not least it has to be noted that the most important actors of the fight against terrorism are still the states, as the genuine implementing, intelligence, law enforcement, judicial, etc. competences that are necessary for real action exist on national level. In this respect both organisations have only a complementary role. However, while in the UN system there is a complete lack of any kind of a more thorough, operational coordination beyond the notices of Interpol, we may find in the EU the emergence and diversification of a continuous law enforcement-judicial and to some extent even intelligence cooperation, via the activities of Europol, Eurojust and IntCen. This offers such possibilities for the member states in terms of analysis and coordination that are not possible on national level. Hence, although the concrete implementing powers have remained on member states level in the Union as well, there is a way that this could be genuinely supported by the cooperation and information exchange in the Union structures, offering possibilities impossible under a purely national approach. The great question of the (near) future may be whether this cooperation could be permanently linked to

the level of the political decision making on EU level, moving further from the current practice of formulating political decisions in a reactive manner, as a response to major terrorist attacks.

As a final consideration, we may reply with clear yes to the starting question, namely whether the emergence of terrorism „2.1” since 2014 has caused a new era in counter terrorism action as well. On the level of the UN, adoption of the Security Council resolution 2178, i.e. the Security Council stipulating obligations towards member states including penalisation without an existing international treaty, has created a qualitatively new situation, opening up the possibility that the Security Council takes the fight against terrorism to a much more political and operational level under the maintaining of international peace and security. As mentioned before, this might be even desirable from the efficiency point of view, however, stepping on this path may have implications on the UN counter terrorism system as a whole. The previous, consensual, treaty-based approach can lose ground and e.g. the adoption of a comprehensive convention may be deleted from the agenda (on the contrary, thinking this process a bit further in a somewhat provocative manner, what should prevent the Security Council from defining terrorism in a resolution, once that has been unsuccessful as an international convention?)...

While this has been the only, albeit important element in the UN system, there are several developments in the one of the European Union underscoring that counter terrorism action has entered a new era since 2014. On the one hand the renewal of the legal definition by the adoption of the new directive points into this direction, just as the adoption of other, much protracted legislation, such as the EU PNR directive, offering new tools for the authorities. The establishment of the ECTC within Europol is noteworthy as well, with the potential to substantially deepen counter terrorism law enforcement cooperation among the member states and to make it more effective. However, we may consider as an even more significant step the start of a process including the possibility of a structured and continuous approach, linking together the operational and the political levels, by the permanent analysis of the threat and the formulation of responses on EU level. In this respect, the roles of the EUCTC, IntCen and Europol and their seemingly permanent channeling towards the level of political decision making needs to be emphasized, just as the feedback from there. This may lead within a short period to the opportunity of a counter terrorism action of such depth, quality and intensity within the Union that was not to be imagined even a few years ago.

Use of the results of the research may be possible first and foremost during the gradual and postgradual training for students having an interest in counter terrorism issues. In case of publication, it may be of help for officials in public administration and law enforcement, dealing with international cooperation, as it includes all the information that is necessary to understand, how the UN and EU systems of counter terrorism action are constructed. The conclusions on certain deficiencies of domestic counter terrorism legislation might eventually be useful for the legislator as well.

IV. List of the author's publications in the subject matter of the thesis

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