

THE DEATH PENALTY AND TERRORISM

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In preparing this paper I found myself in the unusual position of having to negate my own work as I will try to show, the topic on which I am supposed to speak is, in reality, a non-issue. This topic, "The Death Penalty and Terrorism", implies that there are arguments about the death penalty which are particular to terrorist crimes, and which do not apply to other crimes. As I will attempt to show, there are no reasonable arguments in favor of the death penalty for terrorists which cannot also be raised in relation to the death penalty in general. And the arguments which are put forward in favor of the death penalty for ordinary crimes have no additional force as regards terrorist crimes quite the opposite whereas arguments against the death penalty are at least as strong as regards terrorist crimes as they are otherwise.

The "relativity" of the issue is underlined by a preliminary question: the question of how to define "terrorism".¹ It is a problem that has been widely discussed but to which lawyers have not yet found a satisfactory answer. Without going into too much detail, a few remarks must be made.

The problem of definition has arisen mainly in the context of the inter-governmental debate on cooperation between western European states in the fight against terrorism - a debate colored by the existence of an international legal principle to the effect that persons shall not be extradited for "political offences". The debate has centered on means of limiting the applicability of this principle so as to exclude terrorist offences: two Conventions on the Suppression of Terrorism have resulted which allow extradition for certain offences, such as the taking of hostages, kidnapping, and offences committed with firearms and explosives, irrespective of the political motivation of the act. At the same time, it should be stressed that the western European answer to the problem is specifically linked to Western Europe, i.e. to member-states of the Council of Europe, who share (or proclaim to share) common values of democracy and human rights. Terrorism, for the purposes of this debate, is defined only in relation to (western European) democracy: it was a premise of the debate that the aim of terrorism is "to overthrow and destroy democracy in our countries, together with the parliamentary and pluralistic connotations it has acquired ...". This is clearly expressed in the fact that the European Convention on the Suppression of Terrorism applies only to member-states of the Council of Europe and that non-member-states may not accede to it.

This solution may be useful in view of the limited, practical, aim of the Council of Europe's work in this respect (facilitating international cooperation amongst its members in the fight against terrorism), but it is not helpful in the present debate. In fact, it underlines the dilemma about whether to define terrorism by reference to its political motivation or by reference to the methods it employs, or both. That dilemma is crucial to the present discussion.

If one defines terrorism by reference to the violent and gruesome methods it employs, then one remains within the area of the ordinary laws all such acts of violence constitute criminal offence in their own right. This even applies to offences specially created in this context, such as the prohibition to found, or be a member of, an organization with certain violent aims. It is only when one leaves the area of violent offences that serious problems arise, in particular as regards prohibited expressions of opinions. Criminal prosecutions for such expressions of opinion are a matter of concern to Amnesty International: even if it is recognized that there are limits to the freedom of expression (incitement to racial hatred; advocacy of violence; more

¹ Amnesty International has, in several of its publications, referred to "politically motivated acts of violence", thus distinguishing prisoners convicted for perpetrating such acts clearly from Prisoners of Conscience, which are defined as: "persons who in violation of (the provisions of the Universal Declaration of Human Rights) are imprisoned, detained or other-wise physically restricted by reason of their political, religious or other conscientiously held beliefs or by reason of their ethnic origin, sex, color or language, provided that they have not used or advocated violence ...". (Article 1a of Amnesty International's Statute). Unless Amnesty International believes that persons convicted of politically motivated acts of violence are innocent of such acts and in fact imprisoned for their beliefs, ethnic origin, sex, color or language, such persons will not be "adopted" by Amnesty International, that is, Amnesty International will not work for their release. However, in accordance with articles 1b & 1c of its Statute, Amnesty International will work for a fair and speedy trial for such prisoners and will oppose torture, inhuman or degrading treatment imposed on such prisoners, including the death penalty. By adhering strictly to its own mandate, Amnesty is therefore little affected by the definitional problem.

problematic: insulting or slanderous statements), it is Amnesty International's experience that in the context of terrorism states tend unduly to restrict free speech if they feel that it is in some way "supportive" or "apologetic" towards terrorism. For the purposes of the present discussion this is not however an important issue although from time to time such oral offences have come under the aegis of anti-terrorist legislation, it is not generally proposed even by those who favor the death penalty for terrorists that this should extend to those merely expressing an opinion even if that opinion is supportive of violence. Indeed, a policy of executing people for expressing their opinion cannot fail to degenerate into brutal repression of political opinion hostile to the government or the state generally, as is demonstrated by those states which carry out such a policy.

This brings me to my next aspect. If one defines terrorism by reference to its political motivation only, one tends to cast the net excessively widely. Quite apart from the oral offences mentioned earlier, there are a great many politically motivated criminal offences which could not reasonably be held to constitute terrorism. Spraying slogans on walls (i.e. damaging property); refusing to pay tax; all kinds of acts of civil disobedience, tend to be politically motivated. Those definitions that are based on the political motivation aspect, therefore, tend at the same time to limit themselves to certain serious, violent, crimes only. Terrorism is then defined as the perpetrating of certain criminal acts of violence for political motives.

How do these considerations bear on the present discussion? As I said before, I feel that they show that the discussion is largely about a non-issue and I will try to demonstrate that.

If one argues in favor of the death penalty for terrorists, and one defines terrorism by reference to the gruesome nature of the crimes committed, then it is illogical to restrict the argument to terrorist, that is: politically motivated, crimes. Why should only the politically motivated kidnapper, hostage-taker, or murderer be executed? The magnitude of the crime is no criterion in this respect. Quite apart from the fact that it is impossible to set norms that are not arbitrary (number of victims? that would be cynical), "ordinary" crimes can claim as many victims as terrorist ones. Cases are known of persons who blew up airplanes in order to claim on the life of one passenger. The people who sold poisonous cooking oil in Spain were at least as reckless with the lives of their victims as are terrorists who plant a bomb in a department store, giving some (only too often: inadequate) warning. Nor is the argument affected by the fact that terrorists tend to be part of an organization. So are many criminals. Should the murderers of Dalla Chiesa be executed if they are members' of the Red Brigades, but not if they turn out to be member of the Mafia? Not to mention the fact that very often it is impossible to draw the line between ordinary and politically motivated criminals. Many members of terrorist organizations are pleased to fill their own pockets as well as the coffers of their organization, whereas many criminals or criminal organizations have political aspirations or aims. In other words, the only issue that remains is a relative one: whether the arguments for or against the death penalty generally carry any additional (or less) weight as regards terrorist offences.

Reference to the political nature of terrorist crimes is not usually brought forward as in itself a sufficient argument in favor of the death penalty. It would indeed be a very dubious argument. If it were to be argued that the perpetrator of a crime should be executed, not so much because of the gruesome nature of the crime he committed, as for the fact that his motive was political (i.e. others perpetrating equally gruesome crimes but for private gain could not be executed), then that would be tantamount to punishing the perpetrator for his political opinion rather than for his acts. Furthermore, governments have always shied away from such public recognition of terrorist crimes as being, by virtue of their political motivation, of a different nature than ordinary crimes; rather they have sought to emphasize the criminal nature of the acts perpetrated for political motives, and have consequently refused to give in to demands for "special", "political" or "prisoner of war" status for persons convicted of politically motivated crimes.

To sum up: there are no arguments in favor of the death penalty for terrorists arising out of the nature of terrorism. Neither the nature of the crimes perpetrated for political motives, nor their magnitude, nor their organizational background, provides a workable and just line of demarcation between terrorist offences on the one hand and ordinary offences on the other, on which a discriminatory policy of sentencing could be based. A distinction based on the political motivation behind terrorist offences, as opposed to motives of private gain behind ordinary offences, is equally unworkable and unjust.

This does not exclude the possibility that the arguments in favor of the death penalty generally weigh more heavily in the context of terrorist crimes. A number of “special” arguments in favor of the death penalty for terrorists, which have been brought forward, fall into this category (even if at times they have not been presented as such, but as unique to terrorism).

The death penalty being envisaged as a lawful punishment, it will be discussed under the usual headings applicable to all penal sanctions. These are:

Retribution;
Specific deterrence; and
General deterrence.

Re-socialization, being a generally recognized aim of punishment, will be discussed in the context of the above headings.

In discussing the death penalty for terrorist crimes under each of these headings, the general issue will of course need to be referred to, but this will be done only briefly: there will deal with the general issue in more detail.

Retribution is based on the concept that the damage done to society must be repaid in some way by the perpetrator of a criminal act. An in my view positive aspect of retributive thinking is that it holds a person responsible for his acts, and does not merely see him as a product of his environment. At the same time, the kind of retribution that society demands is rather inadequate. Leaving aside cases where damage can actually be undone, it “settles the bill” by inflicting punishment on the criminal so as to satisfy the general sense of justice. This rather crude mechanism (which has here been stated in rather over-simplistic terms) is tempered by the modern requirement that punishment shall comprise the aim of racializing and rehabilitating the criminal. This is specifically stated in Art. 10.3 of the International Covenant on Civil and Political Rights as regards imprisonment. It is implicit in the development of non-custodial sentences, which avoid the stigma of imprisonment while allowing for more constructive measures. It is however completely negated in imposing the death penalty. If you kill somebody, you give up hope of re-socializing him, you write him off as a human being, as part of human society. He becomes a mere object of public wrath, and is declared incapable of moral or social improvement. To me as a Christian (and to many of my non-Christian friends) that is a repulsive philosophy, and probably the main reason for my opposition to capital punishment. I hope this aspect of the issue will be part of the discussion.

But to come back to my specific subject: is the case for retribution any stronger in cases of terrorist offences than in ordinary criminal cases? This is largely the same argument as the one I have dealt with above whether terrorist crimes are *by their nature* more repulsive than ordinary crimes. As I hope to have shown, there is no terrorist crime which is not matched, in its gruesomeness, its callousness and its cowardice by ordinary crimes. Indeed, the fact that an act was committed not for personal gain, but in aid of some ideal (however warped) used the count in favor of the accused; even if that is no longer accepted with regard to terrorist crimes, I cannot see how it could count against a criminal - unless of course it is the motive, the ideal itself, which is held to be a cause for imposing the death penalty. In that case however, as I said before, one would be punishing the perpetrator for his opinion rather than for his act (and, incidentally, there would be no further reason to restrict the death penalty to serious, violent, crimes). The conclusion must be that the ultimate philosophical, moral, question whether any crime morally justifies the taking of the perpetrator's life (other than in self-defense) is no different as regards terrorist crimes than as regards ordinary serious, violent, crimes. I must leave that general discussion to others at this conference.

The other, generally accepted, aims of criminal punishment are specific and general deterrence, that is: they are practical considerations superimposed on, and subsequent to the question of criminal liability.

Specific deterrence denotes the deterrent effect of punishment on the punished criminal. It involves a prognosis about future behavior of the individual concerned, which co-determines the severity of the penalty to be imposed. The general principle is that, subject to other considerations, no more severe punishment shall be imposed than is required to deter the individual concerned. Although the death penalty is, of course, the ultimate specific deterrent, this principle entails the requirement that it shall not be imposed unless there are no other means at the disposal of the state to deter the individual. Opponents of the death penalty, including

myself, believe that this can never be the case, unless one reverts to the opinion, which I have described as repulsive, that some people may be regarded as beyond social or moral improvement. But leaving that aside, the question must again be: are there any special arguments in this respect relating to terrorist criminals which do not apply to ordinary criminals? It must be noted that the existence in most countries of life imprisonment, subject only to pardon by the Executive, is in principle as effective a specific deterrent as the death penalty (I will make some remarks on life imprisonment later). Nor would it be correct to hold that terrorists are less capable of re-socialization and rehabilitation than ordinary criminals. First of all, there are many examples of even the most serious terrorist offenders who have, if not recanted, than at least foresworn terrorism as political means. Some well-known German terrorists have been released from life imprisonment. Recidivism of persons convicted in the special anti-terrorist "Diplock" courts in Northern Ireland is apparently very low. On the other hand, insofar as it may be argued that "hard core" terrorists are unique in showing no signs of any rehabilitative prospects, it may be noted that Council of Europe expert Prof. W. Sluga (cited by Amnesty International in its report on maximum security prison conditions in the Federal Republic of Germany) observed:

"the frequent absence of repentance in criminals; the dominant feature is often resentment at the injustice of a long sentence. This is reality and therefore cannot be a subject for treatment by psychotherapy."

The conclusion must be that the rehabilitative prospects of terrorists, even if they are regarded as extremely low (which is not justified as a general assumption) do not differ from those of ordinary serious offenders. Again, there is no special argument in favor of the death penalty for terrorists only.

There is a special argument which is raised regarding deterrence which has a specific deterrence aspect: the possibility that the effectiveness of the punishment is frustrated by other acts of terrorism which blackmail the authorities into releasing a convicted terrorist before he has served his sentence or, in case of life imprisonment, before he has been re-socialized. The argument is more directly linked to general deterrence however, and will be discussed under that heading, to which we turn now.

General deterrence denotes the deterrent effect of punishment on other (would-be) criminals. It tends to be over-rated generally, but with regard to the death penalty it is now widely accepted that the death penalty has no special deterrent effect. This will no doubt be discussed in some detail at the conference, and I will not here enter the discussion, apart from referring to the excellent paper "Is Capital Punishment a Unique Deterrent?" by Prof. Fattah, published by Amnesty International in 1980².

In so far as any special arguments with regard to terrorist offences are concerned, I may quote Prof. Fattah:

"As to terrorists and other political criminals, often singled out as a group to whom the death penalty should be applied, their fanaticism and dedication to their cause counteract and neutralize whatever legal threat is meant to deter them. Moreover, many of them seek through their actions their own self-destruction, a destruction which they view as the easiest and quickest way to the state of martyrdom to which they aspire."

This statement is amply demonstrated by historical and contemporaneous facts.

The conclusion must be that insofar as general deterrence is concerned, there is no special argument in favor of the death penalty for terrorist only - rather the opposite.

I will now come to the special deterrence argument which has been put forward on a number of occasions, also by people who generally oppose the death penalty. They argue that only by physically eliminating a terrorist offender can the risk be avoided that his comrades will commit further acts of terrorism to blackmail the authorities into releasing him. There are a number of, I believe convincing, arguments against this view. First of all, unless suspected terrorists were to be executed the moment they are apprehended (and thus the rule of law abandoned), the legal process will provide abundant time for acts of terrorism aimed at the release of the prisoner, on trial for his life. Indeed, each step in such proceeding would mark a welcome opportunity for propaganda (let us not be deceived into believing that terrorist organizations care all that much about the lives of their members; the leaders of such organizations are often as callous and as cynical

² Is capital punishment an unique deterrent? A Dispassionate Review of Old and New Evidence. AI Index ACT 05/34/80

about the lives of their subordinates as they are about the lives of innocent civilians). The final stages of those proceeding would almost amount to an invitation for further terrorist acts; an execution would no doubt be followed by retaliation. Secondly, a consistent application of the propose.' would mean that all those convicted terrorists be executed whose imprisonment might be ground for acts of terrorism by their comrades - irrespective of the crimes for which they are convicted. It would negate that most basic principle of criminal justice that punishment should be in proportion to the crime. In fact, people would be executed, not for a crime which they committed, but for other crimes which others might commit.

Thus, the proposal, if implemented, would either deny suspected terrorists a trial, or would not achieve its aim of preventing blackmail through further note of terrorism it might actually cause further acts of terrorism; and, if implemented consistently, it would negate the basic principle that punishment should be in proportion to the crime.

To sum up again none of the considerations which are generally considered to determine the severity of punishment to be imposed on an offender offer special argumenta in favor of the death penalty for terrorist offenders only. Such special arguments can neither be based on considerations of retribution nor on considerations of specific or general deterrence. The possibility that imprisonment of a terrorist criminal may induce his comrades to commit further acts of terrorism in order to obtain his release equally does not provide an argument in favor of the death penalty for terrorists.

I believe that these are the most important considerations for our present debate. However, there are a number of other issues on which I would like to comment briefly.

First of all, there are a number of general arguments against the death penalty, apart from the above mentioned, which may be considered from the perspective of terrorist crimes. I would like to mention two: the possibility of error and the inhibiting effect of capital punishment on juries and judges.

As regards the possibility of error I would like to note that in terrorist cases special criminal procedure often apply, which increase the risk of wrongful convictions. I may note that the death penalty was abolished in Northern Ireland at around the same time as special courts for terrorist offenders were introduced, and that it was specifically stated that it would be inappropriate to give such special courts the power of life and death. On the other hand, I may point to the existence during World War II in the Republic of Ireland of special courts for anti-state crimes which could convict on the basis of anonymous, unsigned, unsworn written testimony handed to the court by a senior police officer - and which could impose only one sentence: death.

As regards the inhibiting effect of capital punishment on judges and juries, Prof Fattah writes:

“Those who are familiar with the administration of justice know that the death penalty, especially if it is mandatory, reduces the likelihood that indicted offenders will be convicted.”

This is the more true if juries in particular accept as in some way justified, or even share, social grievances which were the motive for the (terrorist) crime. The history of Ireland, in particular, knows many instances of such “perverse” acquittals. Needless to say, where terrorism is the expression of a social divide in a state, executions will do nothing to narrow that divide.

Secondly, I would like to refer to an important practical consideration, arising from the very fact that many people, and a number of states, feel a moral repulsion towards the death penalty. The general rapporteur for a Council of Europe conference on "The Defense of Democracy against Terrorism in Europe: Tasks and Problems" (Strasbourg, November 1980) concluded that the conference highlighted:

"the negative effects which the existence of capital punishment in some member countries has on the chances of international cooperation. Here it may be said that the abolition of the death penalty in all member countries as recommended in Resolution 727, which our Assembly adopted on 22 May 1980 would not only facilitate joint action, other than of a constitutional order, against subversive violence, but would also help to protect and strengthen human rights in the geographical area of the Council of Europe."

Finally, I said I would make some remarks on life imprisonment, on which I know a debate is taking place in Italy. It is sometimes argued that the death penalty is no more inhuman than life imprisonment. But to accept

the death penalty because another inhuman penalty also exists is wrong one must start somewhere. The first priority must be to abolish the death penalty world-wide, because of an essential difference between the death penalty and life imprisonment: only the death penalty is irredeemable. It is indeed inhuman to incarcerate a human being for his entire life, until his “natural” death. But “life imprisonment” need not be that: it leaves the possibility of release, if not by judicial, then by Executive order. Council of Europe experts have said that life imprisonment without hope of release is inhuman, that there always must be means of releasing someone when imprisonment serves no further purpose, or itself become inhuman. That can be a starting point for a discussion. It should not detract from the abolitionist cause, rather it should complement it.

PLEASE NOTE

The opinions expressed in this paper are those of the author and do not necessarily reflect the views of Amnesty International

Appendix

By Claudio Giusti

“The morning of the execution both of them sang: “Long live the rebels...”

They sang without fear while they went to the gallows pole. (...)

If they aren't afraid of death, why can capital punishment be a deterrent?

To be honest, I think that, with the many death sentences I executed, I didn't stop any murderer.”

Albert Pierrepoint, the last English executioner, about the execution of two members of IRA.

British authorities ruling Palestine hanged several members of the underground Zionist Irgun organization in the 1940s following their conviction on charge of bombing and other violent attacks. Menachem Begin, former Irgun leader and later Prime Minister of Israel, reportedly told a former British Government minister that the executions had “galvanized” his group, which subsequently hanged several British soldiers in retaliation. Menachem Begin said the hangings “got us the recruits that we wanted, and made us more efficient and dedicated to the cause ... you were not sentencing our terrorists to death, you were sentencing a lot of your own people, and we decided how many”

Amnesty International “When the State Kills”, 1989 ACT 51/07/1989 p. 19

“Those who really think that death penalty can stop terrorist attacks or make them decrease, are naïve people or dreamers. Usual punishments, death penalty included, don't provoke any fear within terrorists or political criminals, who are ideologically motivated and devoted to sacrifice for love of their cause [...]. Besides, terrorist activities are dangerous and the terrorist faces lethal risks every day, so he isn't frightened by immediate death. How could he be discouraged by the risk of being sentenced to death?”

Professor Ezzat A. Fattah,

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