

Defining Terrorism and Victims of Terrorism in Comparative Law*¹

Definiendo el terrorismo y víctimas del terrorismo en derecho comparativo

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ABSTRACT

How terrorism affects the rights of people. The rights of victims are a crucial element in normalizing a country after a crisis. Define what a victim of terrorism is, it is a priority task, due to the gaps of a consensual definition through the legal concepts of terrorism. It is political rhetoric that defines who can be considered a victim. A victim of a bombing in Libya is not the same as a victim of the armed conflict in Colombia. Where massive violations of human rights are used as a method. Defining the victims of terrorism requires a dialogue and a political agreement. In this article the lawyer and candidate for a law magister degree, Linda Marcela Cortés, analyzes such definitions in international and domestic legislation, and its relevance, in public health, as well. The challenges of the antiterrorist law are presented as a new branch of international law, by the slow change and under the political rhetoric of international humanitarian basic notions of law.

KEYWORDS: Victims of Terrorism, rights of victims, Special Status, international and domestic legislation.

RESUMEN

Como el terrorismo afecta derechos de las personas, los derechos de las víctimas son un elemento crucial para normalizar un país después de una crisis. Definir qué es una víctima de terrorismo es una tarea prioritaria, debido a los vacíos de una definición consensual a través de los conceptos legales de terrorismo. Es la retórica política la que define quién puede considerarse víctima. No es lo mismo una víctima de un bombardeo en Libia que una víctima del conflicto armado en Colombia, donde se usan las violaciones masivas a derechos humanos como método. Definir las víctimas de terrorismo requiere un diálogo y un acuerdo político, de ahí que en este artículo la abogada y candidata a maestra en leyes, Linda Marcela Cortés, analice tal definición en la legislación internacional y doméstica y, por su pertinencia, la de salud pública, así como los desafíos del derecho antiterrorista como nueva rama del derecho internacional, al cambiar lentamente y bajo la retórica política las nociones básicas del derecho internacional humanitario.

PALABRAS CLAVE: Víctimas del terrorismo, derechos de las víctimas, estatus especial, legislación internacional y doméstica.

Justification

I wanted initially to reflect on the rights of the victims of terrorism because if terrorism aims at people's rights, it is a crucial element to consider for normalizing after a crisis. Defining vic-

tims of terrorism was a priority. As Professor Kent Roach said, it was an interesting aspect of the debate that the dissertation should explore.³ However, it became the main purpose of my paper due to the difficulties to find a consensual definition through legal and political concepts

3. This paper was initially my research paper for the course Counter-Terrorism in Comparative Law and Policy taught by Kent Roach in the Law Faculty at the University of Toronto in 2008. It was updated to include the last Colombian Law in 2013.

of terrorism. It is obvious to say who is a victim of terrorism after seeing ravages of bombings in the news, but the legal and political rhetoric about what is terrorism will define who is considered a victim. For example, United States did not recognize that indiscriminate numbers of killed and injured civilians for its bombings of Libya in 1986 were victims of terrorism, even though the 6th UN Commission and the international community disagree; US considered that “El Dorado” was not a terrorist attack at all, even though the means were terroristic and unlawful under international law.⁴ Another example: some victims received compensation after the American Embassy bombing in East Africa in 1998. A US program indemnified the last wife or common law partner of killed native population living or working next to the Embassy, forgetting that victims were also other wives because polygamy is allowed by familial law in this country.⁵

Other more difficult example is from Colombia. The rebellious groups were declared terrorists per se in the international lists after 9/11. The switch from armed conflict to terrorism changed the context and nature of the conflict under international law. Guerrillas as uniformed rebels playing under Geneva conventions, mercenaries

hired to counter-attack them and intimidate segments of populations to not support guerrilla’s aims, and narcotrafficants involved in business with both groups were labelled as terrorists without any distinction. In other group, there are the state agents involved in cases of human rights violations in the same context of the conflict, in particular for extrajudicial executions, torture and forced disappearances as a way to terrify individuals and populations. There are right now victims of terrorism, victims from abuse of power and other gross violations of international human rights, and collateral victims of the military lawful activities. They have unequal treatment being victims of the same conflict due to the high rate of impunity and different criteria that criminal or administrative procedures impose to claimants depending on what kind of victims they are. This is the debate around the project of “Law of Victims”⁶ that proposed mechanisms for immediate justice for all victims of the armed conflict since 1964; the government argues that the Colombia State cannot accept abuse of power (State terrorism) committed by state agents during the armed conflict against civilians; collateral damage under legal operations; or compensations for actual victims of mercenaries that negotiate their reinsertion with the government some

4. Paradoxically, El Dorado is a Spanish idiom to catalogue the mission of the Hispanic conquerors and colonists looking for El Dorado, the greater mythological treasure with indigenous gold and precious minerals in Colombia. More details about Libya bombings in Pollack, Kenneth M. *Arabs at War, Military Effectiveness 1948-1991* University of Nebraska Press, 2002 and Stanik, Joseph T. *El Dorado Canyon: Reagan’s Undeclared War with Qaddafi*, Naval Institute Press, 2003.
5. See more in Hirsch, Susan. *In the Moment of Greatest Calamity, Terrorism, Grief, and a Victim’s Quest for Justice*, Princeton Press, 2006.
6. See a criticism in <http://www.amnestyusa.org/document.php?lang=e&id=ENGNAU200811258389>. The original and the second draft of the Law of Victims are not available on official’s websites.

years ago. It modified the original project without considering the previous consensus among real victims of terrorism, the academy, civil organizations, politicians and representatives of the major public institutions of human rights in Colombia during two years of serious debates supported by UN funds.

These examples show that defining victims require political agreement because there is also a dilemma defining terrorism as well. From a comparative view, terrorism could be considered a war, a crime or something between both,⁷ but at law there are only victims of war crimes and victims of crimes. As a result, I plan to study possible theoretical definitions of victims into the legal contexts in which terrorism has been criminalized. Firstly, I will explore victims through theoretical observations to international anti-terrorism law and other international instruments, observing the legal context of terrorism during armed conflicts. Secondly, I will analyze the definitions of victims into some domestic anti-terrorism laws, especially including the Colombian and the public health approach. Finally, I will conclude with my personal definitions as a way to integrate the main ideas explored in this paper. I hope that the outcome of this paper could contribute to my own understanding about the challenges that anti-terrorism law is facing as a new branch of international law.

Methodologically, the research challenged the way in which we, as continental young schol-

ars, use to compare legislations. My first challenge was to compare intersections between legal branches (international classic law and the new branch counter-terrorism law and policy) and the legal language used in the three different systems (international law, common law, and continental law). I should use different political and legal dictionaries. Terrorism and their connected issues are topics studied in law and in political sciences. This issue is more evident when studying doctrine. Most continental books address the issue in books related to political sciences while new books found in common law are more related to see the topic as a new legal branch of counterterrorism since September 11 events.

Only timing helps to understand how definitions evolved, according to specific legal and political contexts and how now states are not so much interested in keeping their own legal traditions when needed. It is quite impressive the way states are using international policies and soft law to evolve the new branch of counter-terrorism domestically. An international organism or a powerful state propose a directive, guideline, or call to action based on the methodologies of a different legal system, and interested states just need to transplant or to implement the norm internally without the limitations and time consuming procedures of ratification in states based on continental law such as Colombia or France, for example. This is a practice that I call “legal politicized culture” to the point that such states were able to leave

7. Ackerman, Bruce. The Emergency Constitution. (2004) 113 Yale J.L. 1011, pp. 1033, in Roach, Kent, comparative anti-terrorism law and policy, University of Toronto, 2008. Textbook's cases.

behind their traditional attachment to international law norms ratified as the same level of their own constitutions to entry to new regimens more efficient to fight against their own political resistances.

Other implication is that definitions of terrorism, terrorists, and victims are quite different in each system while anti-terrorist measures, regulations, and policies are domestically implanted as they were proposed into the international directive or regulation. There is not consolidated basic notions, but states decided to follow the international schemes. It is useful because each state could use their own definitions and developments according to their needs or particular contexts without reducing standards of international cooperation and fight against transnational terrorism. The problem I saw is that in certain cases, resources or commitments are based on certain definitions that did not recognize such particular contexts or developments, and force certain states to reject previous international law found in other branch, such human rights. I will refer to specific examples inside the paper.

A second challenge is the historical perspective found in the literature and websites consulted. When I looked for definitions and implications for victims of terrorism, consolidated reading lists are quite different to the new challenges faced for literature in developing countries of the South struggling with “resistances” or guerrillas or narcotic dealers. Before 11 September, those countries studied the topic of attacks as part of the international law of war and human rights. Now, it is a political issue of calling the



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guerrillas as terrorists. It also shows different outcomes of having a political definition of terrorism and terrorists. If using past literature lists, terrorist attacks by narcotics dealers were outside the scope of the legal instruments. They were just considered common criminal acts. Now, countries as Colombia facing such terrorists attacks should include this kind of crimes as typical terrorist crimes against the system and the political stability. This is a new perspective with clear implications that I will explain in this paper.

The third challenge, I already referred to it. Now, states removed many different websites related to the topic due to security issues. In previous years, we used to look even to “terrorists’ official websites”. It used to be a good practice to contrast how resistances or terrorists used to define their own acts and also to verify news or arguments from leaders targeted as “terrorists” by state terrorism. It used to be a good practice to verify bias and inconsistencies of data. Now, as I said, it is quite impossible this practice, and even going to libraries in states watching for scholars and their books. During my year in Toronto, I also tried several times to reach the websites official of the government agencies related to the topic, and I did not reach statistics, or official data about terrorism in Colombia. During those years, I could not also reach relevant books in university libraries. Thus, I just use the Colombian literature someone donated to the University of Toronto that assessed the political terrorism after 1985. It helped me to understand that the phenomena of terrorism and comparing systems is a sensitive topic even in developed countries websites management. In one opportunity, calling to my country to ask for librarian help, they were able to ask me my references and why I was doing such a research. It was during the time the law of victims was pre-launched without transparent statistics.

For that reason, I could not fulfill completely the comment made by professor Kent Roach about that it could be useful if I was able to explain more about this state terrorism, an issue more inside the branch of the human rights and international classic law. It has been impossible to

me until now for the reasons explained above. In addition, again most books about this topic and the way in which people targeted as terrorists by political systems are found in other sciences, as political science, outside the scope of the legal methodology of comparing a legal institution. However, such books and NGO’s websites made possible that we study this kind of topics. The problem is that they deal with the topic of claiming, advocacy and call to action, and only few of them try to develop legal arguments using strict legal methodologies.

As a developing country scholar, I acknowledge your invitation to this conference, and I would like to add that we should focus on developing new methodologies that help us to be more productive as comparativists in studying and producing new definitions that will be the cornerstones for new legal branches. In my case, I just focus on developing a new integrative definition of terrorism and victims. This paper helped me to see a broad of possibilities for future papers on the topic, in which I would like to explore how law is networking more than ever with politics (legal and political obligations finally can marry in this century), the issue of validity and efficacy of international definitions, and how two different legal system could work together to foster more fair and flexible international instruments that helps to victims, the real subject to be protected by any kind of norms. However, my main call is that scholars in this conference work together for doing new online blog-dictionaries with the new developments. It is a hard work, but together we can do it using our intellectual curiosity and the guide of our supervisors or comparativist mentors.

I. Defining Victims of Terrorism in International Law

A. Victims and the UN Conventions on Anti-terrorism

Legal definitions of terrorism in international anti-terrorism instruments are the first scope for defining victims of terrorism. Because there is no consensus about what in fact terrorism is, the theoretical focus of victims should be considered in different ways. According to the Convention on the Prevention and Repression of Acts of Terrorism (1971), terrorist acts are crimes against persons or annexed acts of extortion that have an international significance.⁸ In this context, victims are persons in general chosen by terrorists to make an international impact. Following the ideas of the UN Office on Drug and Crime,⁹ victims of terrorism are also the peacetime equivalent of victims of war crimes, but it does not consider that terrorism could occur also in a warfare context. In contrast, the International Convention on the Suppression of the Financing of Terrorism ICSFF (1999)¹⁰ being comprehensible about intentional factors that define terrorism without mentioning ideological motives, seems to not discriminate if terrorism occurs during peacetime or armed conflict. Therefore, it can be also a

tactic for war crimes. The Resolution expressly introduces the idea of the status of the victims of terrorism is this way:

Death or serious bodily injured civilian, or any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

Terrorism is close to war from this scope. The definition, however, does not say that military combatants could be victims of terrorism, but it protects non-combatants and humanitarian forces. Similar scope was introduced in the UN Report of the High-level Panel on Threats, Challenges and Change (2004) distinguishing victims of terrorism from victims of other international crimes, such as trafficking of persons. In both contexts, terrorism will be all intentional disproportionate acts that harm civilians and non-combatants in order to intimidate a population or to compel an institution to do or to abstain from doing any act, such as obtain an advantage over others. Terrorist attacks being a method to intimidate, it is necessary to be careful examining the idea of terrorism during peacetime or armed conflicts. If terrorism

8. Nguyen Quoc (+), Dinh, Patrick Daillier et Alain Pellet. *Droit international public*, 6e édition entièrement refondue, Paris, l. g. d. j., 1999, p. 637.

9. See UN Office on Drug and Crime website (2008). The original quote about terrorism is the peacetime equivalent of war crimes was also quote in two texts. Scharf, Michael, *Defining Terrorism as the Peacetime Equivalent of War Crimes, a Case of too Much Convergence Between 2HL and ICL?* 7 ILSA J. Int'l & Comp. L391 (2001). Martin, Vanessa and Marc Olivier Benoit, *La Definition du Terrorism*, Ibid.

10. <http://untreaty.un.org/english/Terrorism/Conv12.pdf> Section 1 (b)



If victims of terrorism are victims of war, they will be assisted by the rules proposed in the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949) and their two additional protocols.

occurs during peacetime by military, unlawful armed forces or criminals interested in pressuring institutions or to intimidate a population, it will be considered a crime per se. (see chapter on domestic law). If terrorism is part of an armed conflict, victims will be considered as victims of war crimes¹¹ independently of perpetrators' identity.

On this latter idea there are some particular considerations. During armed conflicts, actors should protect victims under the scope of the Geneva Conventions limiting violence over enemies and civilians.¹² Labeling as terrorist any kind of unofficial combatant is a different approach to define unofficial belligerents that are legally regulated by Hague and Genève Conventions. A new approach to terrorism after 9/11 said that unofficial belligerents should be prosecuted as terrorists because their acts are intended to compel governments or to intimidate segments of a population. Nguyen Quoc and others explained that guerrilleros are authorized combatants if they openly use weapons and uniforms having the same rights and obligations to official military forces.¹³ In contrast, mercenary forces and other unofficial forces without uniforms have not the quality of lawful combatants or war prisoners. According to the authors, they are condemnable as terrorist under international laws.¹⁴ On the other hand, if state agents commit or facilitate human rights violations, it is considered state terrorism.

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11. Article 51 para 5 (b) AP I. See also Article 8 of Rome Statute of ICL.

12. Nguyen Quoc (+), Dinh, Patrick Daillier et Alain Pellet. *Droit international public*, p. 931.

13. Nguyen Quoc (+), Dinh, Patrick Daillier et Alain Pellet. *Droit international public*, pp. 933 to 935.

14. Nguyen Quoc (+), Dinh, Patrick Daillier et Alain Pellet. *Droit international public*, p. 936.

15. <http://www.unhcr.ch/html/menu3/b/94.htm>. Additional I Protocol aims to protect Victims of International Armed Conflicts and Additional II Protocol aims to protect Victims of Non-International Armed Conflicts.

size protecting harmed civilians, sick persons, pregnant women, seniors, disable persons and children under 15 years old, adding journalists that are particularly exposed to threats.¹⁶ The First Additional Protocol proscribes any criminal act against civilians during international armed conflicts; the Second, acts of terrorism against civilians during non-international armed conflicts. This latter proscribes any acts or threats of violence “which primary purpose is to spread terror among the civilian population”. Both Additional Protocols have recently acquired importance in the UN Sixth Committee.¹⁷ It is also possible that a terrorist attack that only aims to target the military, unintentionally harmed civilians or non-combatants; these will be considered “collateral damage”, but not terrorism excepting if a party needs to be stigmatized in public opinion. I do not believe in the theory of collateral damage because every

armed actor is aware for scoping plans, means and weapons to fight a war.¹⁸

Because terrorism is in fact a method regardless of perpetrators’ identity or the context in which they operate, I agree with some scholars that argue that it will be useful to find a new term to describe the terrorism focus on the victims’ rights.¹⁹ It may enable international law to involve states, too, as possible actors of terrorism. In fact, participants of the UN Report 2004 observed that the legal framework in this issue was stronger than the criminal approach against non-state actors.²⁰ However, this is a large debate. While some scholars such as Coady, Primoraz and Walzer seem to justify state terrorism in extreme circumstances, others like Blakesley, Van Boven and Giraldo reiterate that all kinds of terrorism and crimes against humanity have no moral or legal justifications.²¹

16. Nguyen Quoc (+), Dinh, Patrick Daillier et Alain Pellet. Ibid.

17. UN Chronicle Sixth Committee Legal - Cloning Concerns; The Criminal Court - By Vikram Sura with Jonas Hagen.mht. 2008.

18. In fact, under the NEPA or North American Environmental Policy Act, every military program, project or weapon are subject to an environmental review or assessment to certificate their impact on human health, environment and natural resources. COUNCIL ON ENVIRONMENTAL QUALITY. *Regulations for implementing the procedural provisions of the National Environmental Policy Act*, 40 CFR Parts 1500/1508, p. 1508.25. This text is fund in [www.whitehouse.gov/CEQ] and [www.ceq.eh.doe.gov/nepa]. Linda Cortes. Environmental Assessments. University Externado de Colombia, p. 286.

19. Arnold, Jeffrey, Per Örténwall and others. A Proposed Universal Medical and Public Health Definition of Terrorism, in *Pre-hospital and Disaster Medicine*, Vol.18, No. 2, April – June 2003, 47 to 52; and Martin, Vanessa and Marc Olivier Benoit, *La Definition du Terrorism*, Ibid.

20. Organisation des Nations Unies, “Un monde plus sur: notre affair a tous”, Rapport du groupe de personnalités de haut niveau sur les menaces, les defies et le changement, décembre 2004, quoted by Martin, Vanessa and Marc Olivier Benoit, *La Definition du Terrorism*, p. 41.

21. Blakesley, Christopher. *Terror and Anti-terrorism, A Normative and Practical Assessment*, Transnational Publishers, 2006, p. 213 and 224. Van Boven, Theo and others. *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*. Limburg University, 1992, Introduction. Giraldo, Javier SJ, *Colombia the Genocidal Democracy*, Common Courage Press, 1996, passim.

The right to “self-defense does not include the use of innocents as tools”.²²

On the other hand, there is other evidence that anti-terrorism law is changing classical notions from international law. The inclusion of persons not taking an active part in the hostilities in a situation of armed conflict introduces a different approach for protecting persons beyond the status that international law offers to military non-combatants during hostilities.²³ According to Geneva Conventions and other instruments, belligerent or enemies could consider that non-combatants are enemies as well. They are not internationally protected as other persons like diplomatic staff, but the only right that they have being captured is to have the same prerogatives of a prisoner of war. They usually are belligerent members of armed forces in administrative services that could not have the duty to wear uniforms such as non fighting personnel, legal staff of military services, religious and medical military staff, and military in non-combatant missions like judges, governmental staff and blue collar workers.²⁴ According to Fleck and

Bother, “international law does not protect them from being object of an attack” even though they have the right to self-defense. It seems that this extra protection to non-combatants comes from the North American approach to criminalize international terrorism²⁵ if there are national’s civilians or military victims unarmed and/or not on duty. It does not discriminate if the terrorist attack was during “hostilities such as Col. James Rowe, killed in Manila in April 1989”, or during peacetime such as “bombings against U.S. bases in Europe, the Philippines, or elsewhere”. Based on this idea, combatants from subnational groups committing murder of US non-combatants will be always considered terrorists.

Finally, there are also exceptions. From the perspective of the rights of the peoples, terrorism could be not proscribed as an intention to liberate a sovereign territory against a foreigner occupation or any form of contemporary colonialism²⁶ if the perpetrators are the freedom fighters. This is the right to resistance. The same UN Sixth Committee in 2005²⁷ reiterates

22. Blaklesley, Christopher. *Terror and Anti-terrorism*, p. 224

23. Fleck, Dieter and Michael Bothe. *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1995, pp. 311 to 313.

24. Article 3 Hague Regimen, Article 4 No. 1 GC III, Article 43 Para. 1 AP I and Article 48 API, VR 3, quoted by Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Ibid.

25. <http://www.history.navy.mil/library/guides/terrorism.htm>. *Patterns of Global Terrorism*. Washington: Dept. of State, 2001: vi.

26. Declaration on the Rights of Peoples, Algiers, 4 July, 1976. http://www.algerie-tpp.org/tpp/en/declaration_algiers.htm.

27. Jorri Duursma. Definition of Terrorism and Self-determination, in *Harvard International Review*, September 22, 2008. “This defence of the territory and state sovereignty must respect the international laws of war as defined in, among others, the Geneva conventions of 1928, 1929, and 1949. Certain criminal acts may then be allowed in public international law e.g. such as the use of armed force to preserve sovereignty; but these acts may be forbidden by national penal law”.

the idea that “the right of self-determination of peoples could not in any way be called terrorism”, but this is a right only entitled to international recognized peoples that have previous sovereignty over their territories excluding indigenous peoples or other minorities claiming for autonomy.²⁸ This is the political conflict between states and peoples fighting for sovereign recognition; usually, these latter are labeled as terrorist. Duursma cited examples of this kind of conflict: Serbia and Kosovo,²⁹ Pakistan and Kashmir, China and Tibet. Victims in this context should be entitled to the same protection as victims of war. Otherwise, it will be an injustice. Moreover, the same UN report in 2004 said that it is essential that the occupation do not justify that actors target and kill civilians.³⁰ I agree. Any conflict opens opportunities to target civilians in disproportionate or indiscriminate ways according to the personal or political intentions of the parties involved.

B. Victims in the UN Resolutions 1566 (2004) and 1624 (2005)

The Resolutions also offers further adjectives to qualify victims of terrorism. They are fo-

cused in showing victims of intolerance and extremism; while the latter definition focuses on “harm to humans without specific mention ‘to political or religious motive’”, as Kent Roach noticed.³¹ While the UN Resolution 1373 (2001) was focused on monitoring financial resources that directly or indirectly support terrorists, the Resolution 1566 (2004) made a reference to victims through an intricate definition of that differs to elements provided by the studied Convention:

criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, and *calls upon* all States to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature.

28. See as examples, ILO Conventions 107 and 164 or the UN Declaration on the Rights of Indigenous Peoples, 2007.

29. “In this context the Kosovo Parliament proclaimed Kosovo’s international political independence on February 17th, 2008, transgressing UN Resolution 1244 that confirmed the UN’s attachment to international respect of the territorial integrity of the Federal Republic of Yugoslavia.” J. Duursma, p. 3.

30. Organisation des Nations Unies, “Un monde plus sûr: notre affaire à tous”, Rapport du groupe de personnalités de haut niveau sur les menaces, les défis et le changement, décembre 2004, quoted by Martin, Vanessa and Marc Olivier Benoit, *La Définition du Terrorisme*, p. 41.

31. Roach, Kent. *A Comparison of Australian and Canadian Antiterrorism Laws*. (2007) 30 U.N.S.W. L.J. 53.

The Resolution is emphatic in defining terrorism as a crime without considering elements from the Geneva conventions that should refine the discourse. It seems that the main victims are other than civilians per se; the expression about civilians is added as something secondary. Moreover, the expression ‘taking of hostages’ does not take into account prisoner of war rules for military and non-combatants as we saw before. Furthermore, it made special reference to victims in its preamble, “including children, caused by acts of terrorism motivated by intolerance or extremism in various regions of the world”. They will be victims of crimes intended for political, ideological, ethnic, or cultural extremist reasons. It recognizes also that families are also victims when article 10 suggests that an international fund should be desirable to compensate victims and their families, “which might be financed through voluntary contributions, which could consist in part of assets seized from terrorist organizations, their members and sponsors”. We could say that there are victims of extremist democracy too, because there were many terrorist attacks to promote this value in countries that are not democratic. For example, Cuba always reiterates that the United States never has attempted to extradite the two terrorists involving in the tragic Cubana Flight 455 in 1976. They are protected by the United States arguing that they could face human rights’ risks in Cuba

and Venezuela after being released from other charges such as illegal migration.

Additionally, Resolution 1624 (2005) in their preamble emphasizes that victims are civilians of diverse nationalities and beliefs, caused by terrorism motivated by intolerance or extremism. It was also more abstract in determining that the victim is the civilization itself when expressly made reference to targeted religions and cultures. The Resolution 1624 makes a call for a dialogue among civilizations for “addressing unresolved regional conflicts and the full range of global issues, including development issues”. Consequently, they could be victims of gross crimes, even genocide. From this perspective, victims of terrorism are not neutral individuals in socially inclusive communities,³² as recent approaches seem to suggest. This was the approach that clearly legalizes the political rhetoric after 9/11 when Blair declared that “what happened on Tuesday was an attack not just upon the United States but upon the civilized world”; and Bush, that “this is the civilization’s fight... of all who believe in pluralism, tolerance and freedom.”³³ Furthermore, the 2005 World Summit Outcome was emphatic reaffirming those human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and legitimately constituted Governments acts could be destroyed by terrorists.³⁴ Off course, they do not include that anti-terrorism measures are also responsible to protect

32. Young 2002 in Sullivan, Dennis and others. Handbook of Restorative Justice, Routledge, 2006, p. 177.

33. In Donohue, Laura. The Cost of Counterterrorism, Cambridge, 2008, p. 7. Chapter The war model versus criminal law.

34. United Nations Resolution 60/1. <http://www.unodc.org/unodc/en/terrorism/index.html>.

human rights and democracy. Accordingly, “terrorists who seek to damage freedom and democracy will have achieved a far greater”.³⁵

The problem with these kinds of definitions is that opponents or different minorities are also targeted as suspected terrorists, affecting core values in pluralist societies. Nevertheless, posterior anti-terrorism approaches tried to moderate this latter discourse, such as the UN Global Anti-terrorism Strategy (2006) which explicitly said that terrorism cannot and should not be associated with any religion, nationality, civilization or ethnic group.³⁶

C. Victims in the UN Resolution 40/34 (1985) and UN Resolution 60/147 (2005)

Other international instruments explicitly define who is a victim of terrorism. The UN Declaration of the Rights of the Victims (1985) is one of the most relevant.³⁷ Its scope remains intact while the definition of terrorism was updated in several laws and policies after 9/11. It distinguishes between victims of crime and victims of abuse of power. Section A states that:

Victims of crime are “those persons who individually or collectively have suffered any kind of harm, including physical or mental injury, emotional suffering, economic loss or substan-



Victims of terrorism will usually be victims of crime because most of the laws criminalize terrorism and even abuse of power. In addition, the Declaration specifies that “any person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted or the familial relationship between the perpetrator and the victim.”

tial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws functioning within Member States, including whose laws proscribing criminal abuse of power.”

Section B defines victims of abuse of power as the same kind of victims “through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights”.

35. Ranstorp, Magnus and Paul Wilkinson, *Terrorism and Human Rights*, Routledge, 2008, p. 68.

36. United Nations Global Anti-terrorism Strategy Adopted by the General Assembly on 8 September 2006 <http://www.unodc.org/pdf/terrorism/Index/60-288en.pdf>.

37. A/RES/40/34. <http://www.un.org/documents/ga/res/40/a40r034.htm>

Therefore, victims of terrorism will usually be victims of crime because most of the laws criminalize terrorism and even abuse of power. In addition, the Declaration specifies that “any person may be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted or the familial relationship between the perpetrator and the victim.” This is also a definition that clearly include that victims could be individuals per se or collectivities. Determining categories of persons could be also useful to protect the rights of minorities when “victims’ perspective is considered a complication”.³⁸

It also includes as victims the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. Moreover, the Declaration emphatically states that victims have the right to reparation without any kind of distinction such as race, color, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability. On the other hand, the idea to protect assistance personal or persons preventing victimization comes from the international humanitarian approach interested

in protecting humanitarian workers during hostilities or armed conflicts. In this way, terrorism being a crime has also traces of war. According to J. Meharg,³⁹ “humanitarian workers are no longer safe. They are political targets in unconventional armed conflicts”; and they usually works clandestine and pull out according to the degree to which human rights are connected with the conflict. Mychajlyszyn argues that in “terror tactics, humanitarian space may be non-existent”;⁴⁰ these workers are more vulnerable to be targeted by war crimes and terrorism per se than the same military.⁴¹

UN Resolution 60/147 of 2005⁴² gives also a human rights approach to the terrorism phenomenon. The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law reiterates the definition of victims under the proposed scope of 1985, but without distinguishing between victims of crime or victims of abuse of power. If gross human rights violations were the terrorist method, victims could be defined under this legal instrument. However, this Resolution decides that “where appropriate, and in accordance with domestic law,” victims could also

38. Van Boven, Theo and others. Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms. Limburg University, 1992, p. 4 and 5.

39. Meharg, Sarah. *Helping Hands and Loaded Arms, Navigating the Military and Humanitarian space*, Pearson, 2007, pp. 34 and ss.

40. Meharg, Sarah. *Helping Hands and Loaded Arms*. *Ibíd.*

41. See also New York Convention of 1994 that aims to bring protection to UN officials and associate staff during armed conflicts.

42. <http://www2.ohchr.org/english/law/remedy.htm>

include the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. This disposition is particularly harmful excluding certain victims of terrorism because States under serious internal conflict could have the possibility to deny protection to individuals who have suffered harm intervening to assist others. In developing countries, it is usual that public servants, advocates or human rights activists interested in preventing or denouncing victimization are a special focus for threats or criminal acts from terrorists or state terrorism as well. Actually, there is an initiative to promote both approaches as a UN Convention on Justice and Support for Victims of Crime and Abuse of Power, including victims of terrorism to censure this phenomenon.⁴³

D. Victims of Terrorism according to their Special Status

Finally, other international instruments supply definitions to describe victims of terrorism according to special considerations about their status or vulnerability. The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973),⁴⁴ including their families,

is an example. Even though this instrument does not make explicit mention of terrorism, it considers that any intentional threat, attempt or crime against diplomatic agents and other internationally protected persons jeopardize their “safety creating a serious threat to the maintenance of normal international relations which are necessary for cooperation among States”, such as political terrorism could be interested in disrupting.⁴⁵ The Convention specifies that a first group of international protected persons are a head of State and their staffs, head of government or ministers for foreign affairs, and members of their families who accompany them; a second group, representatives or officials of a State, international organization or intergovernmental agency “who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household”. The means could be murder, kidnapping, violent attack upon the persons, their liberty or their official or private premises and transport.

The ECOSOC Guidelines for Children Victims and Witnesses of Crime⁴⁶ is another example that describes victims of terrorism that deserve

43. Ibid.

44. http://untreaty.un.org/ilc/texts/instruments/english/conventions/9_4_1973.pdf

45. See Rozakis, Christos. Terrorism and the Internationally Protected Persons in the Light of the ILC's Draft Articles [article] L.23 Int'l & Comp. L.Q. 32 (1974).

46. ECOSOC Resolution 2005/20 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime. <http://www.un.org/ecosoc/docs/2005/Resolution%202005-20.pdf>

special protection according to their vulnerability, taking into consideration their legal, social, economic, cultural and geographical conditions. Adopted in 2005, it defines measures to protect children and adolescents under the age of 18 that have been victims and witnesses of crimes regardless of their role in the offense or in the prosecution of the alleged offender or groups of offender terrorists. This approach shows special attention to vulnerable or defenseless persons that for their condition may not stop or resist the terrorist attack.⁴⁷ Terrorist children are also considered victims due to socio-economic or familial circumstances that pressure them to participate in terrorist activities, as others documents reiterates, *e. g.* the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules). The Guidelines promote special rights such as to be treated with dignity and compassion, non-discrimination, to protection, harmonious development, participation, to privacy, to be informed, to be heard and to express views and concerns; to effective assistance, to reparation, to preventive measures that proscribe more victimization and to be protected from hardship during the justice process. While deserving children's special protection, the governments prosecuting child terrorists are reluctant to comply with Children Rights or

to apply these kind of guidelines, treating them as witnesses, too. Being prosecuted as a terrorist in the military base of Guantanamo Bay, Omar Khaddar's case shows that anti-terrorism policy does not always aim this kind of consideration well.⁴⁸

II. Defining Victims of Terrorism in Domestic Law

A. Victims of Terrorism in Comparative Anti-terrorism Law

Other kinds of definitions arise from the domestic anti-terrorism laws that are a product of the trend that Roach defines as a criminalization of politics.⁴⁹ This trend does not consider that for the magnitude of the crime, criminal law cannot provide enough cornerstones to vest rights in different kind of victims that for dissimilar circumstances cannot obtain restorative and corrective justice inside the system, even though criminalization seems to be the "the ultimate tribute to victims"⁵⁰ that States undertake. Victims under this framework are only part of the political rhetoric to justify excessive measures to prosecute possible or suspected terrorists more than defining elements to enable victim's

47. See the classical notions of victimology from Hentig. See Sullivan, Dennis and others. *Handbook of Restorative Justice*, Routledge, 2006, p. 276.

48. Human Rights Watch. *The Omar Khadr Case, A Teenager Imprisoned at Guantanamo* <http://www.hrw.org/legacy/background/usa/us0607/us0607web.pdf>

49. Kent Roach, "The Dangers of a Charter-proof and Crime-based Response to Terrorism" in Daniels, Macklem and Roach (eds) *The security of Freedom: Essays on Canada's Antiterrorism Bill* (Toronto: University of Toronto Press, 2001), p. 141.

50. Roach, Kent. *The Criminal Law and Terrorism*, in *Global Anti-Terrorism Law and Policy*, Victor Ramraj, Michael Hor, and Kent Roach eds., Cambridge University Press, 2005.

access to justice. From a theoretical account, victims in comparative anti-terrorism law are seen as a means used by perpetrators to pursue their goals. In this kind of criminal type, the passive subject usually is the state as the political regimen or the rule of law. Victims are only defined as victim as the terrorist method more than the main target from terrorist acts. They are in a secondary position in the criminal type. Much of this criminal legislation generally preserves the idea of victims of political, religious or ideological causes.⁵¹

The most relevant anti-terrorism law, for example, the UK Act (2000), the Australian Criminal Code (1995), the Canadian Criminal Code (and Bill C-36) and the US Patriot Act (2001) explicitly defines terrorism cataloguing a variety of victims as tools for crimes or victims of terror as a method aimed to intimidate the public, or to compel the government, persons and domestic or international organizations.⁵² Victims could be physically harmed persons (any mention that they could be physiological or psychiatric harmed persons), death

persons and endangered persons from terrorist activities. In addition, they could be owners or possessors of damaged property or business. Other groups of victims are abstract individual or collectivities that without being harmed directly, they will also suffer the terrorist impact. They could be a public in general affected

or menaced from terrorist health risks; users and operators of disrupted governmental services, electronic systems, transport, or other essential public or private services (because water is being privatized). Going further, they could be also the electors if the terrorist acts aim to disrupt democratic processes. It is important to clarify that the UK Act of 2000 explicitly excludes as a victim any person committing the terrorist action.

The US Victims of Crime Act (1984) was amended to define the victim of terrorism as a person who is a national of the United States or an officer or employee of the United States Government who is injured or killed as a result of a terrorist act or mass violence occurring outside or within the United States.

Protectionist criminal laws from England, Canada and the United States were careful including that victims could be citizens, federal agents and provincial public servants affected by terrorist in order to claim extradition of suspected terrorists.⁵³ The US Patriot Act includes resi-

51. See also Kent Roach, "Sources and Trends in Post 9/11 Antiterrorism Law" in Benjamin J. Goold and Liora Lazurus (eds) *Human Rights and Terrorism* (Portland, OR: Hart Publishing, 2007), Section III.

52. Section 83.01 (b) (i) Canadian Criminal Code. See: Roach, Kent. A Comparison of Australian and Canadian Antiterrorism Laws. (2007) 30 U.N.S.W. L.J. 53, p. 57.

53. <http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=2330951&Language=e&Mode=1&File=39>.

dents and extends the criminal scope indicating that persons means any individual, firm, corporation, educational institution, financial institution, governmental entity, or legal entity or other entity. In addition, the United States approach distinguishing between victims of domestic terrorism and victims of federal terrorism as a way to protect a broader catalogue of public servants beyond the international protected persons, including too nationals living outside the country.⁵⁴ It aims to criminalize as terrorism crimes that usually were not considered as terrorism per se in the past. Victims could be killed or kidnapped congressional, cabinet, and Supreme Court agents, murdered or slaughtered foreign officials, official guests, or internationally protected persons; dead or kidnapped President and Presidential staff; nationals living outside the country; and killed or attempted killed national officers and employees. Other main aspect of the US Patriot Act is that it includes any targeted person affected or menaced by a terrorist using explosives, biological, chemical and nuclear weapons, or any other dangerous weapon.

Despite the longer catalogue of possible victims, it is also meaningless seeing the remote circumstances that civilians or common victims could

participate effectively in the new criminal procedures or could guarantee any restoration under criminal schemes. As a result, the same systems enacted bills or codes to describe victims. I will cite the most significant after 9/11. The US Victims of Crime Act (1984)⁵⁵ was amended to define the victim of terrorism as a person who is a national of the United States or an officer or employee of the United States Government who is injured or killed as a result of a terrorist act or mass violence occurring outside or within the United States, but if the victim is less than 18 years of age, incompetent, incapacitated, or deceased, includes a family member or legal guardian of that person. However, this simple definition is developed for further restrictions on the funds to compensate victims of terrorism. This creates conflicts.

For example, the US 9/11 Fund Compensation⁵⁶ was extended to cover victims like rescue, recovery or cleanup workers or volunteers who were present at the World Trade Center site, Ground Zero, between September 11 and September 15, 2001 and have medical documentation that they sustained an injury resulting from their presence at Ground Zero. As a result, workers that have been present after 15 September were not protected. They are claiming in the

54. Title 22 of the United States Code, Section 2656f (d) and the Patriot Act section 808. See *Patterns of Global Terrorism*. Washington: Dept. of State, 2001: vi, *ibid*. They explained that the term “terrorism” means premeditated, politically motivated violence perpetrated against non-combatant targets by subnational groups or clandestine agents, usually intended to influence an audience. The term “international terrorism” means terrorism involving citizens or the territory of more than one country.

The term “terrorist group” means any group practicing, or that has significant subgroups that practice, international terrorism

55. Title 42 Chapter 112, § 10603b § 10603b. Compensation and assistance to victims of terrorism or mass violence.

56. http://www.nycosh.org/environment_wtc/Victim_Comp_Fund_factsheet.html.

judiciary.⁵⁷ Other persons not workers physically injured must have received medical treatment within 72 hours of 9-11-01 excepting for pulmonary or sinus illness that could be developed a posteriori. The rescue workers had a rule in which the Special Master had the discretion on a case-by-case basis to extend the 72-hour rule, and persons that for any reason did not receive medical treatment in this term may not obtain compensation under the fund. Furthermore, the Fund did not cover Post Traumatic Stress Disorder (PTSD) alone; victims must show documented physical injury from the terrorist attack. Therefore, it is not surprising that many excluded workers and neighbors are claiming in the United States judiciary to be recognized as victims.

B. Victims of Terrorism in Comparative Law Scholar

The clearest account of victims though legal definition of terrorism was the product of comparative law in 1988. Alex Schmid and Albert Jongman⁵⁸ after analyzing more than 109 legal documents and definitions of terrorism conclude that the way in which a person become a victim defines the technical difference between terrorist acts and other crimes. Therefore, they stated the following conclu-

sion that is still valid in which I will underline the victims' elements:

“Terrorism is an anxiety-inspired method of repeated violent action, employed by semi or total clandestine individual, group or state actors, for idiosyncratic, criminal or political reasons, whereby –in contrast to assassination– the direct targets of violence are not the main targets. The immediate human victims of violence are generally chosen randomly (target of opportunity) or selectively (representative or symbolic targets) from a target population, and serve as message generators. Threat –and violence– based communication processes between terrorist (organization), (imperiled) victims, and main targets are used to manipulate the main target (audiences (s)), turning it into a target of terror, a target of demands, or a target of attention, depending on whether intimidation, coercion, or propaganda is primarily sought.⁵⁹

Using this scope, we can understand what victims as terroristic method mean. Schmid and Jongman also traced concepts attached to victims in the 109 definitions. For example, they found that 37.5% of definitions differentiated between immediate victims and main targets; 17.5% made reference to civilians, non-combatants and neutral persons; 15.5% accentuated the innocent character of victims; 13.5% involved

57. John J. Goldman, N.Y. Rescuer Workers more to Sue over Respiratory Damage. LA Times Feb 12,02 at A10.

58. Schmid, Alex, Albert Jongman and autres. Political Terrorism: A New Guide to Actors, Authors, and Concepts, Data Bases, Theories and Literature, New Brunswick, N.J., 1988, p. 28 and ss. Cited also by Martin, Vanessa and Marc Olivier Benoit, La Definition du Terrorism: Un Etat des Lieux, in David, Charles et Gagnon Benoit, Repenser Le Terrorisme, Concept, Acteurs et Reponses, PUL, 2007, pp. 23.

59. Schmid, Alex, Albert Jongman and autres. Political Terrorism, Ibid.

The clearest account of victims though legal definition of terrorism was the product of comparative law in 1988. Alex Schmid and Albert Jongman⁵⁸ after analyzing more than 109 legal documents and definitions of terrorism conclude that the way in which a person become a victim defines the technical difference between terrorist acts and other crimes.

by terrorists, but it should also consider “the geographic scope of the terrorist act and his harmful consequences”. These latter elements that seem practical for some economical or political reasons could promote unequal treatment of victims of terrorism and further violence in critical regions. Besides this divergence, it is desirable that anti-terrorism law and policy understand the historical or socio-geographical perspectives in which the terrorism has been developed to protect possible target victims or populations or to grade punishments according to the harmful effects on persons, environments, or properties.

concepts about symbolic targets; and 4% mentioned third parties. It is relevant that 41% of the definitions made mention to psychological effects and anticipated reactions from victims and main targets.

In contrast, other scholarly research recently describes other elements for the definition of terrorism that could limit the victims’ scope. For example, B. Koch from the European Center of Tort and Insurance Law argues that the “formulas defining terrorism were primarily used to restrict compensations rather than describe the phenomenon”.⁶⁰ From his view, a definition of terrorism not only should contain the intentionality of the acts and the means used

C. Victims of Terrorism from a Public Health Definition

A group of twenty one doctors and directors from national and foreign Schools and Institutions of Public Health and Medicine⁶¹ in 2003 discussed that anti-terrorism law did not yet offer a workable definition of terrorism according to its impacts on victims. They said also that actual definitions do not facilitate clinical and scientific research, education, and communication about terrorism-related events or disasters. I agree. Terrorism is defined more for the quality of perpetrators than for the magnitude of the impact over different kinds of victims. Accordingly, they suggested this definition focused on “addressing the health consequences of terrorism”:

60. Quoted in Jorri Duursma. Definition of Terrorism and Self-determination, p. 1.

61. Arnold, Jeffrey, Per Örténwall and others. A Proposed Universal Medical and Public Health Definition of Terrorism, in Prehospital and Disaster Medicine, Vol.18, No. 2, April – June 2003, 47 to 52. p. 1

“terrorism is an intentional use of violence — real or threatened—” in which victim could be “one or more non-combatants and/or those services essential for or protective of their health, resulting in adverse health effects in those immediately affected and their community, ranging from a loss of well-being or security to injury, illness, or death”.

It still excluded combatants as victims of terrorism, but this definition is more scientific and workable than one offered by the US National Center of Health Statistics (NCHS) based on the FBI concept of terrorism as “injuries resulting from the unlawful use of force or violence against persons or property to intimidate or coerce a Government, the civilian population, or any segment thereof, in furtherance of political or social objectives”.⁶² The group was right and the NCHS accepts the limitations around the latter definition. First, it is impossible for a practitioner to qualify subjectively the event to provide a priori a terrorism certification. It should be a secondary task after assisting patients and being directed by investigators. Second, the ICD 10 and ICD – 9 CM classifications proposed for deaths, injuries and illnesses associated with terrorism are quite useful in a first instance of the emergency; however, impacts of threats or secondary impacts of terroristic violence have symptoms that occur many years later. These impacts usually are not reported as victims of terrorism in

the officials’ statistics. For example, it is not the exact number of actual respiratory patients 8 years after the 9/11 terrorist attack, the number of mental illnesses reported in relatives of victims of state terrorism in Kosovo or the number of starving people for the chemical scorching of lands in Colombia that are immediately known.

I found that the most important contribution made from the medical definition is its objective account about victims of terror as a method. In fact, practitioners including those in warfare should assist victims regardless of other considerations such as the terrorist identification. This latter, as the group said, “is immaterial to the task at hand”. Furthermore, they have other arguments that supports my idea about rejecting collateral damage as a way to justify certain terrorism acts. “Unintentional violence against human beings, still is violence and produces similar health changes”.⁶³ Therefore, a generic term could be useful to determinate a new scope for victims rights. They also explained that violence forces unnatural change in human populations, like “agricultural terrorism connected with psychological harms, maldevelopment, injuries or deaths; international starvation, with injuries related to deprivation; cyber terrorism, with direct psychological effects and indirectly limiting access to essential services”.⁶⁴ Other indirect effects of terrorism could also provoke health public emergencies if it aims to threaten

62. http://www.cdc.gov/nchs/about/otheract/icd9/terrorism_code.htm

63. Arnold, Jeffrey, Per Örténwall and others. A Proposed Universal Medical and Public Health Definition of Terrorism, pp. 50 to 52.

64. Arnold, Jeffrey, Per Örténwall and others. A Proposed Universal Medical and Public Health Definition of Terrorism, Ibid.

or destroy healthcare systems, to disrupt essential services like water, food, sanitation or shelter, and to lead to economic loss limiting access to essential services. “Terrorism accomplishes all of this without any direct injury or loss of life” and it can happen in peacetime or war conflicts. The group emphasizes that it does not matter if the perpetrators are states, guerrillas, criminals, freedom fighters, lonely persons or fanatics. From my view, these were relevant quotes from a legitimate source that shows different ways in which political and legal definitions did not take in consideration certain technical criteria defining terrorism. This is a task beyond the passionate criminalization of conduct after an attack occurs.

D. Victims of Terrorism under Colombian Law

We can say that in general, the Colombian anti-terrorism law has similar trends to the comparative law because the State is active in participating in the international treaties. However, our version of terrorism is particular considering that it could happen in the context of the armed conflict or outside it. Most of the victims of terrorism are the same victims of the armed conflict since guerrillas and mercenaries were included in the international lists of terrorists. The Criminal Code reformed in 2000⁶⁵ involves two kinds of terrorist conducts in which the state –the rule of law– is the passive

subject of terrorist conduct from the perspective of national security. If any of this conduct leaves human victims and damage to public or private properties, a concurrence of crimes will be analyzed to punish the agents. For instance, a terrorist act could be concurrent with aggravated assassinations, genocide, kidnapping, forced disappearance, torture, etc. It made possible that two kinds of victims coexist: the rule of law and the life and personal integrity of the murdered. Therefore, the state is represented by the national general attorney; and the victims, by their legal agent, spouse or common law partner, or legitimate inheritors.⁶⁶

The human victims under Article 144 could be segments of the civil population damaged from indiscriminate or disproportionate attacks during hostilities or armed conflict, or from repressive acts or threats of violence directed to provoke populations into fear. The international organizations are included too. The human victims under Article 343 could be a population or segment of population victimized for any provocation or dangerous threats that menace the life, the physical integrity, the inhabitants’ freedom, the buildings, the media, the transport system, or any other system. The punishment is aggravated if they involve younger criminals, takes institutional, diplomatic or army buildings, alters democratic events, or the agent is a public servant. Both approaches do not take into account terrorists’ purposes. Both kinds of

65. Law 599 of 2000.

66. Ricardo Bejarano Beltran. *Comentarios sobre el tipo penal de terrorismo y otros crímenes conexos*, Universidad Nacional, 2007-2008. See also: Cerón Eraso, Efraín. *La Víctima en el Proceso Penal Colombiano, Doctrina y Ley*, 2007.

terrorist conduct do not imply a previous purpose of the perpetrator. However, the Criminal Code enacted two other penal types to punish conduct against the democratic regime. Article 468 criminalizes the agitation or any acts provoked by tumults that violently require from the government to do or to abstain from doing any act; Article 469, the sedition or any transitory intent for obstructing the constitutional or legal regime.

In addition, Colombia accepts the definition of victims under the UN Resolution 40/34 of 1985 and the Resolution 60/147 of 2005. The Constitutional Court in the Case C-370 of 2006 reiterated the application of human rights Conventions in this matter. It emphasized that for equality and procedural rights, non-consanguine relatives and other close persons to the main victim are also victims according to the significance of the damage. Moreover, moral victims which cannot prove a patrimonial damage are also entitled to participate in criminal justice procedures. Victims only need to show a real or specific damage to have rights.

This is the opportunity to make a political clarification. International community generally has the stereotyped idea that terrorism in Colombia is linked to narcotraffic⁶⁷ due to the popular drug salers' terrorism from 1980 and 1993 during the life of Escobar and Gacha. This is a common mistake because terrorism in Colombia is linked to the way in which armed actors pro-

voke terror since 1954. The theoretical observations made in the first chapter of this paper about victims of war crimes should be applied. Javier Giraldo SJ, leader of the civilian Intercongregational Commission of Justice and Peace, was right in explaining that international press agencies have been more focused on the stereotype ignoring the real victims in Colombia. For example, he made the comparison that international news reported extensively a narcotraffic bomb killed 20 persons on January 30 in 1993, when less or no attention was made to the 134 cases of victims from political slaughters made by the paramilitary and the security forces in the same month to terrify segments of populations. Other examples that "between 1989 and 1990, the most related narcotraffic bombings were carried out, ONG's registered only 227 drug fatalities, when during the same time period they registered 2,969 victims of political murders, not counting deaths in combat between the army and the guerrillas", a number of victims in a year similar to the 9/11 tragic terrorist attack in Manhattan. These numbers do not show collateral victims of the conflict in this terrorist context.

Others are the victims of terrorism from state agents involved in cases of extra judiciary executions, torture or other kinds of crimes against humanity in the same context of the armed conflict.⁶⁸ This is another example that criminalization does not prevent neither victimization nor reparation. On the contrary, most victims find

67. Javier Giraldo, p. 19.

68. Colombia Nunca Mas Crímenes de Lesa Humanidad. Zona 7, 1966-2000, 2000.

that their situation inside the criminal process is worse or more dangerous. The high degree of impunity for this kind of terrorist act makes it impossible that they obtain at least restorative justice. This is a problem that many scholars denounce in cases in which human rights violations are involved.⁶⁹ For example, only 4% of crimes related to these cases until 1991 obtain a decision that do not imply an effective punishment to criminals.⁷⁰ Other examples from 1991 to 2000 shows how impunity is connected to crimes from state terrorism due to different pressures even though many investigators bring the evidence: from 2.632 cases political slaughter only 310 were to justice, and 3/4 of these latter were declared closed.⁷¹

Another problem defining victims of terrorism is that injured or slaughtered persons through open fire weapons, the usual method to provoke terror, are not considered as victims of terrorism under the regulations to guarantee the free and equal hospital attendance for victims of terrorist acts.⁷² The Decree 263 of 1993 only covered terrorist events from bombings or other explosives aimed to provoke communities into

panic and to damage persons or properties. This is one point that the original project Law of Victims suggested to change. I had explained elsewhere that this regulation enacted the public or private hospitals' and clinics' due obligation to bring immediate attendance to victims of terrorism without any previous condition for their admission or any differential treatment for their social or economic position. In addition, it created a particular public fund to support urgency and post-therapy costs and several sanctions for institutions that do not enforce the norm.

Furthemore, the armed actors have been catalogued as terrorists. The legal definition of victims is now under a classification of measures for justice described into the new Victims Law (Law 1448 of 2001);⁷³ this is a mystery because Colombia has no official definition of the conflict under international law that allows for an academic debate without being menaced or accused by the armed actors. The law just speaks about victims in general without classifying victims of guerrillas, mercenaries or paramilitary, and of state terrorism. Articles 1 and 3 of the new law states children and adolescents that

69. Giraldo, Javier SJ, *Colombia the Genocidal Democracy*, Common Courage Press, 1996. Valencia Restrepo, Dario y otros., *Derecho Penal, Terrorismo y Legislación*, Universidad Nacional de Colombia, 1991. *Colombia Nunca Mas Crímenes de Lesa Humanidad. Zona 7, 1966-2000, 2000.*

70. Valencia Restrepo, Dario y otros., *Derecho Penal, Terrorismo y Legislación*, p. 160.

71. Giraldo, Javier SJ, *Colombia the Genocidal Democracy*. *Passim*. *Colombia Nunca Mas Crímenes de Lesa Humanidad. Zona 7, 1966-2000, 2000. passim.*

72. Monroy, Lilibiana. *Leyes Cortas sobre Actos Terroristas para Efectos de Salud*, en *El Pulso*, Medellín, Año 4, No. 45, Junio 2002. Decree No. 263 de 1993, "Por el cual se dictan medidas tendientes a garantizar la atención hospitalaria, a las víctimas de atentados terroristas"

73. http://www.bibliotecajuridica.com.co/LEY_1448_DE_2011.pdf.

were abused and raped are victims. Also, victims may be:

Se consideran víctimas, para los efectos de esta ley, aquellas personas que individual o colectivamente hayan sufrido un daño por hechos ocurridos a partir del 1° de enero de 1985, como consecuencia de infracciones al Derecho Internacional Humanitario o de violaciones graves y manifiestas a las normas internacionales de Derechos Humanos, ocurridas con ocasión del conflicto armado interno.

También son víctimas el cónyuge, compañero o compañera permanente, parejas del mismo sexo y familiar en primer grado de consanguinidad, primero civil de la víctima directa, cuando a esta se le hubiera dado muerte o estuviere desaparecida. A falta de éstas, lo serán los que se encuentren en el segundo grado de consanguinidad ascendente.

De la misma forma, se consideran víctimas las personas que hayan sufrido un daño al intervenir para asistir a la víctima en peligro o para prevenir la victimización.

La condición de víctima se adquiere con independencia de que se individualice, aprehenda, procese o condene al autor de la conducta punible y de la relación familiar que pueda existir entre el autor y la víctima.

Victims before 1985 will not have economic reparations, but they will be entitled just to symbolic measures. These victims are defined as the general society without any individualization. This definition is useful to help, to assist, and to integrally repair victims of the armed conflict without identifying the agents, however, the definition excludes dependents and relatives that could be victims or people interested under

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the damage jurisprudence and the inheritance regimen of the Civil Code. In this case, those kinds of victims could access justice using legal procedures that in developing countries as Colombia is slow and fraught with unjust decisions. This is really contradictory because the major measure proposed under the new law of victims is the land and other goods restitution that were taken by armed actors or abandoned by displaced victims. The law also made some reference to the international legislation by introducing as victims staff members of the assistance and prevention teams.

The Colombian law, in contrast to the doctrinal approaches, includes the definition of victims military and police staff working under special regimens; however, the members of armed actors cannot be victims excepting minors that leave the group before their citizenship age. This is a particular article because the international regulation brings to rebellious actors using uniforms certain rights and duties similar to those of the official forces. Conversely, the Colombia law forces those armed actors to accomplish human rights regulations and the Geneva Convention of 1949 without defining their political status.

The initial project did not contemplate that relatives and dependents of armed actors could be considered as direct or indirect victims if they suffered into the armed conflict. This article was erased but it shows clearly a moral or social sanction against the armed actors.

This kind of latter resolution also does not consider rehabilitation and reconciliation politics to restore rights of members of those armed actors, for example, in specific contexts in which it could be possible to find legal evidence related to their acts or memberships were founded in legitimate defense against other illegal or

armed actors. In addition, the new law excludes victims of common delinquency like the urban narcotraffickers. So, if there are victims of terrorism committed by common criminals, their restoration will be in the judiciary system. This measure increases impunity due to the difficult task of determining actors and their financial patrimonies. For this reason, this consideration is more about defining policies than criminalization *per se*.

Law 1448 of 2011 also defines a differential treatment inside the public policy of victims according to their vulnerability inside the armed conflict like indigenous and other ethnic communities (ROM gypsies, afrocolombian descendents, raizals and palenqueras.) For example, the law defines that they should be consulted previously about projects of restoration, programs or financial resources that may affect them. This is a measure to preserve their culture and material existence according to their rights. This kind of regulation is constitutional to protect minorities but Colombia has not approved yet the Declaration on the Rights of the Indigenous Peoples (2007)⁷⁴ that protects members of those minorities regarding their economic and social rights, usually affected by terrorists (e.g. land access, natural resources management, etc).⁷⁵

74. <http://www.un.org/esa/socdev/unpfi/es/drip.html>.

75. Commission for the Peace and the Justice. Colombia Nunca Más. Crímenes de lesa humanidad. CODHES, Consultoría para los derechos humanos y el desplazamiento. Lors d'un séminaire international sur le thème des déplacés organisé à Bogotá du 30 mai au 2 juin 2000, and recent statistics Human Rights International Commission website, International Amnesty website and the Declaration of Organización Nacional Indígena de Colombia in November 11 of 2008.

76. Declaration of Organización Nacional Indígena de Colombia in November 11 of 2008. The government argued in 1998 that there were 81 IP. In 2002, there were recognized other 3 communities and in 2005 other 4. Ministerio del Interior y de Justicia. "La población étnica y el Censo General 2005"; *Colombia: una nación multicultural. Su diversidad étnica*, p. 35.

In addition, there are still ethnic communities without legal recognition into the governmental index although the universities have studied and documented their existence.⁷⁶ In those indices, only is member who dwells into the community land. Other problem is the lack of consistent official statistics related to the number of members; a problem that scholars and human rights ONG claims it is crucial to discover human rights violations committed by state terrorism and other armed actors. For example, there is no official answer about why indigenous peoples in Colombia decreased from 933.800 to 701.860 or in which circumstances 75.000 people were displaced to other municipalites losing their land tenure between 1995 to 1997.⁷⁷

Then, individualizing or determining ethnic victims of terrorism will be a difficult task and the restoration measures will be collectives, affecting the right of every individual to obtain specific rights if they are dispersed to prevent more attacks. Furthermore, it could be unequal considering that in those communities, women have different status and they do not have the same right or leadership like men in managing resources caused by compensations under the new law.

Final Considerations

Defining victims needs more than criminalization of terrorist conduct. The broad definition of terrorism in counter-terrorism law and poli-

cy is more focused on defining perpetrators than victims. These latter are only described as tools or the method used by terrorists to pursue their ideological or political intentions in order to intimidate a population or to compel institutions to do or to abstain from any act or decision. Only certain definitions like the public health approach seem to see the victim as the main element into a possible definition of terrorism. It tries to take in account that victims are also psychologically or psychiatrically affected persons and their communities from terrorist acts or threats. A lack of gender approach was also evident on anti-terrorism laws. Only the UN Resolutions on the Rights of the Victims show the importance to not discriminate against persons. This is because legal systems are embedded in internal economic considerations that see more efficient to visualize collective rights making ethereal civil and human rights of specific individuals. Victims are also considered little battle horses in the political rhetoric to justify anti-terrorism extra measures.

On the other hand, defining terrorism as a war provides consistent legislation that could vest better rights in victims. Comparing international approaches, terrorism as a war is more consistent with vested rights in victims using international humanitarian rules independently of the perpetrator's identity. Under this domain, it is difficult also that States want to include themselves as possible sources of terrorism during peacetime or sources of war

77. See census and data in Cletus Gregor Barie, *Pueblos indígenas y derechos constitucionales en América Latina*, México, 2003, p. 45; Bases para el Plan Nacional de Desarrollo 2002 - 2006. Capítulo III. Construir Equidad Social.

crimes during armed conflict because terrorism is a term to censure certain attacks, but there are others that are politically endorsed as non-terrorists. Another alternative is to comply with UN Resolutions on the Rights of the Victims. These resolutions supply elements that complement the criminal domestic approach due to several difficulties to describe different kinds of victims according to the magnitude of the terrorism act. Evidence shows that terrorism is more than crime, it is near to war. In addition, any international definition includes military forces or future generations as possible victims of actual terrorism.

From my perspective, due to the nature and scope of a terrorist act, terrorism is any crime against humanity intended to intimidate groups, minorities or populations or to compel governments to do or to abstain from doing any act or decision. As a crime against humanity, the domain of defining victims will go beyond domestic criminal law and can be also defined as gross human rights violations such as genocide. Attaching the human right element, terrorism will be more objective including other sources than crimes from extremism or intolerance; it does not matter if it occurs during peacetime or armed conflict. Terrorism is a systematic method to terrify persons; it is not simple assassinations or extortions of individuals. Therefore, humanity is the best legal term to include possible victims, including the non-combatants that anti-terrorism laws want specially to protect. Defining victims is difficult too. I argue

that victims of terrorism are any person affected directly or indirectly by a terrorist act, including new generations. This simple definition is dispossessed of any consideration that may discriminate against any person for their health conditions, age, race, nationality, ethnicity, etc. In fact, it can also include relatives, owners, etc. In addition, recognizing the effect on future generations is not only useful to prevent terrorism learning from the past. It is certain that impacts of terrorism on natural and urban environs could also affect the mental or physical health of populations, including new generations. From bombings to starvation, seniors, women, men, children and newborns feel the horrible effects of violence; this is impossible to erase only with criminal prosecutions.

Defining victims is a first task. Another is to protect their rights after a terrorist act occurs. Both tasks will be part of a policy that coherently defines methods of restorative justice and corrective justice through a clear understanding of the context in which terrorism occurs. The simple retributive justice is not enough to satisfy victims of terrorism. The nature of the terrorism shows that actually, there is no real possibility to obtain justice by prosecuting suspected terrorist or low-combatants. For this reason, I agree with Kent Roach in their proposal that it is better to be realists and understand that some kind of terrorism cannot be eradicated at all. The best option is to design plans to prevent and to minimize terrorism's effects on persons and their rights.⁷⁸ Terrorist acts are chaos, are

78. Roach, Kent. The Criminal Law and Terrorism, in *Global Anti-Terrorism Law and Policy*, Victor Ramraj, Michael Hor, and Kent Roach eds., Cambridge University Press, 2005, p. 147.

emergencies, no simple crimes. As emergencies, policies and plans are necessary. Otherwise, assistance will be also part of the chaos.

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