

“Risk that the exception will become the rule”

Can we be at war against terrorism?

It is very difficult to qualify global terrorism in legal terms. The 9/11 attacks could qualify as crimes against humanity under the Statute of the International Criminal Court: “a widespread or systematic attack directed against any civilian population, with knowledge of the attack” instigated or directed by a Government “or by any organization or group”. The USA chose to qualify the attacks as an act of war, both transferring full power to the President and invoking an act of aggression under international law in order to justify a so-called preventative legitimate defence, which was the supposed reason for their intervention in Iraq, the result of which we all know.

The French penal code incriminates terrorism and also defines it as a crime against humanity. One can talk about war to emphasize the tragic dimension, but the “Islamic State” is not a State under international law even if it is increasingly taking the form of a de facto state. We are dealing with pre-globalisation legal tools based on sovereign States and interstate international law.

What would be an apt international framework with which to fight these new threats?

Globalisation has reinforced the interdependence of countries. A global community is currently taking shape but without the legal concepts to tackle this new so-called “post-modern” situation where the line between a war and a crime is blurred, as was the case in pre-State societies.

It would require a global declaration of interdependence, along with principles of planetary solidarity and co-responsibility. In this respect, terrorism raises the same issues as global warming: what is an appropriate form of global governance that ensures the global good? Who are the stewards of an earth in which we can safely live in the context of global warming? Who are the stewards of peace in the context of global terrorism?

A new international legal framework is required in order to ensure these global commons are protected. In the 18th century, the international community fought against what were then called the enemies of mankind, i.e., pirates. Terrorists are perhaps the pirates of the 21st century.

Is France's state of emergency an appropriate response and a legitimate decision?

It was a better response to apply the 1955 state of emergency law than article 16 of the Constitution, which confers full powers to the French President. The Head of State had no choice if he wanted to make a prompt, visible retaliation against the attackers. On the other hand, this situation undoubtedly calls for a reform of our institutions over the long term. But this can only happen, as the President pointed out, under the Rule of Law and in line with France's international obligations. Foremost among these is the European Convention on Human Rights, which can be overridden in the event of “war or other public emergency threatening the life of the nation”, but must be “strictly restricted to the exigencies of the situation”.

In this case, a country can derogate from certain fundamental rights by taking measures which restrict, for instance, respect for freedom, privacy and freedom of expression, as long as this does not affect what are called non-derogable rights, i.e., essentially the right to respect human dignity, which prohibits torture and other inhuman treatment, even towards “barbarians”. Extradjudicial house searches, which impinge upon privacy, as do house arrests under conditions derogating from the respect for freedom of movement, would probably be allowed if the Council of Europe is informed of the measures taken and the reasons for these. The situation is very different to the USA where the state of emergency can only be invoked through war, without international control.

Is it not risky for France to extend its state of emergency for three months?

If we are effectively caught up in a “war” against global terrorism, it's going to go on for a long time. This risks jeopardising humanist values under the pretext of defending them, as the Americans did when they authorised torture and opened Guantanamo Bay. The risk is also that the exception will become the rule, as it will be difficult to put an end to these measures. In a war, the usual pacification process is a peace treaty. Right now it is hard to imagine with whom a peace treaty could be drawn up.

In a seemingly never-ending situation like this, the international legal framework needs to be adapted accordingly. In the meantime, we can only make do with what we've got, and use the old legal framework for a new situation.

Doesn't the increase in security laws over the last twenty years make the state of emergency measure somewhat redundant?

It's true that domestic law already allows a number of things, and there might have been a symbolic purpose in applying the state of emergency. What is concerning is that each terrorist attack is followed by a legislative tightening, without resulting in any satisfying outcome. There is a sort of race, which over the long-term could be lethal for democracy.

What is the approach of our neighbouring countries to these issues?

German Basic Law provides for a domestic and international “state of necessity” but is limited to the transfer of powers to the Chancellor, without suspending fundamental rights. German constitutional law is dictated by the desire to maintain, as far as possible, all guarantees of the rule of law, even in exceptional circumstances. In Spain, the 1978 constitution defines three so-called temporary states (state of alert, state of emergency and state of siege [martial law]) and refers to terrorism, but specifies which rights may be suspended.

In France, there is no provision on terrorism in the Constitution. Yet the situation has changed since 1958 with terrorism's shift in magnitude, and the coming into force of the European Convention on Human Rights. If we change the framework for transferring powers, this requires specifying the duration, conditions, guarantees and restrictions, including the rights which cannot, even temporarily, be derogated.