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HUMAN RIGHTS, RELIGION AND TERRORISM¹

Direitos humanos, religião e terrorismo

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Abstract: This paper has as its object the current reflection on the protection of human rights in the fight against terrorism, above all, the most intolerant one based on a closed and sectarian view of the religious phenomenon. Having this in mind, it seeks, first, to understand the movement for the internationalization of human rights and its impact on the contemporary human rights agenda, especially in relation to the use of force and the fight against terror. Afterwards, it focuses on seven main challenges and perspectives, however not excluding others, religious-based terrorism from the perspective of international human rights law, namely: creating a specific international Convention for the prevention and combating of terrorism; understand terrorism as a crime against humanity within the jurisdiction of the International Criminal Court; endorse the idea that the fight against terrorism will only be effective with the respect and promotion of human rights; demand that anti-terrorist measures respect the essential core of human rights protected by international human rights treaties; prevent and punish discriminatory measures in the name of anti-terror strategies; fight religious-based fundamentalism and ensure pluralism, diversity and inter-religious dialogue; and identify, exchange and promote best practices for combating terrorism that respect human rights and fundamental religious freedoms. All supported by the point of view that the commitment to human rights implies a cogent exercise of otherness and tolerance as a contribution of the force of law and not of the right of force.

Keywords: Human rights. Terrorism. Religion.

Resumo: O presente artigo tem como objeto a reflexão atual sobre a proteção dos direitos humanos ante o combate ao terrorismo, sobretudo, aquele mais intolerante calcado em uma visão fechada e sectária do fenômeno religioso. Para tanto, busca, primeiro, compreender o movimento de internacionalização dos direitos humanos e seu impacto na agenda contemporânea de direitos humanos, em especial em relação ao uso da força e combate ao terror. Após, enfoca sete desafios e perspectivas principais, porém não

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excludentes, para o enfrentamento do terrorismo de base religiosa sob a ótica do Direito Internacional dos Direitos Humanos, a saber: criar uma convenção internacional específica para a prevenção e o combate ao terrorismo; compreender o terrorismo como um crime contra a humanidade de competência material do Tribunal Penal Internacional; endossar a ideia de que o combate ao terrorismo só será efetivo com o respeito e promoção dos direitos humanos; exigir que medidas antiterroristas respeitem o núcleo inderrogável de direitos humanos protegidos pelos tratados internacionais de proteção dos direitos humanos; prevenir e punir medidas discriminatórias em nome de estratégias antiterror; combater o fundamentalismo de base religiosa e assegurar o pluralismo, a diversidade e o diálogo inter-religioso; e identificar, intercambiar e promover as *best practices* para o combate ao terrorismo que respeitem os direitos humanos e liberdades religiosas fundamentais. Tudo fomentado pela ótica que o comprometimento com os direitos humanos implica um cogente exercício de alteridade e tolerância como contribuição da força do direito e não do direito da força.

Palavras-chave: Direitos humanos. Terrorismo. Religião.

Introduction

Almost twenty years of conflict in Afghanistan between radical Muslims and non-Muslims, the conflicts in Nigeria between Christians and Muslims, the Shiites and Sunnis fighting in Iraq, the continuing tension between Jews and Muslims in Israel and Palestine, the religious division of Sudan, which resulted in a flow of millions of refugees, the civil war in Syria reaches almost a decade; all these, among others, are living examples of how, in the name of the war on terror, human rights can be violated.⁴ The refugee crisis, which reached its peak since the Second World War, is a direct and immediate consequence of these conflicts and demonstrates how humanitarian consequences of fighting religious-based terrorism are globally felt. Therefore, the issue is not only on the global agenda, but is growing at a fast pace that affects everyone and needs to be addressed.

When Joaquin Herrera Flores announced that human rights represent “*processes of struggle*”⁵ – he was not referring to this struggle; but he was mentioning the resistance contained in the expansive force of the affirmation and promotion of human rights. Another is the fight that destroys the basis of life of populations, which discards

⁴ These are the provisions of the UN Security Council resolution which show what is stated here: “*Expressing its gravest concern at the continued suffering of the Syrian people, the dire and deteriorating humanitarian situation, the ongoing conflict and its persistent and brutal violence, the negative impact of terrorism and violent extremist ideology in support of terrorism, the destabilizing effect of the crisis on the region and beyond, including the resulting increase in terrorists drawn to the fighting in Syria, the physical destruction in the country, and increasing sectarianism, and underscoring that the situation will continue to deteriorate in the absence of a political solution*”. UN. Resolution 2254 (2015). Adopted by the Security Council at its 7588th meeting, on 18 December 2015.

⁵ (Tradução própria). “*Processos de luta*”. (FLORES, Joaquín Herrera. *A (re)invenção dos direitos humanos*. Florianópolis: Boiteux, 2009. p. 34.)

otherness for religious intolerance, operating in the exclusion logic that gives rise to the law of force and not the force of law.

It is in this clash between the force of law and the law of force⁶ that the paradox between the protection of human rights during the fight against terrorism raises, especially the one intolerant based on a closed and sectarian religious phenomenon.

There is no incompatibility between the religious dimension and the human rights arena, even because the mark of the secular state is precisely that of plurality and respect. What is unharmonious is precisely an authoritarian view of the religious phenomenon. In such concern, several authors point out a non-authoritarian and oppressive interpretation of religions⁷.

Based on these assumptions, this paper focuses on the challenges and perspectives for confronting religious-based terrorism from the view of international human rights law. Firstly, it will seek to understand the movement for the internationalization of human rights and its impact on its contemporary human rights agenda, especially in relation to the use of force and the fight against terror, mainly the religious based one. In a second part, the focus will be on the main challenges and perspectives for fighting religious-based terrorism from the perspective of International Human Rights Law.

The exercise hereof starts from the conception that the commitment to human rights implies a cogent exercise of alterity and tolerance. In the language of human rights, *reciprocity*, as Nancy Frasier⁸ affirms, which *per se* demonstrates the insufficiency of extreme religious conceptions and the need to contribute to alternative and compatible interpretations to the protection of human rights, in times of growing acts of terror.

The impact of terrorist attacks on the contemporary human rights agenda

On a “moral” basis, human rights are born when they can and not when they should be, as Norberto Bobbio points out; these rights are not born all at once and not once and for all⁹. This is the reason for Hannah Arendt’s statement that rights are not a gift, but a creation, a human invention, in a constant process of construction and reconstruction¹⁰.

⁶ PIOVESAN, Flávia. *Direitos humanos e justiça internacional*. 3. ed. São Paulo: Saraiva, 2012.

⁷ Cite-se por todos: AN-NA’IM, Abdullah A. Proteção legal dos direitos humanos na África: como fazer mais com menos. In: BALDI, Cesar Augusto (Org). *Direitos humanos na sociedade cosmopolita*. Rio de Janeiro: Renovar, 2004. p 429-464.

⁸ FRASIER, Nancy. Repensando a questão do Reconhecimento: superar a substituição e a reificação na política cultural. In: BALDI, César Augusto (Org). *Direitos humanos na sociedade cosmopolita*. Rio de Janeiro: Renovar, 2004. p. 601-622.

⁹ (Tradução própria) – “Estes direitos não nascem todos de uma vez e nem de uma vez por todas.” (BOBBIO, Norberto. *A Era dos Direitos*. Rio de Janeiro: Campus Elsevier, 2004.)

¹⁰ The discourse of human disposability is highlighted by the belief in the unlimited possibilities of totalitarian systems, according to Hannah Arendt: “Until now the totalitarian belief that everything is possible seems to have proved that everything can be destroyed. Yet, in their effort to prove that everything is possible, totalitarian regimes have discovered without knowing that there are crimes which man can neither punish nor forgive. When the impossible was made possible it became the unpunishable, unforgivable absolute

In Joaquín Herrera Flores words, human rights a “*rationality of resistance*”, as they translate “*processes that open up and consolidate spaces for fighting for human dignity*”¹¹. They invoke an emancipatory platform aimed at the protection of human dignity, being a conscious construction aimed at ensuring human dignity and avoiding suffering, in view of persistent human brutality¹².

The international system of human rights protection constitutes the greatest legacy of the so-called “*Age of Rights*”¹³, which has allowed the internationalization of human rights and the humanization of contemporary law, with impacts on international law and national systems.

Considering the history of rights, the idea of contemporary conception of human rights, which was introduced by the 1948 Universal Declaration and reiterated by the 1993 Vienna Declaration of Human Rights. This concept is a result of the movement of internationalization of human rights, which is an extremely recent movement in history, emerging from the post-war period, as a response to the atrocities and horrors committed by Nazism.

Totalitarianism and its cruelties meant a rupture with the human rights paradigm, through the denial of the person as a source value of Law. If the Second World War meant a rupture with human rights, the post-war period means their reconstruction. In Thomas Buergethal words:

The modern International Law of Human Rights is a post-war phenomenon. Its development can be attributed to the monstrous violations of human rights of the Hitler

evil which could no longer be understood and explained by the evil motives of self-interest, greed, covetousness, resentment, lust for power and cowardice; and which therefore anger could not revenge, love could not endure, friendship could not forgive”. (Tradução própria) – “Até agora, a crença, totalitária de que tudo é possível parece ter provado apenas que tudo pode ser destruído. Não obstante, em seu afã de provar que tudo é possível, os regimes totalitários descobriram, sem o saber, que existem crimes que os homens não podem punir nem perdoar. Ao tornar-se possível, o impossível passou a ser o mal absoluto, impunível e imperdoável, que já não podia ser compreendido nem explicado pelos motivos malignos do egoísmo, da ganância, da cobiça, do ressentimento, do desejo do poder e da covardia; e que, portanto, a ira não podia vingar, o amor não podia suportar, a amizade não podia perdoar” (ARENDETT, Hannah. *As origens do totalitarismo*. São Paulo: Cia das Letras, 1989. p. 510).

¹¹ (Tradução própria) – “Os direitos humanos compõem uma racionalidade de resistência, na medida em que traduzem processos que abrem e consolidam espaços de luta pela dignidade humana” (FLORES, 2009, p. 7).

¹² This is the meaning of human rights: “to reintroduce human beings into the circuit of reproduction and maintenance of life, allowing them to open up spaces for struggle and claiming.” (Tradução própria) – “reinsrer os seres humanos no circuito de reprodução e manutenção da vida, permitindo-lhes abrir espaços de luta e de reivindicação” (FLORES, Joaquín Herrera. *Direitos humanos, interculturalidade e racionalidade da resistência*. In: WOLKMER, Antônio Carlos (Org.). *Direitos humanos e filosofia jurídica na América Latina*. Rio de Janeiro: Lumen Júris, 2004. p. 382).

¹³ “By the end of this process, citizens’ rights will really, positively, have become human rights. Or at least they will be the rights of the citizen of that city which has no borders, because it comprises all the mankind; or, in other words, they will be the rights of man as the rights of the citizen of the world.” (Tradução própria) – “No final desse processo, os direitos do cidadão terão se transformado, realmente, positivamente, em direitos do homem. Ou, pelo menos, serão os direitos do cidadão daquela cidade que não tem fronteiras, porque compreende toda a humanidade; ou, em outras palavras, serão os direitos do homem enquanto direitos do cidadão do mundo.” (FLORES, 2004, p. 50).

era and to the belief that these violations might have been prevented had an effective international system for the protection of human rights existed¹⁴.

The idea that protection of human rights strengthen with the various systems of human rights protection interact for the benefit of protected individuals. By adopting the value of the primacy of the human dignity, these systems complement each other and aid the national system of protection in order to provide effectiveness in the protection and promotion of individuals. This is the logic of Human Rights Law under the approach of a multi-level Legal System. Hence, a new paradigm emerges – multilevel and transversal, based on the coexistence of several parallel and harmonious orders – that must dialogue among themselves around human rights.

However, the current global scenario marked by recent major attacks by terrorist groups with massive human killings, it in contemporary space. According to the global terrorism index, measured by the *Institute for Economics and Peace*, the number of countries affected by terrorism is increasing. Thus, there is a risk that the fight against terrorism will compromise the civilizing apparatus of rights, freedoms and guarantees, for the sake of security.¹⁵ There is, in this scenario, a close connection with religious-based discussions since, according to the same institute, the Taliban and the ISIL (Islamic State of Iraq and the Levant) are, currently, the most deadly terrorist groups in the world.¹⁶ In a period of constant conflicts, which its core lies in religious battles, human rights culture is tested on its capacity of resistance.

The examples mentioned at the beginning of this paper to illustrate how the process of fighting terror produces iniquity on human rights grounds. The military siege of the global powers against insurgents kills those who remain, from various deprivations, especially hunger. It also convicts to death those who dare to leave, restricting migration and refugee policies; they are individuals who are in the gap between the past and the future, without the right to have rights.¹⁷ Human rights – or their supposedly protective discourse – have paradoxically, in certain cases, turned into humanitarian aggression.

¹⁴ (Tradução própria) – “O moderno Direito Internacional dos Direitos Humanos é um fenômeno do pós-guerra. Seu desenvolvimento pode ser atribuído às monstruosas violações de direitos humanos da era Hitler e à crença de que parte dessas violações poderiam ser prevenidas se um efetivo sistema de proteção internacional de direitos humanos existisse” (BUERGENTHAL, Thomas. *International Human Rights in a Nutshell*. Minnesota: West Publishing Co, 1988. p. 32).

¹⁵ In such concern, see HEYMANN, Philip B. *Civil liberties and human rights in the aftermath of September 11* and COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE. *Guidelines on Human Rights and the Fight against Terrorism*. Strasbourg: Council of Europe, 2002.

¹⁶ INSTITUTE FOR ECONOMICS AND PEACE. *Global Terrorism Index*. GTI 2019 complete and interactive map are available at: <www.visionofhumanity.org>. Accessed in January 2019.

¹⁷ “The first human right, from which the others derive, is the right to have rights, rights which totalitarian experience has shown can only be demanded through full access to the legal order that only citizenship offers”. (Tradução própria – “O primeiro direito humano, do qual derivam os demais, é o direito a ter direitos, direitos que a experiência totalitária mostrou que só podem ser exigidos através do acesso pleno à ordem jurídica que apenas a cidadania oferece” (LAFER, Celso. *A reconstrução histórica dos direitos humanos*. São Paulo: Cia das Letras, 1998. p. 166.)

The contemporary history of human rights has, in this aspect, transmuted itself to the narrative of inversion of these rights. It is alarming that in the current scenario this rational model is still alive and with even more extreme manifestations: promoted *humanitarian interventions* (sic) that emphasize the ambivalence of human rights. Countries and people – not infrequently the civilian majority – have been destroyed in the name of ensuring the formality of human rights. What most frequently was and is destroyed is the basis of life of the population, annihilating the already scarce and incipient national economic infrastructure, traditionally located in the “global south”¹⁸ or in the “rest of the world”¹⁹.

The ideology that guided – and guides – such inversion of the world, as a result of which the victims are guilty, and the offenders are innocent and proclaim themselves judges of the world, has its roots in the classical thinking of John Locke, according to what Joaquín Herrera Flores mentions.²⁰ Locke’s ideas, at a crucial moment of colonial domination, elaborated such inverse interpretation of human rights. Until then, colonialist domination and expansion were justified by the divine right of the Kings. However, after the *bourgeois* revolutions this argument could no longer prosper as a valid justification for this process. Locke offered to the *bourgeois* society a justification for the domination and exploitation of the other. For the contractualist author – taking as basis the equality of men in the state of nature – the violent (colonial) interventions did not violate human rights, but, on the contrary, represented their faithful application. According to this idea, precisely by being endowed with equal rights, any human being is entitled to discipline and punish their offenders, in the capacity of enforcers of “natural law” in the ‘perfect state of nature’²¹.

In such concern, Franz Hinkelamert states: “*Sin embargo, cuando Locke habla de este estado de naturaleza, no está hablando de ningún pasado, sino del presente*”²². The author concludes:

De esta manera, Locke formula el prototipo clásico de la inversión de los derechos humanos, que sigue siendo hasta hoy el marco categorial bajo el cual el imperio liberal ve su imposición del poder a todo el mundo. Hasta hoy, en efecto, todas las guerras hechas por el imperio son consideradas guerras justas. Guerras tan justas, que el adversario no puede reclamar ningún derecho humano. No hay derechos humanos del

¹⁸ (Tradução própria) – “sul global” (DARGIN, Justin. *The Rise of the Global South*. London: World Scientific Publishing Co, 2013).

¹⁹ (Tradução própria) – “resto do mundo” (FERGUSON, Niall. *Civilization: The West and the rest*. New York: Penguin, 2011).

²⁰ FLORES, Joaquín Herrera. *El vuelo de Anteo: derechos humanos y crítica de la razón liberal*. Bilbao: Desclee, 2000.

²¹ (Tradução própria) – “Segundo esta lógica, justamente por ser dotado de iguais direitos, qualquer ser humano tem direito de castigar e punir os violadores destes, na qualidade de aplicador da ‘lei natural’ no ‘estado de natureza perfeito’ (LOCKE, John. *Dois Tratados do Governo Civil*. Trad. Miguel Morgado. Lisboa, Portugal: Edições 70, 2006).

²² HINKELAMERT, FRANZ. El proceso actual de globalización y los derechos humanos. In: FLORES, 2000.

adversario, y quien los reclama, también se ha colocado en estado de guerra contra el género humano.²³

In this regard, the Lockean perspective underlies all of these contemporary religious-based processes to fight terrorism. Thus, in the name of human rights, the rights of all those who exercise resistance to the dominant standard and its operating system are thrashed. That is why it is not uncommon that the main tensions caused by terrorist acts include a religious pattern different from that of the West, since human rights law's core lies in the "*Western conception of law and the value of identity*"²⁴. Reproductions of Western values operate "*as a standard of exclusion measures*"²⁵, warns Joaquin Herrera Flores. The author continuously asserts that a disintegrated world derives through this point of view, because "*there will always be something that is not subject to the dominant gravity law and that should be marginalized from analysis and practice.*"²⁶

In addition, the intolerance of the fight to the non-Western religions also reproduces intolerance in Western societies themselves. Studies demonstrate the perverse impact of terrorist attacks on the composition of a global agenda that tends to be restrictive on freedoms. As an example, one can mention the legislation in a diversity of States, expanding death penalties, creating unsustainable prejudice, facing the due process of law and the right to a fair and public trial, admitting immediate extradition without the guarantee of rights, restricting rights, such as freedom of assembly and expression, among other measures.²⁷

Hence, arises the challenge to keep the effort of building a State of International Law, in an arena that privileges the Police State in the international field, fundamentally guided by the motto of international force and security. Against the risk of State terrorism and the confrontation of terror, with instruments of terror itself, there is only one remaining way: to consolidate the international rule of law²⁸.

²³ HINKELAMERT, FRANZ. El proceso actual de globalización y los derechos humanos. In: FLORES, 2000. 24 (Tradução própria) – "Concepção ocidental de direito e no valor da identidade" (FLORES, 2004, p. 364).

²⁵ (Tradução própria) – "Como um padrão de medidas de exclusão" (FLORES, 2004, p. 366).

²⁶ (Tradução própria) – "Sempre haverá algo que não esteja submetido à lei da gravidade dominante e que deve ficar marginalizada da análise e da prática" (FLORES, 2004, p. 366).

²⁷ About this theme, see "ONG questiona estado de exceção na França". *O Estado de São Paulo*, 21 de janeiro de 2016, p. A11. See also the research appointed in the article "For whom the liberty bell tolls", *The Economist*, 31 ago. 2002, p. 18-20. About the matter, see, among others, report of the Human Rights Watch, *In the name of counter-terrorism: human rights abuses worldwide*. In this regard, mention should be made of the passage by the U.S. Congress on September 28, 2006 of a bill establishing military commissions to judge those accused of involvement in acts of terrorism against the United States, who will observe their own legislation. According to this bill, the President of the Republic will be responsible for interpreting the meaning and scope of the Geneva Conventions, defining also acceptable methods of interrogation in relation to so-called "enemy combatants" (any individual who provides material or financial support to terrorists). See "Lei dos Tribunais militares divide juristas", *O Estado de S. Paulo*, 30 set. 2006, p. A36; "Retrôcesso nos EUA", *Folha de S. Paulo*, 30 set. 2006, p. A-2; "Nova Lei americana recebe críticas da ONU e de ONGs", *Folha de S. Paulo*, 30 set. 2006, p. A-20.

²⁸ BINGHAM. Tom. *The Rule of Law*. London: Penguin, 2010.

An effective State lead through international law will exist only under the empire of law, with the power of speech and legitimacy of consensus. As the UN Working Group on Terrorism concludes: “*The protection and promotion of human rights under the rule of law are essential for the prevention of terrorism.*”²⁹ In the same direction, the then UN Secretary-General emphasized: “*We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.*”³⁰

The strength of the international rule of law surpasses the omnipotent temptation of the strongest dictatorship, with contempt for all moral and legal principles that aim to correct excesses of the primacy of force and wealth over the individual rights.

This leads us to reflect about the main challenges and prospects for confronting religious-based terrorism under International Human Rights Law.

Challenges and prospects for fighting religious-based terrorism from the perspective of international human rights law

Although there is an international consensus that terrorism is a serious threat to peace and security, revealing a systematic and deliberate violation of human rights,³¹ no agreement has been reached within the international community on its definition.

The definition of terrorism demands, particularly on the religious-based cases, in its complexity, the challenge of disrupting the traditional point of view that inspires the international architecture of human rights protection – that human rights violations involve, on one hand, the State (as the violating agent) and, on the other, the victim. This is because in terrorism, the perpetrator is usually a non-State actor and the victims are civilians, non-combatants, collectively considered. Thus, terrorism involves a different pattern of conflict when compared to the traditional concept to which human rights treaties aim to respond.

Efforts are being made to successfully define terrorism, even with no clear consensus on its concept. Indeed, the Declaration on Measures to Eliminate International Terrorism, adopted by the General Assembly on December 9, 1994, attached to Resolution 49/60, includes elements that are central to terrorism: “*criminal acts intended or calculated to provoke a state of terror in the general public (civilian and non-combatants), a group of persons or particular persons for political purposes*”. It

²⁹ (Tradução própria) – “A proteção e a promoção dos direitos humanos sob o primado do Estado de Direito são essenciais para a prevenção do terrorismo”. (See UNITED NATIONS. *Report of the Policy Working Group on the United Nations and Terrorism*. United Nations, A/57/273-S/2002/875).

³⁰ See UNITED NATIONS. *In larger freedom: towards development, security and human rights for all*. Report of Secretary General, March 2005.

³¹ On the theme, see UNITED NATIONS. General Assembly. *Uniting against terrorism: recommendations for a global counter-terrorism strategy*. April 27, 2006, especially in the topic entitled *Terrorism is unacceptable*, which provides: “We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.”

adds that those acts “are in any circumstance unjustifiable, whatever the consideration of a political, philosophical, ideological, racial, ethnic, religious, or other nature that may be invoked to justify them.”³²

Therefore, generalized criminal acts, with specific objectives, added to the absence of any reasonable justification emerge, albeit timidly, as a concept approximation nucleus. When associated with religion, these ideas gain even more problematic contours. The action of groups such as the Islamic State or Boko Haram – for illustration purposes only – shows that religious fundamentalism is a fuel for a perverse view of terror. Fundamentalisms lead to the idea of absolute truth, which limits the field of otherness. Unilateral centrality leads to an extreme, an intolerant and exclusionary scenario that, *ipso facto*, does not comply with the ethics of otherness that permeates the legal discourse of human rights.

Each in its own way, the autarchic conceptions of the religious phenomena collaborate to “the separation between us and them, the disregard for the other, the ignorance with respect to which the only thing that makes us identical is the relationship with others; the contamination of otherness”³³ and, in extreme cases, using force, annihilate the other, the different.

The prejudice is widespread. Whether in fundamentalism, which exploits terror as a way to propagate itself, or in ideology which fights based on Western universal values. Fundamentalisms are based on an idea of sectarian and annihilating truth – therefore incompatible with the promotional point of view of rights, they refer to Christian and Islamic theologies, “according to which the revelation is conceived as the structuring principle of the organization of society in all its dimensions.”³⁴

Thus, in this scenario, in order to contribute to the debate, among many other, seven challenge stand out, which are at the heart of the fight against religion-based terrorism from the perspective of International Human Rights, namely: creating a specific international convention for preventing and combating terrorism; understand terrorism as a crime against humanity within the material jurisdiction of the International Criminal Court; endorse the idea that the fight against terrorism will only be effective with the respect and promotion of human rights; demand that anti-terrorist measures respect the essential core of human rights protected by international human rights treaties; prevent and punish discriminatory measures in the name of anti-terror strategies; fight religious-based fundamentalism and ensure pluralism, diversity and

³² (Tradução própria) – “Atos criminosos objetivam ou são calculados para provocar um estado de terror na população em geral (civis ou não-combatentes), em um grupo de pessoas ou em um grupo particular de pessoas para fins políticos” (Consult United Nations, Economic and Social Council, *Promotion and Protection of Human Rights*, E/CN.4/2006/98, December 28, 2005, p. 14 and *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while countering terrorism*, p. 03).

³³ (Tradução própria) – “A separação entre nós e eles, o desapareço pelo outro, a ignorância com respeito a que o único que nos faz idênticos é a relação com os outros; a contaminação de alteridade” (FLORES, 2004, p. 373).

³⁴ (Tradução própria) – “De acordo com as quais a revelação é concebida como o princípio estruturante de organização da sociedade em todas as suas dimensões” (SOUZA SANTOS, Boaventura. *Se Deus fosse um ativista de direitos humanos*. 2. ed. São Paulo: Cortez, 2014. p. 42).

inter-religious dialogue; and to identify, exchange and promote practices for fighting terrorism that respect human rights and fundamental freedoms.

The purpose of identifying those challenges is to contribute to the consolidation of the State that complies with the Rule of International Law and the prevalence of the strength of human rights over the use of force incited by terrorist groups and the State's actions that against them.

a) Create a specific international convention for preventing and fighting terrorism

The lack of consensus in international legislation on terrorism, as highlighted above, has prevented the adoption of a specific treaty aimed at the prevention and repression of terrorism. Therefore, it is necessary to advance and deepen the discussion on what is and is not terrorism; its implications for human rights and Humanitarian Law; and the accountability of governmental and non-governmental players.

It is essential to elaborate a specific international convention to prevent and fight terrorism from the perspective of preservation of rights. It is clear that laws do not have the ability to, *per se*, changing reality. However, as Felix Kirchmeier points out, legislative change carries with it the capacity of unifying discourse and forming consensus that can impact, from the outset, the protection of rights:

For human beings, whose rights are infringed through failure to protect, respect or fulfill, addressing the implementation gap is not first and foremost a legal question. What matters more than technical compliance with a legal standard are practical measures that deliver results. In order to deliver results in an international context, however, it is necessary to work from a common starting point towards common goals with a common understanding of the key concepts.³⁵

The existence of a cogent and binding standard for preventing and fighting terror, added to the strengthening of human rights standards, could contribute to the consolidation and expansion of the necessary limits in this area. The need for hard law on the matter reinforces the duties and meanings of binding legal obligations by the international community.

Of course, the mere emergence of an international treaty will not in itself change the current picture, but international experience demonstrates that the normative setting of responsibilities plays an important role. For this matter, it is essential to combine preventive and repressive actions, so that the confrontation of terrorism is added to the confrontation of organized crime and corruption, adding measures for disarmament. In the UN Secretary-General point of view:

Our strategy against terrorism must be comprehensive and should be based on 5 pillars: 1) it must aim at dissuading people from resorting to terrorism or supporting it; 2) it

³⁵ MARKS, Stephen P. (Ed.). *Implementing the Right to Development: The role of International Law*. Geneva: Friedrich-Ebert-Stiftung, 2008. p. 7.

must deny terrorists access to funds and materials; 3) it must deter States from sponsoring terrorism; 4) it must develop State capacity to defeat terrorism; and 5) it must defend human rights³⁶.

On this subject, preventive and repressive measures require international cooperation and, above all, the advancement of the right to development, in order to reduce inequality and social exclusion that demarcate asymmetrical relations between northern and southern hemispheres. International community's duty to act in favor of the minimum guarantees of human rights emerges as an obligation *erga omnes* and demand true protagonism and solidarity from the international society against the massive violation of human rights.

Strengthening international cooperation is fundamental – an additional reason for the formulation of hard law that effectively commits agents to this duty of solidarity. International measures of a preventive and repressive nature must be combined with national policies to prevent and repress terrorism.

b) Understand terrorism as a crime against humanity under the material jurisdiction of the International Criminal Court

The International Criminal Court (ICC), introduced by the Rome Statute, has a permanent, independent character, having complementary jurisdiction to the national courts, constituting a decisive advance for the protection of human rights. It is based on the primacy of legality, through a pre-established, permanent and independent justice system, applicable equally to all States that recognize it, capable of ensuring rights and fighting impunity, mainly the most serious international crimes. It enshrines the principle of universality, insofar as the Rome Statute applies universally to all States Parties, which are equal before the Criminal Court.

The ICC appears as a complementary apparatus to national courts, with the objective of ensuring the end of impunity for the most serious international crimes, considering that, sometimes, in the occurrence of such crimes, national institutions show failures or omissions in the achievement of justice. Consequently, it is affirmed the primary responsibility of the State in relation to the judgment of human rights violations, the international community having joint liability. It is worth mentioning that the jurisdiction of the ICC is additional and complementary to that of the State, as reiterated in the first article of its statute, being therefore conditioned to the incapacity or omission of the internal judicial system.

Pursuant to Article 5 of the Rome Statute, the Court shall be responsible for judging the following crimes: a) the crime of genocide (as provided for in Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide); b) crimes against humanity (including widespread and systematic attacks against

³⁶ See UNITED NATIONS. *In larger freedom: towards development, security and human rights for all*. Report of the UN Secretary-General, March 2005.

the civilian population, in the form of murder, extermination, slavery, deportation, imprisonment, torture, sexual violence, rape, prostitution, forced pregnancy and sterilization, forced disappearance, the crime of apartheid, among others, which seriously impair physical or mental integrity); c) war crimes (violations of International Humanitarian Law, especially the 1949 Geneva Conventions); and d) crimes of aggression (still pending definition, pursuant to Article 5, 2 of the Statute).

Although the Court's material jurisdiction does not expressly include the crime of terrorism, it can be understood as a crime against humanity and is therefore included in the Court's material jurisdiction. The reason for this is, pursuant to Article 7 of the Statute, the crime against humanity requires the occurrence of a serious and systematic attack against a civilian population, comprising "*other inhumane acts of a similar character that intentionally cause great suffering or seriously injure physical integrity or mental or physical health.*"³⁷ It is, therefore, an open clause to allow the inclusion of terrorism as a true crime against humanity.

This interpretation would contribute to the strengthening of mechanisms of repression and prevention of the crime of terrorism, reinforcing the necessary accountability and collaborating to the end of impunity.

c) Endorse the idea that the fight against terrorism will only be effective if human rights are respected and promoted

In fight against terrorism, it is essential to reiterate the idea that such fight will only be effective if human rights are respected and promoted. In the assessment of the UN Secretary-General: "*We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.*"³⁸ This reinforces the interdependent relationship between development, security and human rights.

Note that in September 2001, the Security Council adopted Resolution 1373, obliging States Parties to implement more effective measures to fight terrorism at the domestic level and to increase international cooperation in fight against terrorism. This resolution created the Counter-Terrorism Committee to monitor actions in this matter and receive reports from the States on the measures that were taken. It was reiterated that the fight against terrorism will only be effective if human rights are respected and promoted.

The fight against terror can only be done with the preservation of human rights, enshrining the notion that there is no security without human rights and no human rights without security. In these interdependent and interrelated terms, maintaining a relationship of conditionality and complementarity, the World Bank's 2011 World

³⁷ (Tradução própria) – "Outros atos desumanos de caráter similar que causem intencionalmente grandes sofrimentos ou atentem gravemente contra a integridade física ou saúde mental ou física".

³⁸ See UNITED NATIONS. *In larger freedom: towards development, security and human rights for all*. Report of the UN Secretary-General, March 2005.

Development Report on conflict, security and development, provides: “A key lesson of successful violence prevention and recovery is that security, justice, and economic stresses are linked: approaches that try to solve them through military-only, justice-only, or development-only solutions will falter.”³⁹

d) Demand that anti-terrorist measures respect the unavoidable core of human rights

Anti-terror strategies must be compatible with International Human Rights Law, Humanitarian Law and Refugee Law, precisely to prevent the protection of rights from becoming, paradoxically, the reason for their non-observance.⁴⁰

In such regard, Security Council’s Resolution 1456 (2003) warned that: “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”⁴¹

Human rights treaties establish an unavoidable core of rights, to be respected whether in times of war, instability, public commotion or public calamity, as evidenced by Article 4 of the International Covenant on Civil and Political Rights, Article 27 of the American Convention on Human Rights, and Article 15 of the European Convention on Human Rights. The Convention against Torture, also, in its Article 2, enshrines the clause of the irrevocable prohibition of torture, that is, nothing can justify the practice of torture (be it a threat or period of war, internal political instability or any other public emergency). This is because it presupposes, with the realization of a minimum integra-

³⁹ WORLD BANK. *2011 World Development Report*. Available at: <<http://go.worldbank.org/MPUHAJOPF0>>. Accessed in August 2012. Corroborating this inter-related vision of transitional justice, the UN Security Council’s pioneering report of 2004 highlights: “Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. Our approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms. Our main role is not to build international substitutes for national structures, but to help build domestic justice capacities.” (UN SECURITY COUNCIL. *The rule of law and transitional justice in conflict and post-conflict societies*. Document No. 2004/616. Available at: <<http://www.undemocracy.com/S-2004-616.pdf>>).

⁴⁰ On the inverse connection between war and human rights: “War, despite characterizing international life from immemorial times, is a limit situation. It represents the abolition, for its duration, of one of the oldest taboos of the human species – the prohibition of murder, the basis of the right to life, currently considered the most intangible of human rights. Indeed, war turns the action of killing other human beings not only into something permitted and legitimate, but also something commanded”. (Tradução própria) – “A guerra, apesar de caracterizar, desde tempos imemoriais, a vida internacional, é uma situação-limite. Representa a abolição, durante sua vigência, de um dos mais antigos tabus da espécie humana – a proibição do homicídio, base do direito à vida, hoje considerado o mais intangível dos direitos humanos. Com efeito, a guerra converte a ação de matar outros seres humanos não apenas em algo permitido e legitimado como também algo comandado” (LAFER, 1998, p. 142).

⁴¹ On the theme, see UNITED NATIONS. General Assembly. *Uniting against terrorism: recommendations for a global counter-terrorism strategy*. 27 April 2006; and *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while countering terrorism*.

ted core for the achievement of human dignity, the transposition of the structural difficulties that mean insurmountable obstacles in the resignification of human realities.

States must be required to comply faithfully with the human rights treaties they have ratified, in particular the strict compliance with the unavoidable core of such treaties, as already explained. Hence:

any measures taken by States to combat terrorism must be in accordance with States' obligations under the international human rights instruments. They are determined, in the framework of their respective mandates, to monitor and investigate developments in this area and call upon all those committed to respect for human rights, including the United Nations, to be vigilant to prevent any abuse of counter-terrorism measures.⁴²

e) Prevent and punish discriminatory measures

Counter-terrorism strategies must respect the principle of equality and non-discrimination, rejecting discriminatory, racist and xenophobic practices that infringe the right to diversity and the right to identity, based on nationality, ethnicity, race or religion, because the reason for this is, as Amartya Sen teaches, "identity can be a source of richness and warmth as well as of violence and terror"⁴³. The author also sharply criticizes what he calls "serious miniaturization of human beings" when the recognition of the plurality of human identities is denied, in the measure as people are "diversely different"⁴⁴.

Along history, the most serious violations of human rights have been based on the dichotomy of "*Me versus other*", which diversity was perceived as an element to annihilate rights. It is therefore necessary to adopt preventive measures capable of providing special protection to socially vulnerable groups, such as migrants; foreigners; refugees; religious minorities; and racial-ethnic minorities. Women, children, afro-descendent populations, migrants, people with disabilities, among other vulnerable categories, must be seen in the specifics and peculiarities of their social condition;

⁴² See <<http://www.ohchr.org/english/issues/terrorism/index.htm>>. (Accessed in 07/31/06). On the subject, see the Human Rights Watch report, *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*. In this regard, mention should be made of the historic decision of the American Supreme Court issued on June 29, 2006, determining that the U.S. President has no jurisdiction to establish military courts to judge prisoners at the Guantanamo military base for alleged war crimes. The decision was issued in the trial of the case of Salim Ahmed Hamdan (Hamdan v. Rumsfeld, Secretary of Defense *et al.*), a Yemen national, former driver and former back guard of Osama bin Laden, imprisoned for four years at that military base since his capture by military forces in Afghanistan in 2001. All trials will be cancelled on the grounds that the exception courts are illegal, for violation of the Geneva Conventions and the American laws. The impact of the decision is twofold: on the one hand it imposes firm limits on abuses by the Executive branch, and on the other it ensures to the detainees the rights enshrined in international human rights treaties. On the subject see PIOVESAN, Flávia. Triunfo do Estado de Direito ante a Barbárie, *O Estado de São Paulo*, July 2, 2006.

⁴³ SEN, Amartya. *Identity and Violence: The illusion of destiny*. New York; London: W. W. Norton, 2006. p. 4.

⁴⁴ SEN, 2006, p. XIII e XIV.

universality must be aware and keep in mind the individual particularisms, meanly those historically considered for the subjugation of the other.⁴⁵

As the Committee on the Elimination of All Forms of Racial Discrimination emphasizes in its General Recommendation No. 30, it is essential: “*To ensure that any action taken in the fight against terrorism does not give rise to discrimination, in cause or effect, based on race, color, descent or national or ethnic origin and that non-citizens are not subject to profiling or stereotyping and racial or ethnic order.*”

The subjective peculiarities are considered as important factors of diversity promoting to protection of human rights, especially with regard to collectivities and vulnerable groups. Commitment to human rights implies the cogent exercise of otherness and tolerance. The principle of respect for diversity, in addition to the sphere of individual freedom and autonomy, lies at the heart of discussions about the fight against terror within the framework of respect for human rights.

f) Fight against religious fundamentalism and ensure pluralism, diversity and inter-religious dialogue

As emphasized above, religious fundamentalism is based on rigid systems of texts believed as revealed, supported by dogmatic definitions to encompass believers of different religions. They move from the religious domain of the inner world, based on equality, diversity and respect, to the religious domain of the outer world, with expansionist ambitions, based on inequality, intolerance, based on the sovereignty of the divine and the legitimacy of the sacred.

In this context, it is essential to promote the secular state as a legal-political instrument for the management of freedoms and rights. In the secular state, featured by the separation of state and religion, all religions deserve equal consideration and deep respect. There is, however, no official religion, which becomes the only state concept, abolishing the dynamic of an open, free, diverse and plural society.

The principle of state secularism is projected on a double plane, on the one hand protecting and respecting the ideals professed by the most diverse religious beliefs and, on the other, circumscribing a state sphere free of these influences. In such concern, Rodotà corroborates:

⁴⁵ “[...] *considerar el reconocimiento como una cuestión de justicia equivale a tratarlo como una cuestión de status. A su vez, esto significa examinar los patrones de valores culturales institucionalizados en cuanto a sus efectos sobre el estatus de los actores sociales. Si tales patrones sitúan a los actores en pie de igualdad, capaces de participar paritariamente en la vida social, entonces podremos hablar de reconocimiento mutuo e igualdad de estatus. Si, por el contrario, dichos patrones consideran a ciertos actores como inferiores, excluidos, «otros», o simplemente invisibles, o sea como miembros no plenos de las interacciones sociales, entonces hablaremos de falta de reconocimiento y estatus de subordinación.*” (FRASER, Nancy. Redistribución, reconocimiento y participación: hacia un concepto integrado de la justicia. In: UNESCO. *Informe Mundial sobre la Cultura – 2000-2001*. Available at: <[170](http://132.24835.1/cultura/informe/iMelina Girardi Fachin de Sousligiosa, e debate al ainda tem para lidar com a matolver justamente dentro daquilo que se busca com)>.</p></div><div data-bbox=)

The entrance of secular religion into public space takes place on an equal basis, and not through the granting of any privilege. And part of a choir, not a solo voice. Thus, when the importance of the contribution that religion and religiosity can make to public discourse and a common cultural elaboration, which captures a given, an added value, which has its roots in history, but which may not be used to seek allocation of a special status, a position formally stronger than those granted to all other forms of personal conviction, is stressed.⁴⁶

It is, therefore, the public reason that guides the view of the State that is not confused with that religious private reason.⁴⁷ There is the duty of the State to guarantee the conditions of equal religious and moral freedom, in a challenging context in which, if on the one hand the contemporary State seeks to separate itself from religion, religion in turn seeks to enter the domains of the State.

To confuse state with religion implies the official adoption of incontestable dogmas, which, by imposing a unique morality, make unfeasible any project of an open, pluralist and democratic society. The legal order in a Democratic State under the rule of law cannot become the exclusive voice of the morality of any religion. Religious groups have the right to build their identities around their principles and values, as they are part of a democratic society, but they do not have the right to intend to hegemonize the culture of a constitutionally secular state.

In this respect, it must be highlighted that religions should be open, dynamic and changeable systems. The complexity of reality is assumed through a religious and cultural practice that assumes its context, coexists with the diversity and plurality of possible interpretations and encourages a posture that opens new horizons pertaining the human rights field.

Two strategies stand out here: a) to reinforce the principle of state secularism, with emphasis on the Declaration on the Elimination of All Forms of Discrimination based on Religious Intolerance; and b) to strengthen progressive readings and interpretations in the religious field in order to respect human rights, with special emphasis on dialogue between religions, based on a proposal of intercultural theology, with emphasis on the role of moderate religious ministers. It is also important to strengthen feminist theologies and their progressive impact on both Christian and Islamic versions.⁴⁸

⁴⁶ (Tradução própria) – “A entrada da religião laica no espaço público tem lugar em pé de igualdade, e não através da atribuição de qualquer privilégio. É parte de um coro, não uma voz solo. Assim, quando se salienta a importância da contribuição que a religião e a religiosidade podem fazer para o discurso público e uma elaboração cultural comum, que capta um dado, um valor agregado, que tem suas raízes na história, mas que pode não ser usado para buscar alocação de um estatuto especial, uma posição formalmente mais forte do que as concedidas a todas as outras formas de convicção pessoal” (RODOTÁ, Stéfano. *Perché laico*. Bari: Laterza, 2009. p. 5).

⁴⁷ ZYLBERSZTAJN, Joana. *O princípio da laicidade na Constituição Federal de 1988*. 2012. Thesis (Doctorate in State Law) – Law School, University of São Paulo, São Paulo, 2012. Available at: <<http://www.teses.usp.br/teses/disponiveis/2/2134/tde-11102012-111708/>>.

⁴⁸ For Boaventura de Sousa Santos, feminist theologies “criticize the association of religion and its hierarchical structures with the patriarchal order and the subsequent legitimization of patriarchy and the submission of women

g) *Identify, exchange and promote best practices for fighting terrorism*

Finally, the identification and exchange of successful policies and practices for the prevention and repression of terrorism, with strict respect for human rights and fundamental freedoms, should be fostered.

In view of these challenges, the conclusion shall be the belief in the implementation of human rights, as the rationality of resistance and the only emancipatory platform of our time. It is therefore critical to strengthen the rule of law and peace building in the global, regional and local spheres, through a culture of human rights.

The relationship of interdependence, complementarity and conditionality to involve human rights, security and development must be emphasized. This triad guides any policy and action aimed at the prevention and repression of terrorism.

Thereunto, the “*culture of peace*”⁴⁹ is essential, the vertex of which is no longer marked by the idea of “*clash of civilizations*”, but by the idea of “*dialogue among civilizations*”. In Samuel Huntington’s premonitions: “*In the emerging era, clashes of civilizations are the greatest threat to world peace, and an international order based on civilizations is the surest safeguard against world war*”⁵⁰.

Final considerations

Even if there is no accurate definition or regulation, terrorism is a serious threat to international peace and security and, therefore, needs to be adequately addressed by international human rights law. It must be fought precisely within the framework of what it seeks to preserve, human rights. Under no circumstances, under penalty of a serious reversal of the protective discourse, can the fight against terror lead us to an equal – or even worse – state of affairs.

The counter-terrorism process has been responsible for the production of several iniquities in the field of human rights and there is a close relationship with religious reasons. Firstly, because religious fundamentalist logics based on the uniqueness of the world view exclude the other and incite its fight. In such regard, religious fundamentalisms use the perversity of terror and violence to spread their reasons. Secondly, actions to fight terror end up violating the same rights that were intended to be protected in the first place. Either because they reproduce a Western view of religious values or because they annihilate the rights of those who have violated human rights. Consequently, we see globally shared results that mirror the contemporary humanitarian catastrophe.

within religions”. (SOUSA SANTOS, 2014, p. 53). As an example, mention should also be made of the work of Abdullah Ahmed An-na’im on the reinterpretation of Islam from the perspective of human rights.

⁴⁹ This order of ideas is not new and they already appeared in the Kantian ideal of Perpetual Peace: “it is the necessary crowning of the unwritten code, both in domestic public law and in international law, for the foundation of a general public law and, therefore, for the achievement of perpetual peace”. (Tradução própria) – “É o necessário coroamento do código não escrito, tanto no direito público interno como no direito internacional, para a fundação de um direito público geral e, portanto, para a realização da paz perpétua”.

⁵⁰ HUNTINGTON, 2003, p. 321.

In such concern, seven challenges have been raised in the contemporary human rights agenda, without any pretension of exhaustion, in order to deal repressively and preventively with the phenomenon of religious-based terrorism. They are the following: To create a specific international Convention for the prevention and fighting of terrorism; to understand terrorism as a crime against humanity under the material jurisdiction of the International Criminal Court; to endorse the idea that the fight against terrorism will only be effective with the respect and promotion of human rights; to demand that anti-terrorist measures respect the unavoidable core of human rights protected by international human rights treaties; to prevent and punish discriminatory measures in the name of anti-terrorist strategies; to fight religious-based fundamentalism and ensure pluralism, diversity and inter-religious dialogue; and to identify, exchange and promote the best practices for fighting terrorism, which respect human rights and fundamental freedoms.

From the development of each of the points listed as challenges that the central common point that emerges is the strengthening of the rule of law in the supra-state global scenario. The common thread that runs through the challenges now listed in an attempt to mediate these two poles – that is, fighting terrorism and preserving rights, lies therein. International law, in an attempt to establish the limits of the fight against terrorism based on religious dogmas, is in the crossing stated by Kofi Annan: “*from the rule of the jungle to the rule of law*”⁵¹.

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⁵¹ HUNTINGTON, 2003, p. 321.

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