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INTERNATIONAL TERRORISM: A READING FROM A CONSTITUTIONAL PERSPECTIVE

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ABSTRACT

International terrorism has, in recent years, intensified its presence in different countries, such as the United States, France and Germany. In this context, constitutional guarantees, such as the right to life and physical integrity, may be contrasted with national security and the preservation of order and peace, as occurred in the case of the kidnapping and death of German businessman Hanns-Martin Schleyer in the 1970s. Thus, despite the ancient presence of terrorism, a tortuous concept that has not yet been unified in International Law, it is necessary to elucidate how constitutional guarantees are made effective in a scenario marked by an increase in the number of attacks. The divergence of interpretations and constitutional treatment of Terror in various highest bodies of the Judiciary in different countries highlights the difficulty in achieving effective international cooperation in the fight against terrorism.

Keywords: Terrorism. Constitutional Guarantees. Interpretative divergence. International cooperation.

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INTRODUCTION

The study of terrorism is inserted in the international context of power relations. States, in the search for the accumulation of wealth and power, exert influence on other weaker countries, through strategic alliances, and strengthen themselves in relation to the guarantee that their will will be executed in decisions that promote both national and international impacts. This situation is positive for those who benefit from this order, but in this balance of power, the weakest do not always feel comfortable being in their conditions and seek methods to strengthen their influences, which may involve, some of them, violence.

The problem arose when this struggle, legitimate and positive, exceeded all the limits of common sense and began to affect people totally unrelated to it, who do not want to wage war and who only want to lead their lives in a peaceful and safe way, especially with dignity.

Over the years, the absence of dialogue and the fundamentalism of some have intensified conflicts and wars, causing the emergence of terrorist organizations that act without caring about the possible victims of their acts, as has been seen with the popularization of the terrorist group.

Thus, the Supreme Courts or Constitutional Courts had to address this problem that, despite being old, has taken on new facets in the contemporary world, raising the discussion about how to guarantee the individual rights of a terrorist while protecting and guaranteeing the common good.

The present work will have as a background the dilemma experienced by the German Constitutional Court with regard to the Schleyer Case. The arguments for and against the government's negotiation with terrorists, who demanded the release of political prisoners, can be raised and analyzed, especially in comparison with a previous case that had a different result.

Continuing, cases from countries such as the United States, Brazil and France will be presented. Although they address different aspects, the present decisions allow us to achieve an overview of how the main organs of the national Judiciary position themselves in the face of the problem of terrorism.

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THE SCHLEYER AFFAIR

Initially, it should be noted that the sources used to confirm the following information regarding the Schleyer case, which occurred in Germany, are: Büchel and Aust (2007), Folha de São Paulo (2008), Lemo (2017), Lima (2008), Made for Minds (2007), Made for Minds (2017).

HISTORICAL FACTS

Hanns-Martin Schleyer was an officer in the SS (Schutzstaffel – Protection Troop) during the Nazi period. For this reason, he was imprisoned as a prisoner of war for three years, being released in 1948. His national prominence came only after this period, when his career in the private sector took off at the Mercedes-Benz company, opening the door for him to be appointed President of the West German Employers' Confederation and the Confederation of German Industries.

In this way, his image was linked to the core of capitalism, especially in the context of the Cold War, in a country divided by two ideologies and also by a wall that symbolized the political dispute between the two systems. Student movements and urban guerrilla warfare were common phenomena in the country at that time, and the image of the businessman, already weakened by his impunity in the figure of a perpetrator of Nazism who only spent three years in prison, became even more attractive to be an eventual victim of radical groups. Thus, he was seen as an enemy by left-wing groups that challenged the capitalist system in East Germany.

At the same time, during the 1970s, terrorism was on the rise in Germany. In 1972, the Munich Olympics, which were supposed to demonstrate a plural and free Germany, finally free from the Nazi regime, saw terrorist attacks destroy the magic of the event. The great repercussion of the case in the international media and the disastrous end of the situation, with the death of 11 Israeli hostages and 01 German officer, encouraged other insurgent and organized groups to see in the practice of terrorism an effective instrument to have their demand heard.

From this, the far-left group Red Army Faction (RAF - *Baader-Meinhof*), which had been founded in the 1970s by Andreas Baader, Gudrun Ensslin, Ulrike Meinhof and Horst Mahle; saw in the capture of the businessman a possibility of obtaining the release of some of its leaders who were in prison. The group claimed to be active in accordance with Marxist-Leninist and Maoist ideology.

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The group then kidnapped businessman Hanns-Martin Schleyer in the city of Cologne**.** The action was orchestrated by Brigitte Mohnhaupt, leader of the second generation of RAF terrorists, and carried out by Sieglinde Hofmann, Peter-Jurgen Boock, Stefan Wisniewski and Willi-Peter Stoll.

In order to be successful, the group put a baby stroller on the street and the businessman's driver had to stop. The escort police car that was behind failed to stop and hit the car in which the businessman was. At that moment, RAF terrorists came and shot at the two cars, killing the businessman's driver and his three bodyguards.

Already in this episode, the terrorist group showed the violence with which it operated. The terrorist group demanded, through a letter, the release of 11 political prisoners in Stammheim, among whom were imprisoned RAF leaders such as Andreas Baader and Grudun Ensslin.

Such a scenario put the government in crisis, which caused Prime Minister Helmut Schmidt to create an Emergency Committee in the city of Bonn to negotiate with the terrorists. In fact, the negotiation would only be a façade, in order to gain time for the location of the businessman's captivity, while the prisoners who could supposedly be released were placed in true solitary confinement.

However, the terrorist group has not established captivity in one place. To avoid possible attempts by the government to circumvent the agreement in progress, the group traveled through different countries with the kidnapped businessman, passing through the Netherlands and Belgium.

Image 01 – Hans-Martin Schleyer in captivity

Source: DW Portal. Available at: <http://www.dw.com/image/621415_404.jpg>. Accessed on 08 Oct. 2024.

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In disagreement with the government's decision not to negotiate with the terrorists, the businessman's son, Hanns Eberhard Schleyer, filed a temporary injunction (a kind of Writ of Mandamus) with the German Federal Constitutional Court (TCF – *Bundesverfassungsgericht – BVerfG*) - *1 BvQ 5/77* to compel the German government to release the political prisoners and thus safeguard his father's life.

The period of German history became known as the German Autumn, in which the RAF carried out various terrorist activities, marking a period of extreme terrorist activity in the country.

ANALYSIS OF THE GERMAN DECISION

The plaintiff claimed that it was the duty of the State to protect life in accordance with Article 2.2 of the[7] German Constitution (*Grundgesetz für die Bundesrepublik Deutschland*) and, by failing to meet the demands of the kidnappers, the German State was indirectly condemning his father to death and disregarding the constitutional duty assigned. The protection of life had previously been glorified by an interpretation previously given by the Court itself (TCF) when it developed the idea of the duty of protection of the state entity.

He also claimed that state authorities could not, at their discretion, sacrifice his father's life for the protection of legal interests of greater value, since life was already the greatest legal value in itself.

Finally, the plaintiff also stated that the principle of isonomy was being offended, since the State had acted differently in similar cases, such as that of Peter Lorenz[8], meeting the demands of terrorists and releasing prisoners. His father would thus be protected by Article 3.1[9] of the German Constitution.

The demands were answered as follows by the German Federal Constitutional Court:

[7] "Article 2 (...) II - Everyone has the right to life and physical integrity. Individual freedom must be inviolable. These rights can be reinterpreted only in accordance with the law (free translation, GERMANY, 1949).
[8] Peter Lorenz was a German politician from the Christian Democratic Union (CDU) party. He was kidnapped on February 25, 1975, two days before the West Berlin mayoral elections, in which he was a candidate, by the group 2 June Movement. Among the demands for the release of the kidnapped was the release of some members of the group, such as Horst Mahler (one of the founders of the RAF – Red Army Faction, which refused the exchange), Verena Becker and Rolf Heissler, the latter who was involved with the kidnapping of Hanns-Martin Schleyer. The exchange was successful and, after the release of the inmates, the kidnapped was released on March 4.
[9] "Article 3 I – All persons shall be equal before the law.

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1) Article 2.2 of the Basic Law, together with Article 1.1[10], obliges the State to protect all human life. This duty is understandable, and it is linked to the prohibition of illegal interference by others. This duty must be followed by all state organs, since human life represents the highest value.
2) How the State guarantees the protection of life is a decision of its own responsibility. The agencies themselves decide which measures are useful and necessary to ensure this protection. Freedom of choice may in some cases be co-ordinated by a particular meaning when other protection of life cannot be achieved in any other way. Contrary to what the plaintiff reasonably alleges, the overlapping of private interest, in this case, does not belong to the case.
3) The peculiarity of protection against life-threatening blackmail by terrorists must be taken into account and adapt the measures to the multitude of unique situations involved.
4) The measures taken in these cases cannot be standardised in a general way and binding in advance, nor can they come from the basic rights of individuals. The Constitution creates the duty to protect not only the individual, but all citizens. Effective compliance with this duty leads state agencies to adapt to the circumstances of the individual case. Moreover, if it were, the Constitution would create a predictable state reaction in favor of terrorists. Thus, it would be impossible for the State to actually protect its citizens. That would be a contradiction of Article 2.2 of the German Constitution.
5) For the same reasons, Article 3.1 of the German Constitution cannot command an identical state response in all cases of kidnapping.
6) Thus, the German Federal Constitutional Court cannot order the competent state bodies to decide in a particular situation. It is at its discretion to decide the measures to be taken in order to fulfill its duty of protection.

Analyzing the decision, George Marmelstein Lima, a Brazilian federal judge stated:

> "The Constitutional Court recognized that the fundamental right to life (art. 2, para. 2, item 1, GG) bound the State to a broad duty of protection against any threat to human life, 'including in the face of anti-legal aggression by third parties'. Nevertheless, in that particular case, in which terrorist blackmail was involved, the special circumstances surrounding the threat led the *Bundesverfassungsgericht* to

[10] "Article 1 I – Human dignity shall be inviolable. Respect and protection will be the responsibility of all state authorities" (GERMANY, 1949).

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> consider itself incapable of determining to the competent state organs how to proceed. Thus, he denied the request". (LIMA, 2008).

Indirectly, the Court took into account that the release of 11 prisoners could cause future danger to the basic (constitutional) rights of other citizens, as occurred in the Peter Lorenz case. It would be up to the competent state body, therefore, to decide whether or not to meet the demands of the terrorists.

Another implicit interpretation of the decision is that the terrorists aimed to destabilize the entire legal system and, thus, they were a threat to the legal order. From a constructivist perspective, there is no correct solution to the case. German state bodies need a certain degree of discretion to judge and decide difficult cases.

TRAGIC OUTCOME

With the repercussion of the case and the German government's delay in solving the case, the RAF obtained support from other terrorist groups. One incident in particular was decisive for the outcome of the case.

On October 13, 1977, a Lufthansa Flight 181 between Palma de Mallorca, Spain, and Frankfurt, Germany, was hijacked by the Popular Front for the Liberation of Palestine in cooperation with the RAF. The hijacked plane passed through several cities until it reached Somalia, where the German anti-terrorist command GSG 9 – the elite German federal police – stormed the plane and freed the hostages.

Image 02 – Hijacked Lufthansa plane is freed

Source: DW Portal. Available at: <https://i0.wp.com/www.dw.com/image/39880947_303.jpg>. Accessed on 08 Oct. 2024.

The following night, known as Death Night, Andreas Baader, Grudun Ensslin, Jan-Carl Raspe and Irmgard Möller, RAF leaders, were found dead and wounded in their cells at Stammheim prison. The German government declared that it was collective suicide, but the forensic examination did not find material evidence for this, since the way in which they

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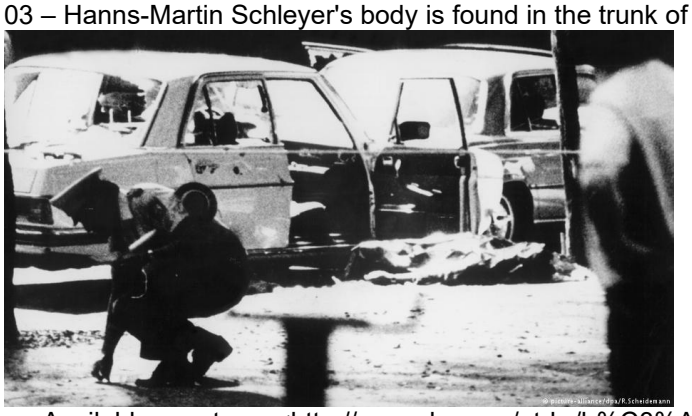
were dead did not lead to believe that it was suicide. In addition, Irmgard Möller ended up surviving and denounced that the deaths were executions, not suicides.

After having their leaders killed/wounded in prison, Hanns-Martin Schleyer's kidnappers shot him in the back of the head and left the body in the trunk of a car in Mulhouse, France.

Image 03 – Hanns-Martin Schleyer's body is found in the trunk of a car



Source: DW Portal. Available at: <http://www.dw.com/pt-br/h%C3%A1-40-anos-sequestro-de-empres%C3%A1rio-iniciava-o-outono-alem%C3%A3o/a-2765484>. Accessed on: 08 out. 2024.

In 2007, the release of Brigitte Mohnhaupt, former RAF leader, after serving a 24-year sentence brought controversy, as she had previously been sentenced five times to life imprisonment plus another 15 years in prison. This decision was handed down by the Court of Stuttgart based on a decision of the German Federal Constitutional Court that guarantees the prospect of having a life in freedom even when sentenced to life imprisonment. Over the next few months, the other prisoners of the defunct RAF were released. In 2008, Christian Klar, the last terrorist, was released.

TYPIFICATION OF TERRORISM IN GERMANY

Entering another sphere, the typification of terrorism in Germany, is not an easy task, since the provisions that deal with the subject are scattered in the legislation. The most important of these is the German Criminal Code (Strafgesetzbuch, StGB), which brings in its section 129a (GERMANY, 2017):[11]

[11] '(1) Any person who establishes an association (Paragraph 129(2)) whose purposes or activities are aimed at:
1. murder (§ 211) or manslaughter (§ 212) or genocide (§ 6 of the Code of Crimes against International Law) or crimes against humanity (§ 7 of the Code of Crimes against International Law) or war crimes (§§ 8, 9, 10, 11 or § 12 of the Code of Crimes against International Law), or
2.Offences against personal liberty in the cases referred to in Section 239a or Section 239b
3. (repealed)

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"(1) Any person who forms an organization with the purpose or activities are directly related to:
1) Murder within specific aggravating circumstances (...), murder (...) or genocide (...) or a crime against humanity (...); or
2) Crimes against personal liberties of sections 239a or section 239b;
3) Repealed;
Or anyone who participates in this group as a member is subject to imprisonment from 01 to 10 years.
(2) The same penalty shall be applied to any person who forms an organization whose objectives or activities are directly connected with:
1) Causing serious mental or physical harm to another person (...);
2) Committing offences described in sections 303b, 305, 305a, or offences that endanger the general public (...);
3) Committing offenses against the environment (...);
4) Committing offences against the following provisions of the War Arms Control Act (...);
5) Committing offenses against the Arms Act (...)
Or any person who participates in any of these groups as a member of the offenses in numbers 01 to 05 that intends to seriously intimidate the population, illegally coerce a public authority or an international organization through the use of force or the threat of the use of force, or to significantly harm or destroy political, constitutional, or constitutional structures. economic or social consequences of a

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or anyone who participates in such an association as a member shall be punished with imprisonment of one year to ten years.
(2) Likewise, any person who establishes an association whose purposes or activities are directed to:
1. to inflict serious physical or mental damage on another person, in particular of the kind referred to in Section 226,
2.Criminal offences pursuant to Sections 303b, 305, 305a or offences endangering the public in the cases referred to in Sections 306 to 306c or 307 (1) to (3), Section 308 (1) to (4), Section 309 (1) to (5), Sections 313, 314 or 315 (1), (3) or (4), Section 316b (1) or (3) or Section 316c (1) to (3) or Section 317 (1),
3. Offences against the environment in the cases referred to in Section 330a (1) to (3),
4.Criminal offences pursuant to § 19 (1) to (3), § 20 (1) or (2), § 20a (1) to (3), § 19 (2) no. 2 or (3) no. 2, § 20 (1) or (2) or § 20a (1) to (3), in each case also in conjunction with § 21, or pursuant to § 22a (1) to (3) of the Act on the Control of War Weapons, or
5. Criminal offences pursuant to Section 51 (1) to (3) of the Weapons Act
or who participates as a member of such an association if one of the acts referred to in numbers 1 to 5 is intended to intimidate the population in a significant way, to unlawfully coerce an authority or an international organization by force or by threat of force, or to eliminate or significantly impede the basic political, constitutional, economic or social structures of a state or an international organization. and, by the manner in which they are committed or their effects, may cause significant damage to a State or an international organisation.
(3) If the purposes or activities of the association are aimed at threatening one of the criminal offences referred to in subsections (1) and (2), imprisonment of six months to five years shall be imposed.
(4) If the offender is one of the ringleaders or backers, in the cases of subsections (1) and (2) a term of imprisonment of not less than three years shall be imposed, in the cases of subsection (3) a term of imprisonment of one year to ten years.
(5) Any person who supports an association referred to in subsections (1), (2) or (3) shall be punished with imprisonment of six months to ten years in the cases referred to in subsections (1) and (2) and with imprisonment of up to five years or a fine in the cases referred to in subsection (3). Anyone who recruits members or supporters for an association referred to in subsection 1 or subsection 2 shall be punished with imprisonment of six months to five years.
(6) In the case of parties whose guilt is minor and whose cooperation is of minor importance, the court may, in the cases referred to in subsections (1), (2), (3) and (5), mitigate the sentence at its discretion (Section 49 (2)).
(7) Section 129 (7) shall apply mutatis mutandis.
(8) In addition to a custodial sentence of at least six months, the court may revoke the ability to hold public office and the ability to obtain rights from public elections (Section 45 (2)).
(9) In the cases referred to in subsections (1), (2), (4) and (5), the court may order supervision of conduct (Section 68 (1)) (ALEMANHA, 2017).

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> State or international organization, and which, given the nature of the consequences of these offenses, seriously affects a State or an International Organization.
> (3) If the object or activity of the group is intended to threaten the commission with one of the offenses mentioned in subsection (1) or (2) above, the penalty shall be imprisonment from six months to five years.
> (4) If the offender is one of the leaders or interpreters, the penalty of imprisonment shall be at least three years in the cases provided for in subsections (1) and (2) above and imprisonment from one to ten years in the cases provided for in subsection (3) above.
> (5) Anyone who supports a group described in subsections (1), (2), (3) above shall be subject to imprisonment from 6 months to 10 years in the cases of subsections (1) and (2), and imprisonment not to exceed 5 years in the cases of subsection (3). Anyone who recruits members or supporters for the group described in subsections (1) or (2) above will be subject to imprisonment from 6 months to 5 years.
> (6) In cases of accomplices whose fault is of a minor nature and whose contribution is of minor importance, the court may, in the cases provided for in subsections (1), (2), (3) and (5) above, mitigate the award at its discretion (section 49(2)).
> (...)
> (8) In addition to a term of imprisonment of not less than 6 months, the Court may order a prohibition from holding public office, from voting, and from standing elected in public elections.
> (9) In the cases of subsections (1), (2) and (4) above, the Tribunal may make an application for supervision."

As can be seen, German legislation is complete and even includes crimes against the environment and the Weapons Codes in the country. With the specific typification and penalization depending on the activity, the country guarantees greater security to citizens against political uses of the aforementioned legislation against opponents.

The penalty for the crime of terrorism currently in force in Germany demonstrates a curious change of perspective. Although there is still the possibility of life imprisonment, the low sentences attributed in this legislation brought above demonstrate the belief in the rehabilitation and recovery of delinquents after serving their sentence.

Germany was innovative in punishing the financing of Terrorism in its legislation. In this way, terrorism and its financing are more effectively combated, since the organization of attacks and the maintenance of the terrorist cell or network require specific budgets, which will not be possible if there is no paying source. Thus, the German Criminal Code, in its Section 89c (GERMANY, 2017[12]), provides:

[12] "Section 89c Terrorist financing:
(1) Any person who collects, receives or makes available assets with the knowledge or with the intention that they may be used by another person for the purpose of committing
1. murder (Section 211), manslaughter (Section 212), genocide (Section 6 of the Code of Crimes against International Law), a crime against humanity (Section 7 of the Code of Crimes against International Law), a war crime (Sections 8, 9, 10, 11 or 12 of the Code of Crimes against International Law), bodily injury pursuant to Section 224 or bodily injury which causes serious physical or mental harm to another person, in particular the kind specified in Section 226,
2. an extortionate kidnapping of human beings (Section 239a) or hostage-taking (Section 239b),

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"§ 89c Terrorist Financing:
(1) Any person who collects, accepts or makes available with the knowledge or for the purpose that it is from another person to the commission (§§ 8, 9, 10, 11 or 12 of the Code of Crimes against Humanity), crime against humanity (§ 7 of the Code of Crimes against the Rights of Peoples), a criminal offence (§ 211), a murder (§ 212) a violation of personal life, as defined in § 224, or a bodily injury causing serious or serious physical or psychological harm to another person, in particular of the type referred to in § 226, pursuant to an exorbitant human being (§ 239a) or a hostage-taking (§ 239b), third of criminal offences under Sections 303b, 305, 305a, or joint criminal offenses in the cases of Sections 306 through 306c or 307. (...) he must be punished with a prison sentence of six months to ten years. Sentence 1 shall be applied in cases 1 to 7 only if the act referred to is intended to intimidate the population in a considerable way, to force an international authority or organization illegally by force or by threat of force, constitutional, economic or social constitutions of a state or an international organization and that may significantly harm a state or an international organization by its nature or its effects. (2) A person who collects, receives or makes available assets under the condition of sentence 2 of paragraph 1 shall also be punished for committing one of the offences referred to in the first sentence of paragraph 1.3. Paragraphs 1 and 2 also apply where the offence is committed abroad. If it is committed outside the Member States of the European

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3.of criminal offences pursuant to Sections 303b, 305, 305a or criminal offences endangering the public in the cases referred to in Sections 306 to 306c or 307 subsections 1 to 3, Section 308 subsections 1 to 4, Section 309 subsections 1 to 5, Sections 313, 314 or 315 subsections 1, 3 or 4, Section 316b subsections 1 or 3 or Section 316c subsections 1 to 3 or Section 317 subsection 1, 4. of offences against the environment in the cases referred to in Section 330a (1) to (3),
5. of criminal offences pursuant to Section 19 (1) to (3), Section 20 (1) or (2), Section 20a (1) to (3), Section 19 (2) number 2 or (3) number 2, Section 20 (1) or (2) or Section 20a (1) to (3), in each case also in conjunction with Section 21, or pursuant to Section 22a (1) to (3) of the Act on the Control of War Weapons,
6. of criminal offences pursuant to Section 51 (1) to (3) of the Weapons Act,
7. a criminal offence pursuant to Section 328 (1) or (2) or Section 310 (1) or (2),
8.a criminal offence pursuant to Section 89a (2a)
is punishable by imprisonment of six months to ten years. Sentence 1 shall only apply in the cases referred to in numbers 1 to 7 if the offence referred to therein is intended to intimidate the population in a significant way, to unlawfully coerce an authority or an international organisation by force or by threat of force, or to eliminate or significantly impair the basic political, constitutional, economic or social structures of a state or an international organisation, and by the way in which it is committed or its effects may cause significant damage to a state or an international organisation.
(2) Anyone who, under the condition of subsection 1 sentence 2, collects, receives or makes available assets in order to commit one of the offences referred to in subsection 1 sentence 1 shall also be punished.
(3) Subsections (1) and (2) shall also apply if the offence is committed abroad. If it is committed outside the Member States of the European Union, this only applies if it is committed by a German or a foreigner with a livelihood in Germany or if the financed crime is to be committed in Germany or by or against a German.
(4) In the cases referred to in subsection (3) sentence 2, prosecution shall require authorisation from the Federal Ministry of Justice and Consumer Protection. If the offence is committed in another Member State of the European Union, prosecution requires authorisation from the Federal Ministry of Justice and Consumer Protection if the offence is neither committed by a German nor is the financed crime to be committed in Germany or by or against a German.
(5) If the assets are of low value in the case of an offence pursuant to subsection (1) or (2), imprisonment of three months to five years shall be imposed.
(6) The court shall mitigate the penalty (Section 49 (1)) or may refrain from imposing a penalty if the offender's guilt is minor.
(7) The court may, at its discretion, mitigate the sentence (Section 49 (2)) or refrain from punishing under this provision if the offender voluntarily gives up further preparation of the offence and avoids or substantially reduces a danger caused and recognised by him that others will continue to prepare or carry it out, or if he voluntarily prevents the completion of this offence. If, without any action on the part of the offender, the designated danger is averted or significantly reduced or the completion of the act is prevented, his voluntary and serious effort to achieve this goal is sufficient." (ALEMANHA, 2017).

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> Union, this only applies if it is committed in Germany by a German citizen or a foreign citizen with means of subsistence or if the criminal offence is committed in Germany or by or against a German citizen. (4) In the cases referred to in the second sentence of paragraph 3, the authorisation of the Federal Ministry of Justice and Consumer Protection should be pursued. If the offence is committed in another Member State of the European Union, the judgment of the authorisation of the Federal Ministry of Justice and Consumer Protection is required if the offence is not committed by a German, nor is the criminal offence committed in Germany or by a German or a German,(5) if the property is negligible in the case of an act pursuant to paragraph 1 or 2, A prison sentence of between three months and five years will be recognized.
> (6) The court must mitigate the sentence (Section 49(1)) or may refrain from punishment if the perpetrator's guilt is minor. (7) The court may, at its discretion, mitigate the punishment (Article 49 (2)) or punishment under this provision if the offender voluntarily abandons the preparation of the crime and the danger recognized by him by others preparing or executing them, avoids or significantly reduces them, or if he voluntarily prevents the completion of this act. If, without the assistance of the perpetrator, the designated danger is avoided or substantially reduced or the conclusion of the infraction prevented, his voluntary and earnest efforts to achieve that object are sufficient."

Like the United States, Germany, despite not formally writing in this legal document, was concerned with both types of terrorism – domestic and international. The excerpt from the German Criminal Code reads in its section 129b (GERMANY, 2017):[13]

> "(1) Article 129 and section 129a are applicable to organizations abroad. If the offence relates to an organisation outside the Member States of the European Union, it does not apply unless the offence was committed through an activity carried out in the Federal Republic of Germany or if the offender or victim is German or found in Germany. In cases falling under the second sentence above, the infringement will only be prosecuted with the authorisation of the Federal Ministry of Justice. Authorization can be granted for an individual case or in general for the trial of future infractions related to a specific organization. In deciding whether to give consent, the Federal Ministry of Justice must consider whether the organisation's objectives are directed towards the fundamental values of a state order that respects human dignity or against the peaceful coexistence of nations and that appears reprehensible when weighing all the circumstances of the case.
> (2) Section 73d and section 74a shall apply to the cases provided for in section 129 and section 129a, in each case also in conjunction with subsection (1) above.

[13] "Section 129b Criminal and terrorist organisations abroad; Confiscation
(1) Sections 129 and 129a shall also apply to associations abroad. If the offence relates to an association outside the Member States of the European Union, this shall only apply if it is committed by an activity carried out within the territorial scope of this Act or if the perpetrator or victim is German or is in Germany. In the cases referred to in sentence 2, the offence shall only be prosecuted with the authorisation of the Federal Ministry of Justice and Consumer Protection. The authorisation may be granted on a case-by-case basis or, more generally, for the prosecution of future offences relating to a particular association. In deciding on the authorisation, the Ministry shall take into account whether the Association's efforts are directed against the fundamental values of a state order that respects human dignity or against the peaceful coexistence of peoples and appear to be reprehensible when all the circumstances are weighed up.
(2) In the cases referred to in Paragraphs 129 and 129a, in each case also in conjunction with subsection (1), Paragraph 74a shall apply.' (GERMANY, 2017).

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In this excerpt, despite formally recognizing the occurrence of international terrorism, it is clear that the legislator opted for the cut of jurisdiction from the borders of the European Union. It is almost a negative declaration of competence in cases where the terrorist organization or group operates outside the regional bloc and has no involvement with Germany. In such cases, no crime is committed under German law, even if the individual, despite not being German, has permanent residence in the country.

However, German legislation also committed excesses. Scally (2016) elucidated that the Constitutional Court considered unconstitutional part of the anti-terrorist legislation in which it was allowed to spy on suspects with hidden cameras and secret microphones in their homes, including bathrooms and bedrooms.

In addition, in the legislation considered unconstitutional, the surveillance of contact persons, even if they were not direct suspects, was authorized, as well as the use of telephone recordings and remote access to electronics using *software* that acts as malware, or virus.

According to Scally (2016), the Supreme Court considered that such a legislative lecture infringed on privacy and exceeded the competences of the federal criminal police (BKA – *Bundeskriminalamt*), treating it as a true intelligence service, which is not the case; in addition to affecting people who are not related to the practice of terrorism.

CASES OF TERRORISM IN DIFFERENT COUNTRIES

Although they do not directly address the dilemma faced by the German Federal Constitutional Court, it is prudent to bring up famous cases in other countries that also involved the highest courts of these nations in order to understand their position in relation to Terrorism.

UNITED STATES – ABDUL AL QAEDER AHMED HUSSAIN VS. BARACK H. OBAMA CASE (2014)

Unfortunately, the U.S. legislation, despite bringing positive developments in the typification of terrorism, such as the differentiation between domestic and international terrorism, has a generic content in the definition of the crime. Thus, several acts can be considered terrorist in the United States, as long as they affect public order and promote a certain intimidation of the government or civil society. Thus, the influence of public opinion and politics on issues that directly impact national security is increased.

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This context of application of U.S. law is evident in the jurisprudence of the Supreme Court of the United States, which involved the dispute between *Abdul Al Qader Ahmed Hussain* and *Barack H. Obama*, former U.S. president, under number 13-638, which was decided on April 21, 2014. In this case, the petitioner was extrajudicially detained, that is, without a trial, for security reasons. It would be a kind of preventive detention.

The case was analyzed by the U.S. Supreme Court under No. 572 U.S. (UNITED STATES, 2014):[14]

> "The Authorization for Use of Military Force (AUMF), which was approved in September 2001, empowers the president to 'use all necessary and appropriate force against those nations, organizations, or persons whom he determines to have planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or which harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons,' Article 115, §2(a), affirmation 224 in *Hamdi v. Rumsfeld*, 542 U.S. 507, 2004. The five members of the Supreme Court agreed that the AUMF authorizes the president to detain enemy combatants (...) In Justice O'Connor's view, for the plurality of the Supreme Court, enemy combatants must include "an individual who ... has been part of or supported forces hostile to the United States or coalition in Afghanistan and partners who have engaged in an

[14] "ABDUL AL QADER AHMED HUSSAIN, PETITIONER v. BARACK H. OBAMA, PRESIDENT OF THE UNITED STATES, ET AL. ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.
The petition for a writ of certiorari is denied. Statement of JUSTICE BREYER respecting the denial of certiorari. The Authorization for Use of military orce (AUMF), passed in September 2001, empowers the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." §2(a), 115 Stat. 224. In Hamdi v. Rumsfeld, 542 U. S. 507 (2004), five members of the Court agreed that the AUMF authorizes the President to detain enemy combatants. Id., at 517–518 (plurality opinion); id., at 587 (THOMAS, J., dissenting). In her opinion for a plurality of the Court, Justice O'Connor understood enemy combatants to include "an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." Id.,at 516 (internal quotation marksomitted). She concluded that the "detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured," is "an exercise of the 'necessary and appropriate force'" that Congress authorized under the AUMF. Id., at 518 (emphasis added). She explained, however, that the President's power to detain under the AUMF may be different when the "practical circumstances" of the relevant conflict are "entirely unlike those of the conflicts that informed the development of the law of war." Id., at 521. In this case, the District Court concluded, and the Court of Appeals agreed, that petitioner Abdul Al Qader Ahmed Hussain could be detained under the AUMF because he was "part of al-Qaeda or the Taliban at the time of his apprehension." 821 F. Supp. 2d 67, 76–79 (DDC 2011) (internal quotation marks omitted; emphasis added); accord, 718 F. 3d 964, 966–967 (CADC 2013). But even assuming this is correct, in either base—that is, irrespective of whether Hussain was part of al Qaeda or the Taliban—it is possible that Hussain was not an "individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." 542 U. S., at 516 (emphasis added). The Court has not directly addressed whether theAUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was not "engaged in an armed conflict against the United States" in Afghanistan prior to his capture. Nor have we considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution limits the duration of detention. The circumstances of Hussain's detention may involve these unanswered questions, but his petition does not ask us to answer them. See Pet. for Cert. i. Therefore, I agree with the Court's decision to deny certiorari" (ESTADOS UNIDOS, 2014).

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> armed conflict in that country against the United States. (...) She concluded that "the detention of individuals who fall into the delimited category they were considering, for the duration of the particular conflict in which they were captured," is an "exercise of the 'necessary and appropriate force' that the U.S. National Congress authorized through the AUMF. (...) She explained, however, that the president's power to detain based on the AUMF should be different when the "practical circumstances" of the relevant conflicts are "entirely different from the conflicts that gave rise to the development of the law of war." (...) In that case, the District Court and the Court of Appeal agreed that the applicant *Abdul Al Qader Ahmed Hussain* could have his detention based on the AUMF because he was 'part of *al-Qaeda* or the *Taliban* at the time of his arrest'. (...) The Supreme Court has not directly stated whether the AUMF authorizes and permits detention on the basis that the individual was a participant in *al-Qaeda* or the *Taliban* but was not "engaged in the armed conflict against the United States" in Afghanistan prior to his capture; nor, given the permissibility of detention, whether the AUMF or the Constitution limits the duration of detention. The circumstances of *Hussain's detention* are likely to involve these unanswered questions, but his petition did not ask the Supreme Court to answer them. (...) Therefore, I agree with the decision of the Court of Justice to deny it".

This decision, by giving broad powers to the head of the Executive to use the forces he deems necessary, including against nations, gives a real blank check for the country to exercise imperialism under the pretext of the fight against terrorism. Who should judge and authorize an intervention in other countries, in accordance with the International Order, would be the United Nations, and not the aforementioned Court. If it were not, it would not make sense to create a Security Council.

The logic behind the decision is similar to that adopted in Germany: the country is sovereign and the discretion in the competence of state agents in the resolution of conflicts of national interest is attributed individually to each of them, in this case to the President of the Republic. However, the legitimization of the use of force against nations conferred by the U.S. Supreme Court goes beyond the procedural level and ends up leaving the records, entering the political and diplomatic field.

The decision is also not justified in the basic power of the nation-state, its sovereignty. Infringing on the sovereignty of another state in defense of its own sovereignty is not in line with the balance and equitable distribution of world power, creating a certain context in which one sovereignty seems to be worth more than another.

In fact, the U.S. Court itself was concerned with ensuring that there was no rupture with what is, in fact, discussed in the process. This can be seen in the passage in which he stated that an eventual benefit could be granted to the petitioner if requested. If he were not practicing or organizing in armed conflict against the United States, even though he was a participant in a terrorist organization, he would have the benefit of a constitutional vacuum

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that should have been filled by the Court, but he did not do so, which is why there is no reason for this discussion in that judgment.

BRAZIL – MAURÍCIO FERNANDEZ NORAMBUENA CASE (2004)

Brazil has recently gone through a period in which it hosted important international events. As a result, concern about possible terrorist attacks has also grown. Mainly because, until that moment, the country did not yet have specific legislation that dealt with the subject, but only a brief reference to the criminal type in Law No. 7,170, of December 14, 1983.

But this is not the focus of the analysis of the case. The main concern of the present case is with the treatment given to terrorism by the Federal Constitution of 1988.

Until 2004, it had not yet been decided in the country whether terrorism would be included in the list of political crimes, being able to count on some legal benefits, or if it would be treated as a common crime.

The case analyzed revolved around the extradition of Maurício Fernandez Norambuena, judged on August 26, 2004 under the rapporteurship of Minister Celso de Mello, in which the sending of the defendant by the government of Chile was requested.

The issue was aggravated in relation to the sentence attributed to the defendant. In Chile, he had been sentenced to life imprisonment, a penalty that does not exist in Brazil and that goes against fundamental constitutional precepts, such as the dignity of the human person.

Initially, the Federal Supreme Court (STF) was concerned with the placement of terrorism within the legal system, being considered a political crime or common crime. If it were considered a political crime, it could receive some benefits, such as the prohibition of extradition. However, Brazil (2004) understood:

> "E M E N T A: EXTRADITION - CRIMINAL ACTS OF A TERRORIST NATURE - MISCHARACTERIZATION OF TERRORISM AS A PRACTICE OF POLITICAL CRIME - SENTENCING OF THE EXTRADITED PERSON TO TWO (2) LIFE SENTENCES - INADMISSIBILITY OF THIS PUNISHMENT IN THE BRAZILIAN CONSTITUTIONAL SYSTEM (CF, ART. 5, XLVII, "B") - EXTRADITION EXECUTION DEPENDENT ON PRIOR DIPLOMATIC COMMITMENT CONSISTING OF COMMUTATION, IN TEMPORARY SENTENCES NOT EXCEEDING 30 YEARS, OF THE SENTENCE OF LIFE IMPRISONMENT - INTENDED IMMEDIATE EXECUTION OF THE EXTRADITION ORDER, BY DETERMINATION OF THE FEDERAL SUPREME COURT - IMPOSSIBILITY - PREROGATIVE THAT ONLY ASSISTS THE PRESIDENT OF THE REPUBLIC, AS HEAD OF STATE - REQUEST GRANTED, WITH RESTRICTION.
> (...)

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> Criminal acts of a terrorist nature, considering the parameters enshrined in the current Constitution of the Republic, are not subsumed under the notion of political criminality, since the Fundamental Law proclaimed the repudiation of terrorism as one of the essential principles that should govern the Brazilian State in its international relations (FC, art. 4, VIII). in addition to having qualified terrorism, for the purpose of internal repression, as a crime comparable to heinous crimes, which exposes it, from this perspective, to legal treatment impregnated with maximum rigor, making it non-bailable and insusceptible to the sovereign clemency of the State and reducing it, furthermore, to the ordinary dimension of merely common crimes (FC, art. 5, XLIII).
> The Constitution of the Republic, in the presence of such interpretative vectors (FC, art. 4, VIII, and art. 5, XLIII), does not authorize the granting of the same benign treatment to criminal practices of a terrorist nature as the perpetrator of political crimes or crimes of opinion, thus preventing the establishment of an inadmissible nature around the terrorist a circle of protection that makes it immune to the extradition power of the Brazilian State, especially if one takes into account the very relevant circumstance that the National Constituent Assembly formulated a clear and unequivocal judgment of disregard in relation to any criminal acts of a terrorist nature, not recognizing the dignity with which the practice of political crime is often impregnated.
> EXTRADITION OF THE TERRORIST: NEED TO PRESERVE THE DEMOCRATIC PRINCIPLE AND ESSENTIALITY OF INTERNATIONAL COOPERATION IN THE REPRESSION OF TERRORISM.
> The statute of political crime is not applicable nor does it extend in its legal-constitutional projection to criminal acts that reflect terrorist practices, whether those committed by private individuals or those perpetrated with the official support of the government apparatus itself, similar to what was recorded in the Southern Cone. with the adoption, by the South American military regimes, of the despicable model of state terrorism.
> Terrorism - which is the expression of a macro-crime capable of affecting the security, integrity and peace of citizens and organized societies - is a criminal phenomenon of the highest gravity, to which the international community cannot remain indifferent, since the terrorist act undermines the very foundations on which the democratic rule of law rests. in addition to representing an unacceptable threat to political institutions and public freedoms, which authorizes excluding him from the benign treatment that the Constitution of Brazil (article 5, LII) reserved for acts that constitute political crime.
> The protection clause contained in article 5, LII of the Constitution of the Republic - which prohibits the extradition of foreigners for political or opinion crimes - does not extend, for this reason, to the perpetrator of criminal acts of a terrorist nature, considering the frontal repudiation that the Brazilian constitutional order dispenses to terrorism and terrorism.
> -- Extradition – as a legitimate means of international cooperation in the repression of common criminal practices – represents an instrument of significant importance in the effective fight against terrorism, which constitutes *"a serious threat to democratic values and to international peace and security (...)"* (Inter-American Convention Against Terrorism, Art. 11), justifying, therefore, for extradition purposes, its mischaracterization as a crime of a political nature. Doctrine".

Under the aegis of such a decision, a situation analogous to that experienced in Germany would already have a concrete and prior response in Brazil: the impossibility of negotiating any kind of clemency to imprisoned terrorists with the aim of freeing new hostages, since, being comparable to heinous crimes, this possibility would be impaired.

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It should be noted that clemency, in Brazil, can take three forms: grace, pardon or amnesty. The first two are acts of the executive power, while the last is an act of the legislative power. Amnesty, according to Costa (2007), is a renunciation by the State of the right to punish, being a cause for extinction of punishability.

According to Costa (2007), grace and pardon would also be forms of extinction of punishability – the former would be granted after a provocation and would reach only the individual, while the latter would be granted spontaneously and would reach a group/collectivity. Both are forms of sovereign indulgence. The Brazilian Federal Constitution only refers to pardon, no longer to grace – although it is still in the Penal Code, which is why it should be called individual pardon.

Amnesty, in turn,

Thus, the head of the Executive could not negotiate the release of those convicted of terrorism.

In continuity, Brazil's decision calls (2004):

> "EXTRADITION AND LIFE IMPRISONMENT: NEED FOR PRIOR COMMUTATION, TO A TEMPORARY SENTENCE (MAXIMUM OF 30 YEARS), OF THE LIFE SENTENCE – REVIEW OF THE JURISPRUDENCE OF THE FEDERAL SUPREME COURT, IN OBEDIENCE TO THE CONSTITUTIONAL DECLARATION OF RIGHTS (CF, ART. 5, XLVII, "b").
> Extradition will only be granted by the Federal Supreme Court, in the case of criminal acts punishable by life imprisonment, if the requesting State formally assumes, in relation to it, before the Brazilian Government, the commitment to commute it to a sentence not exceeding the maximum duration allowed in the criminal law of Brazil (CP, art. 75), since extradition requests - considering the provisions of article 5, XLVII, *"b"* of the Constitution of the Republic, which prohibits criminal sanctions of a perpetual nature - are necessarily subject to the hierarchical-normative authority of the Brazilian Fundamental Law. Doctrine. New understanding derived from the review, by the Federal Supreme Court, of its jurisprudence on the subject of passive extradition".

In this part of the decision, the Brazilian Supreme Court shows concern with the fulfillment of the defendant's sentence according to the guidelines conferred by the Brazilian legal system – which establishes a maximum limit in order to avoid a vexatious or excessively long sentence, as is the case of life imprisonment.

Demanding a formal commitment from the receiving State of the one being extradited is a legal requirement that directly affects the diplomatic sphere, and may harm it. The Brazilian Constitution would not guarantee it if it did not want dignified treatment to be given even to those who committed the worst political crimes against the pillars of the Democratic Rule of Law.

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Finally, Brasil (2004) teaches:

> "THE ISSUE OF THE IMMEDIATE EFFECTIVENESS OF EXTRADITION SURRENDER - INTELLIGENCE OF ARTICLE 89 OF THE FOREIGNER STATUTE - EXCLUSIVE PREROGATIVE OF THE PRESIDENT OF THE REPUBLIC, AS HEAD OF STATE.
> The surrender of the extradited person - who is being criminally prosecuted in Brazil, or who has suffered a criminal conviction imposed by the Brazilian Justice - depends, in principle, on the conclusion of the Brazilian criminal process or on the fulfillment of the custodial sentence decreed by the Judiciary of Brazil, except if the President of the Republic, with the support of a discretionary judgment, of an eminently political nature, based on reasons of opportunity, convenience and/or utility, exercises, in the capacity of Head of State, the exceptional prerogative that allows him to determine the immediate effectiveness of the extradition order (Statute of the Foreigner, art. 89, *"caput", "in fine"*). Doctrine. Precedents".

Here, as with the decision of the German Federal Constitutional Court, broad discretion was granted to another state entity, in this case the Executive, to determine the conditions and political convenience of the extradition. A similar point, because the STF did not enter into the demarcation of how the act of the President of the Republic should be, and he should act according to what he considers best for the State from a strategic and political point of view.

FRANCE – CASE NO. 5,993 (2017)

It would not be possible to go through an analysis of jurisprudence without considering France, the country that was the cradle of one of the main revolutions that gave voice to other previously marginalized social sectors, but which also caused a wave of violence in that period in Europe during the historical phase called the Period of Terror, which lasted from 1793 to 1794.

In fact, it was exactly during the French Revolution that the term terrorism began to have the connotation it has today – propagation of acts of terror – although, according to Santos (2014), the terminology was credited to the German Karl Heinzen in his work "The Murder" (*Das Mord*), in which he evidenced the use of violence by methods that caused panic and terror.

Regarding the French approach, it is worth mentioning the recent decision of the Court of Cassation, the main body of the French Judiciary, which demonstrated the difficulty in conceptualizing terrorism at the international and domestic levels. In the situation in question, the Constitutional Council (*Conseil Constitutionnel*) itself had previously decided, to be precise in 1986, in decision No. 86-213 DC (*Décision No. 86-213 AD*), that it would be

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up to the Judiciary to interpret terms such as intimidation and terrorism, since the legislation was not clear on the subject. Thus, it was stated by France (2017), [15]in a decision rendered regarding Case 5993 (*Arrêt No. 5993*):

> "(...) On the basis of the competence of the Examination Division to determine whether there are sufficient charges against persons charged with crimes aggravated by the particular circumstance of terrorism; whereas there is no universally accepted definition of terrorism in international law; pursuant to article 421-1 of the Penal Code, voluntary attacks on the physical integrity of persons, degradation or destruction of public property or other offenses listed in this article when they are intentionally connected with an individual or collective enterprise whose purpose is to seriously disturb public order through intimidation or terror; whereas this definition of terrorism, resulting from the Law of 9 September 1986, is not linked to the nature of the acts committed that fall within the scope of crimes already defined by the Penal Code, but also to the perpetrators does not necessarily imply that the perpetrators have achieved their objective; Whereas, contrary to what is supported by the defence in one of the pleadings filed, it is irrelevant that the specific violation of the train derailment and collision has been excluded from the list of terrorist acts since 1 March 1994; that it is also an act of terrorism, according to Article 421-2-1 of the same Code, to participate in a group formed or in an agreement established for the preparation, characterized by one or more relevant facts, of one of the acts of terrorism referred to in the preceding article; Whereas the latter infringement requires that the reality of the threat be demonstrated by one or more material facts demonstrating the existence of a concerted plan the implementation of which is in progress;
> (...)
> whereas Parliament and the Constitutional Council have left it to the judicial authorities to interpret the concepts of 'intimidation' and 'terrorism'; In these circumstances, the Chamber of Inquiry considers that, in order to assess whether there are sufficient charges against the accused for having committed or not

[15] "(...) on the grounds that it is for the court of the investigating chamber to determine whether or not there are sufficient charges against the persons indicted for having committed offences aggravated by the particular circumstance of terrorism; that there is no universal and unanimously accepted definition of terrorism in international law; that under French law, acts of terrorism, under the terms of Article 421-1 of the Criminal Code, constitute deliberate attacks on the physical integrity of persons, damage to or destruction of public property, or other offences listed in this article when they are intentionally related to an individual or collective undertaking with the aim of seriously disturbing public order by intimidation or terror; that this definition of terrorism, derived from the Law of 9 September 1986, is not linked to the nature of the acts committed which fall within the scope of offences already defined by the Criminal Code, but to the intention of their perpetrators, the objective pursued not necessarily implying that the perpetrators have achieved their aim; Thus, contrary to what is argued by the defence in one of the pleadings filed, it is of little importance that the specific offence of train derailment and collision has been excluded from the list of terrorist acts since 1 March 1994. that according to Article 421-2-1 of the same Code, it is also an act of terrorism to participate in a group formed or in an agreement established with a view to the preparation, characterised by one or more material acts, of one of the terrorist acts mentioned in the preceding article; that the latter offence requires that the reality of the threat be demonstrated by one or more material facts demonstrating the existence of a concerted plan the implementation of which is in progress (...)that it follows that the Parliament and the Constitutional Council have left it to the judicial authority to interpret the contours of the concepts of "intimidation" and "terror"; that, in these circumstances, the investigating chamber considers that in order to assess whether there are sufficient charges against the persons indicted for having committed terrorist acts or not, it must have recourse to a method reconciling the strict interpretation of criminal law with a teleological approach that makes it possible to question its objectives; that it is thus a question for the investigating chamber of giving meaning to terms not defined by the legislator, and this in a way that is adapted to the developments in contemporary democratic society; that the investigating chamber stresses in this regard that it must interpret the terms "intimidation" and "terror" in France in 2016, at the time when the state of emergency was declared" (FRANÇA, 2017).

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> committed acts of terrorism, a method of reconciliation is a strict interpretation of criminal law with a teleological approach to question its objectives; that this is how the Chamber of Instruction gives meaning to terms not defined by the legislator, in a way adapted to the evolutions of contemporary democratic society; Whereas the investigating chamber stresses that it must interpret the terms "intimidation" and "terrorism" in France in 2016, at a time when the state of emergency was declared;".

Unlike the United States, the French Court understood that it is necessary, for the crime of terrorism to occur, the demonstration of material facts that permeate a plan designed and whose implementation is being achieved so that a citizen can be considered as a practitioner of terrorism. Thus, a person who, although affiliated with an organization for this purpose, is not involved in terrorist actions per se, could not be arrested for such a crime, appearing only as a kind of substitute.

Once the material requirements were demonstrated, the French Court chose to remove the discretion of the use of pretrial detention as a way to curb terrorism. Right or not, the French decision seems to be closer to the basic principles of law and the promotion of Human Rights, since it reduces the possibility of imprisonment of innocent people.

In this circumstance, France established maturity in separating the conjuncture through which it was passing from the strictly constitutional analysis of the cases in which it should manifest itself, since such a decision was handed down in a bloody phase of French history, with the occurrence of at least 14 attacks since January 2015, which began with the attack on the magazine *Charlie Hebdo*. In addition, it occurred in the midst of the declaration of the State of Emergency, which luckily did not culminate in a State of Exception.

In addition, France (2017):[16]

> With regard to acts of violence committed against persons holding public authority during clashes with security forces during demonstrations, such acts are generally subject to ordinary criminal proceedings and cannot in themselves characterise terrorist offences; whereas, therefore, the investigation did not provide evidence to suggest that the acts committed by the members of the so-called Tarnac group were committed with terrorist intent and could in fact constitute a serious threat to the

[16] "(...) that the Tarnac mechanism was "totally illusory" and that a climate of intimidation or terror could only have existed if these "low-intensity" actions had continued over time; that, with regard to acts of violence committed against persons in public authority during clashes with the police during demonstrations, such acts are generally the subject of ordinary criminal proceedings and cannot in themselves constitute offences of a terrorist nature; that, therefore, the investigation has not provided any evidence to support the conclusion that the acts committed by the members of the so-called "Tarnac" group were committed with terrorist intent and could in fact be such as to seriously threaten the population and to compel the State authorities to carry out or refrain from carrying out acts in order to protect individuals, or to destroy or destabilize deeply and durably the political, economic or social structures of the French community; that it is therefore appropriate to confirm the order under appeal in so far as it rightly considered that there is no such thing as the order". (FRANÇA, 2017).

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> population, compel state authorities to carry out or refrain from carrying out acts to protect people or to deeply and sustainably destroy or destabilise political structures, economic or social of the French community; that, therefore, it is necessary to confirm the order made, insofar as it has correctly considered that no such measure exists".

In this part of the decision, another positive point of the French analysis: movements that contest the authorities are not terrorists, even if they use acts of violence during confrontations with public forces. The terrorist's goal is to cause permanent structural and social damage, not to attack specific political decisions. The goal is macro, not micro.

Thus, violence must be one of the requirements for the configuration of terrorism, and is not enough, by itself, to configure a certain action as such. Or, in other words: every terrorist act uses violence, but not every violent act is terrorist.

With this understanding, the French Court ruled out the application of anti-terrorism legislation on social movements, a discussion raised in Brazil when the Anti-Terrorism Law was approved.

CONCLUSION

The constitutional treatment given to Terrorism, as well as the conceptualization of the term, is differentiated and gives rise to different interpretations and forms of thought. As can be seen, despite the various international attempts to cooperate in the fight against terrorism, there is still a long way from reaching a consensus on how it should be treated and, especially, how its practitioners should be punished.

Germany, in the figure of its Federal Constitutional Court, tried to separate the action of the Judiciary from the action of the other powers, which have complete autonomy and can act according to the discretion to make decisions that take into account the public interest and the protection and security of society.

It even allowed the treatment given to cases of Terrorism in that country to be given according to the specific conjuncture of each one of them, arguing that the Constitution does not establish its own ritual according to which the State must act in negotiations with terrorist organizations.

This decision apparently violated Hanns-Martin Schleyer's individual right to life, but it also prevented released terrorists from continuing to commit new activities that threaten social coexistence.

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The United States, on the other hand, in the figure of its Supreme Court, conferred true superpowers on the President of the Republic to use force through the powerful war material it possesses, including against nations, a decision that followed a dangerous meandering and that can be questioned from the institutes of International Law.

In addition, the country allowed preventive detention to be used arbitrarily against those who, due to mere formal requirements of belonging to a terrorist organization, are not, in fact, practicing activities with the intention of provoking terror, distancing, in a way, the intrinsic materiality of Criminal Law.

Continuing, the Federal Supreme Court, the highest judicial body in Brazil, unlike Germany, ruled that the procedural treatment given to terrorists cannot offer clemency by act of the head of the Executive, creating a predictable script of state action with regard to the release of possible terrorist leaders in the event of negotiations to release hostages. Luckily, this decision has not yet been called into question by any factual event.

In the end, the treatment given by the French Court of Cassation to Terrorism demonstrates the difficulty of its standardization, and the Judiciary can analyze on a case-by-case basis the configuration or not of a terrorist act. The decision also ruled out the possibility of imprisonment for mere belonging to a terrorist organization, and it is necessary that material facts associate the person with the practice or organization of an attack, contrary to the American understanding.

Finally, the French approach removed the reach of the crime of terrorism to social movements, avoiding a criminalization of resistance movements in general.

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